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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is projected to reach 1.7 billion by the year 2015. The number of illiterate people in the world is projected to reach 1.7 billion by the year 2015.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (a), 10⁷ cells/ml (b), 10⁸ cells/ml (c), and 10⁹ cells/ml (d). The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (a), 10⁷ cells/ml (b), 10⁸ cells/ml (c), and 10⁹ cells/ml (d). The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (a), 10⁷ cells/ml (b), 10⁸ cells/ml (c), and 10⁹ cells/ml (d).

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

UNITED STATES v. CARTER et al.

(Circuit Court of Appeals, Seventh Circuit. March 18, 1909.)

Nos. 1,534, 1,535.

1. TRUSTS (§ 110*)—CONSTRUCTIVE TRUSTS—FRAUDULENT ACQUISITION OF PROPERTY—EVIDENCE TO ESTABLISH—COLLUSION BETWEEN UNITED STATES OFFICER AND CONTRACTORS.

One of the defendants, as local engineer officer of the United States in charge of river and harbor improvements at and near Savannah, Ga., prepared the specifications on which a contract was let for work involving an estimated expenditure of \$3,000,000. The contract provided for alternative methods of construction of certain of the work, to be designated by the engineer in charge, each kind of work to be paid for at prices fixed by the contract. One method of construction, which proved extremely profitable to the contractors, was adopted by the engineer to a far greater extent than was contemplated by the contract, and afterwards he let other contracts to the same contractors on similar terms and designated thereunder the same method of construction; the result being that the government paid far in excess of a legitimate price for such work, and was defrauded in a sum approximating \$2,000,000. It was also shown that during the five years the work was in progress such profits were from time to time, as payments were made, divided in New York City; one-third being paid to the engineer's father-in-law, by whom they were subsequently practically all transferred to him. *Held*, that the circumstantial evidence was sufficient to establish his connection with the fraud, if not in the original letting of the first contract, in making others after his experience and ability as an engineer must have given him knowledge of the excessive prices being paid, and that the United States was entitled in equity to follow and recover the proceeds of such fraud which passed into his hands, into whatever investments they could be traced, as a trust fund held for its benefit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 160; Dec. Dig. § 110.*]

2. TRUSTS (§ 374*)—CONSTRUCTIVE TRUSTS—ENFORCEMENT—TRUST PROPERTY MINGLED WITH PROPERTY OF TRUSTEE.

It appearing that such defendant had mingled property and securities purchased with money so fraudulently obtained with property and se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curities purchased with other money, and secreted and claimed title to the whole as an entirety, personal expenditures made by him from the mass should be charged against the portion which was his own, and all remaining held subject to the trust, and for any deficiency the United States is entitled to a personal judgment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 607; Dec. Dig. § 374.*]

8. TRUSTS (§ 356*)—CONSTRUCTIVE TRUSTS—TRUST PROPERTY TRANSFERRED TO THIRD PERSONS—RIGHT TO FOLLOW AND ACCOUNTING.

Where a defendant, who had obtained large sums of money from the United States by fraud, invested the same in securities which he subsequently transferred to his codefendants, who, with knowledge of the source from which they were derived and the charges of fraud by the United States, received and concealed the same until compelled to surrender them to the court at suit of the government, such codefendants are accountable for the value of any of the securities so received and not produced, and are not entitled to a deduction therefrom on account of salaries agreed to be paid them for their services in caring for the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 537; Dec. Dig. § 356.*]

Appeal and Cross-Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The appellant, United States, is complainant in a bill filed in the trial court against Oberlin M. Carter, as principal defendant, with Lorenzo D. Carter, I. Stanton Carter, and another impleaded as defendants for subsidiary relief, charging (in effect) fraudulent conduct and conspiracy with persons named as contractors, on the part of Oberlin M. Carter, while serving as engineer officer of the army in local charge of harbor improvements and disbursements therefor in the Savannah district of Georgia, whereby the United States was defrauded in the letting of contracts and payments from the public funds of exorbitant rates and amounts, aggregating \$2,000,000 in excess of the fair value of work performed; that the illicit proceeds and profits of such transactions were divided between the contractors and such defendant, or for his benefit; that such shares therein of the defendant were largely invested by him or for his benefit in real estate and securities, which came to his possession; that portions thereof have been traced and are impounded in other courts under like bills, and other portions are believed to be secreted; and that the other defendants named are secreting and holding in trust for him portions of such investments. This bill was filed as ancillary to other bills therein referred to, but was ultimately adopted under stipulation as the primary case for trial. Upon final hearing of the issues joined (after various proceedings impounding property in controversy as proceeds of the alleged transactions), the decree of the trial court was entered in two parts—one entered March 21, and the other April 14, 1908—and the United States appeals from both decrees.

The main decree is that of March 21st, which adjudges in substance: (a) That all moneys arising from profits made by the contractors, "described in the bill and auxiliary bills," constitute a trust fund in favor of the United States, together with the investments and income thereof, and belong to the United States, and not to the defendant Oberlin M. Carter; (b) that certain securities impounded in the hands of receivers were not purchased with such trust fund, and belong to such defendant; (c) that the other securities and property described "are traced from and held to be investments" arising from such trust fund (aggregating, "at cost or proceeds," \$367,822.71), and adjudged to be the property of the United States; (d) that deficiency decree against L. D. Carter is denied; (e) that deficiency decree is denied against O. M. Carter for proceeds of such trust fund dissipated prior to November 6, 1901, the date of a stipulation entered into between the parties to this suit; (f) that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States recover of I. Stanton Carter \$11,454.18 for an amount of the trust fund received by him and not accounted for. Other provisions of the decree do not require mention, except that matters of allowances to be made were reserved to be passed upon at the foot of the decree. The decree of April 14th awards allowances out of the fund, and, in so far as error is assigned thereupon, the provisions are sufficiently described in the ensuing opinion. Cross-appeals are taken on behalf of Oberlin M. Carter and each of the other parties named in the title in respect of provisions affecting them severally.

The testimony upon which the cause was heard and decided in the trial court makes a printed and exhibit record, referred to in the opinion below as containing over 50,000 pages, which is burdensome in its volume and contradictory in a multitude of details. Many of the printed volumes, under stipulations of the parties for their reception of evidence, embrace full reports of testimony and proceedings in other cases or hearings, in reference to the transactions in controversy, namely: (1) In a court-martial record, upon trial of the defendant Oberlin M. Carter, under War Department order of December 2, 1897; (2) in the record of a board of inquiry of 1897; (3) in a proceeding before Commissioner Shields, in New York, for arrest and removal of the contractors mentioned in the bill, for trial under indictments in the Georgia district. As the hearing of the issues was not referred to a master, except upon one issue relating to investments averred in the bill, the trial court received this mass of testimony in the various forms of submission—including examination in open court, examiners' reports of testimony, and matters stipulated in evidence—for determination of all questions of fact, as well as law, in controversy under the pleadings. No special findings upon the ultimate facts thus involved (aside from the master's report upon the above-mentioned subsidiary issue) appear in the record, and the only aid which is furnished to that end, for the purpose of review, appears in the references to the testimony and conclusions of fact stated in two written opinions filed by the trial judge—one filed January 9, 1908, and the other March 17, 1908—both made part of the record by an order entered April 14, 1908, when the decree was completed. For brevity, these recitals in the main opinion referred to (of January 9th) are thus summarized:

The transactions in controversy were for harbor improvements made by the United States in the Savannah river and contiguous places within the "Savannah district," placed in charge of Capt. Oberlin M. Carter. Capt. Carter entered upon this charge in 1885, under Gen. Gilmore, as chief engineer, continuing therein until the death of Gen. Gilmore in 1888, when Gen. Craig-hill became his superior; and Capt. Carter thus remained in local charge until relieved in July, 1897, by Capt. Gillette, when he voluntarily retired for other service. Prior to 1892 Capt. Carter had been quite intimate with Messrs. Greene and Gaynor, who became contractors for harbor work, as hereinafter referred to, and had contemplated at times private business relations with them. Of the several contracts for work in controversy, the opinion expressly mentions two, one let October 22, 1892, for expenditures estimated at \$3,000,000 in the Savannah river, and the other of October 8, 1896, for improvements in Cumberland Sound, involving \$2,000,000. Referring to the method of advertising adopted by Capt. Carter for letting these contracts, the opinion refers to the testimony of the various officers called in reference to the usual time for such advertising, and concludes that there was no departure "from the usual course obtaining in like case," and that there was "nothing inherent in the matter of notice which suggests any fraudulent intent." The specifications called for three different styles of mats to be employed in the work in quantities to be fixed by the engineer in charge. Mat No. 1 was composed of logs laid parallel to each other, fastened together, and covered with several inches of brush, and then bound together by poles to the required dimensions. No. 2 consisted of artificial logs, made of brush bundles (fascines), laid in alignment, tightly bound and choked at regular intervals, placed side by side, as in No. 1. Across these were placed transversely long brush logs, one on each edge and one down the middle, and all bound together by grillage poles. No. 3 consisted of brush logs firmly united by grillage poles as in No. 2, but lacking the transverse brush logs, with double sets of grill-

lage poles, however. In performance of the work this design No. 3 was employed throughout, and the complainant contends that this was much cheaper to construct, and that, by reason of an understanding between the contractors and Carter that No. 3 should be used, the contractors—Greene and Gaynor, operating under the name of the Atlantic Contracting Company—were able to underbid other contractors and so obtained the contracts.

The opinion reviews the testimony of various witnesses upon the question of difference in cost, and concludes that there was "nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same, when considered with reference to the fact that different kinds of work might require different designs on the same contract"; that "of itself it discloses no evidence of a conspiracy to defraud, nor does it tend so to do." The contention of the government that Carter embarrassed other bidders by this method of including the three designs as of one price is, in effect, stated to be unsupported by evidence. In reference to contentions that Carter discouraged other bidders by refusing to furnish specifications, or sending one copy only when three were required, and other complaints mentioned, the opinion states that several mistakes do appear, but not any "sinister motive" therein, and that nothing appears in evidence upon the opening and letting of bids "calculated to cast suspicion upon Carter's conduct."

The contract of 1892 for Savannah river work, and other subsequent contracts referred to, called for bids for mats by the square yard, and it is contended that prior to these transactions "mats had always been purchased by the cubic yard"; but it is stated that this is not supported by the evidence, and that like terms appear in numerous instances of prior contracts, and that no reason appears why "this class of work should not have been dealt with by the square yard," and that fraud can appear only in the price paid or the character of work accepted thereunder. "Substantially all the fascines used in the several improvements under consideration were made up into mats. These fascines are required by the specifications to 'be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge. The fascines will be from twelve (12) to one hundred (100) feet in length [contract of 1892, and 30 to 100 feet in contract of 1896], and must be compressed tightly by an approved form of choker to a diameter of 9 inches at intervals of two (2) feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush used shall be as straight and well trimmed as can be obtained. The fascines shall be carefully and thoroughly made and handled with care. They shall be piled on shore or on barges for measurement in such way as the engineer officer in charge may direct.'"

The contract of 1892 assumed the quantities of different materials to be used as: Square yards of mattresses, 350,000; cubic yards of fascines, 300,000; sawn timber (feet), 800,000; riprap stone, cubic yards, 200,000. "Under the power reserved in the contract, authorizing the engineer to vary the relative amount of each, Carter increased the amount of mattresses to 1,363,372 square yards, to the practical exclusion of the other materials above enumerated. He was thus able to keep within the estimate of the cost of the whole and within the appropriation, while at the same time he accomplished the results sought for. Conceding the power of the engineer in charge to make such a radical change, some of the expert witnesses were of the opinion that the proposed change should have been submitted to the War Office for approval, in view of its radical nature. For defendant it is insisted that the frequent reports showing the progress of the work advised the department of what was being done, which was all that was required. It is not denied that the substitution appears fully in these reports. In and of itself no improper motive can be deduced on Carter's part from his course in this respect. The failure of the department to call attention to the change might fairly be assumed to indicate approval."

"The specifications provide that the third design mattress—i. e., the one actually used—will consist of a bottom grillage of poles of live saplings, of pine or other timber of a kind approved by the engineer officer in charge. The pole must be straight, of slight taper, of an average diameter of from four (4) to five (5) inches, and not less than three (3) inches at the small end,

and must be placed from four (4) to eight (8) feet apart between centers, both longitudinally and transversely, and spliced together with long scarf joints in a manner satisfactory to the engineer officer in charge. Upon the grillage will be placed a layer of closely compacted fascines, surmounted by a top grillage similar in design to the one at the bottom. The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such manner as the engineer officer in charge may approve.' It is further provided therein that: "The size of the mattresses will be fixed by the engineer officer in charge from time to time. In general they will be from twenty (20) to one hundred (100) feet in width, have such lengths as may be convenient for handling,' etc. It is also provided therein that: 'As a general rule all material will be measured by the engineer officer in charge, or his representative, after their arrival upon the ground, and just before being placed in the work. The mattresses may also be inspected as made.'"

The bid of Greene & Gaynor for mattresses per square yard was 95 cents, and for fascines per cubic yard \$1.60, and the government contends that the fascines should have been procured and measured by the cubic yard, and when required made into mats without additional cost, as shown in prior contracts, where it appears, however, "that the amount of mattresses required was nominal." It appears from the evidence that, while small quantities of brush fascines can be readily obtained in most localities, "large quantities are hard to get," and the testimony of Capt. Carter is accepted that it would take about nine of the fascines made from the brush found on that coast and "choked to nine inches and one yard long to make a cubic yard," while "the same fascines put into the form of a brush mattress would compress so that four to the square yard would be required, and when subjected to the pressure and weight of an eight-course multiple mattress it would take six fascines to make a square yard, as against nine in a cubic yard, or perhaps ten," so each square yard would require six-tenths of a cubic yard of fascines, or 96 cents, and with grillage poles added the cost of one square yard of fascines in multiple form mat would thus amount to \$1.19.

In September, 1893, the contractors began under the 1892 contract to construct what are termed multiple mats or mattresses, for which no provision was made in the contracts, specifically. These "consist of one mattress imposed upon another, varying from 2 to as many as 16, according to the needs of the construction. They were built upon the deck of a barge, especially prepared for the purpose, with facilities for sliding them from the deck into the positions desired. It is claimed by Carter, and seems to be conceded, that this method of planting the brush mats was found to be very desirable, in order to prevent the undermining which preceded the laying of single mattresses or stone work. The scouring produced by the resistance of the single stone-loaded mats to the currents had a tendency to cause the currents to work around the outer end of the single mat and stone work and undermine it. By the use of the multiple mats the construction proceeded so rapidly and so affected the currents as to prevent the bottom wash, whereby a more even foundation and other good results were obtained. In addition, it seems the single mat, when separately loaded with stone for ballast, was apt to sink into the soft bottom of the river, sometimes to the depth of 70 feet. By the use of multiple mats, it was possible to sink eight courses of mattresses with the same amount of stone as is required by the specification in sinking one mattress. Thus seven courses of stone were saved, while at the same time the construction was laid rapidly and made less liable to sink into the muddy and sandy bottom of the river. To build these multiple mattresses without making the openings between the different layers too large, the double grillage was omitted from all the mattresses except the lower side of the lower mattress and the top of the upper mattress. There would be only a half grillage between the intermediate tiers of fascines. The multiple mat was firmly bound together with wire and by other prescribed methods, so that the whole formed a compact body of large dimensions, often 100 and more feet wide and 50 feet long, weighing sometimes 200 tons. The barge was then towed out to the place where the mat was to be placed, and by means of a lowering adjustment, located on the side of the barge next to the

destined place, the mat was slid off into the water and into position, and weighed with stone sufficient to sink it and hold it in place. Complainant insists that thus a large saving was made to the contractors both in material and labor, in that they were saved the trouble of planting each mattress separately and the cost of the unused grillage poles. The saving in stone accrued to the government, except so far as it was otherwise expended, more particularly in paying for the extra fascine work. The use of multiple mats on the Savannah river work is warmly approved by most of the experts and is fully justified by the evidence. It is also clear that for the purposes of that work it was desirable that the grillages be made single, except at the bottom and on the top of the multiple mattress." After recapitulation of the conflicting testimony as to the advantages of this plan of multiple mattresses, the opinion states that "there seems to be little ground for questioning the good judgment and skill of the engineer in charge in causing the mats to be put together and used in the multiple form, nor is it apparent that there was anything suspicious in his not insisting on a reduction in price per square yard for mats laid in multiple form, as against individual mats, provided they came up to the specifications."

The opinion comments on the want of specific testimony from which "to ascertain just what was the construction of the mattresses, multiple and single, under the 1892 contract," but that it seems to be conceded that they were substantially like those in evidence under the 1896 contract, except that "they contained something more of grillage." The government's contentions in respect thereof are then stated in substance: (1) That they were accepted "in lengths varying from 12 to 18 feet, instead of 12 to 100 feet, as required under the 1892 contract, and 30 to 100 feet, as required under the 1896 contract, according to Carter, to facilitate hauling from camp to barge, saving to contractor 25 per cent. of cost"; (2) that they were not well trimmed; (3) did not contain the quantity and quality of material required; and (4) were not arranged and tied according to the specification. The opinion states that the provision of design No. 2 that brush is to be "carefully laid in the fascines so as to break joints and to make a continuous fascine, extending completely across the mattress," is not expressed in the specification of design No. 3 used by Carter in this work, but "that no reason appears under the evidence why it should not be required in one as well as the other, and it does appear that fascines 100 feet long were difficult to transport from the camp to the barge." No continuous fascines were required by Carter, and he claims that the work was thereby hastened without injury to the government; nor does it appear that continuous fascines "added anything to the merits of the mats." Allowance, therefore, of the short fascines, is not deemed such departure from the contract as would authorize the engineer to require the contractor to reduce the price therefor, and, while the latitude thus left with the engineer "might easily be abused," it is not "per se evidence of a misuse of it to waive the more expensive construction when no disadvantage would thereby accrue to the work in hand." The contract provided that "the brush used should be as straight and well trimmed as can be obtained," and the question is discussed whether this provision intends what are known as "military fascines," consisting of "trimmed rods or poles so bound together as to constitute a compact bundle," or the ordinary fascines made of live brush mentioned in another part of the contract; and considerable of the testimony is reviewed in reference to such contention, with the deduction that the evidence does not sustain the contention that military fascines were intended.

Upon the contention, however, that the fascines furnished under the 1892 contract were not well trimmed, so that the bulk was increased for measurement, while the mattress was not made "sufficiently solid" for the work, the conflicting evidence is referred to with this conclusion stated: "The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed carelessness for which Carter was justly entitled to be criticised; but considering the material results, the magnitude of the work, and assuming the absence of any mercenary or any other ulterior motive on Carter's part, except such as might justly be deduced from the facts so considered, * * * Carter's course in the premises was not necessarily in abuse of the discretion vested in him, nor seri-

ously inconsistent with his claim that he discharged his duty to the government, so that the government has failed to maintain its case" in this particular. Comment is also made in reference to the numerous eminent engineers testifying in favor of the work as constructed that "it is an impressive fact in this case that the defendant is so emphatically indorsed by these men, who are above suspicion." The opinion proceeds, however, to consideration of the circumstantial evidence offered by the government as tending to support the charge of fraudulent conduct on the part of Carter in the letting of these contracts and acceptance of work thereunder, namely: The great volume of evidence introduced in support of the charge that the profits thus realized by the contractors were divided between such contractors and one Westcott, the father-in-law of Carter, and were paid over for the benefit of Carter, and invested in real estate and securities which are now traced to Carter's possession, exceeding \$400,000 in amount.

After commenting on the "ingenuity and patience" on the part of the complainant, which had resulted in tracing the actual divisions of the amounts paid to the contractors month by month to the bank account of R. F. Westcott, together with proof of the investment of like amounts in various securities and real estate from time to time and of subsequent transfer thereof by Westcott to Carter, and that such facts are so well established that they are substantially uncontroverted by counsel for Carter, except in reference to certain of the securities which are claimed to have arisen from other sources, and then referring to the contentions of Carter that such divisions and sources of the investments were unknown to him and not even suspected, and the securities were received by him upon the understanding that they were a gift for reasons stated, the opinion remarks that "there is no legal presumption here that Carter knew what was going on and had been a party to it," but that, nevertheless, the burden was cast upon him to explain "very many items shown in the accounts in evidence." It then states that the transactions in suit "cover the period from December, 1891, to 1897, during which period a number of contracts were let, and that, even though Carter was not in actual conspiracy with the contractors, yet, if he knew of their vast profits on the prices allowed them on the earlier work, it was his duty to investigate thoroughly the situation and see to it that the government thereafter paid no more than was fair and just. Even negligence under such circumstances would have amounted to fraud. If, therefore, Carter was cognizant of the fact that the contractors were reaping an abnormal profit from the 1892 work, and that Westcott was interested in that profit and was turning it over to him under any kind of a cover as and for his share of said profit, he was false to his trust and should be held liable to make good to the government all the fruits of his fraudulent acts. This, of course, presupposes that such profits, if any, accrued out of fraud upon the government in the matters of letting or accepting the contracts in question, or both. If the government lost nothing by the transaction, there is nothing due to it."

The opinion then concludes as follows: "The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst. No doubt some shameful part of the profit reaped from these harbor constructions came in this way. How much can never be ascertained; certainly not all of it, nor even, relatively speaking, a considerable portion thereof. It is also claimed that some of the saving to the contractors arose from the fact that they or some of them claimed a patent or patents upon the methods for handling multiple mats. The record discloses no basis upon which to estimate that saving, if, indeed, it resulted in any saving, so that it is without moment at this time. Undoubtedly, constructions of the character now involved afford, when held down to a fair advance on actual cost, little or no inducement to contractors, because of the element of chance growing out of the weather and water conditions. Liberal allowance should, under the evidence, be made to cover such contingencies; but, when all these considerations are borne in mind and given due weight, it is still beyond controversy from the record that a great wrong was practiced upon the government by the contractors. The evidence to be found in the record with regard to the

financial transactions of Carter and Westcott and the contractors, Greene and Gaynor, is both vast and intricate and entirely circumstantial. It has been read and re-read by the court as presented in the briefs and depositions. To recite it here is of no value. Suffice it to say that, without passing directly upon the questions as to whether Carter had actual knowledge of and connived at this raid upon the government, the facts brought out concerning these financial transactions are such that he must, as a conclusion of law, be held chargeable with knowledge of what was being done in the premises. This fact alone makes it clear that the government is entitled to a decree awarding to it each and every of said pieces of property held by the receiver which shall be found to have been purchased directly or indirectly with moneys received by Westcott, or any one else, or in any other way arising from funds made up of profits realized by the contractors under the contracts in suit; and it will be so ordered."

For the purpose of ascertaining the securities in evidence which are thus chargeable as held in trust for the government, and for ultimate decree in respect of all securities impounded in the hands of receivers or otherwise, the hearing was continued, and the second opinion (March 17th) treats of such ascertainment and disposition of the securities with reference to the evidence tracing the origin of the securities; and thereupon the securities were set apart, as mentioned in the decree. The following stipulation, which was entered into between the parties to the bill, pending proceedings on the part of the receiver to obtain possession of securities mentioned in the bill as held by one or the other parties named, is referred to in the decree and becomes material for consideration of various assignments of error, viz.:

"United States of America—ss.

"United States of America v. Oberlin M. Carter et al. In Equity.

"Pending on Bill and Auxiliary Bills in the Circuit Courts for the Southern District of New York, District of New Jersey, Southern District of Georgia, Southern District of West Virginia, Northern District of Illinois, and Southern District of Illinois.

"Agreement.

"It is agreed between the United States, complainants, and Oberlin M. Carter, I. Stanton Carter, and Lorenzo D. Carter, defendants in the above-entitled cause, as follows:

"(1) The issue as between the United States and Oberlin M. Carter as to the fraudulent diversion of funds, intrusted to him as disbursing officer, into the assets as charged in complainant's bill pending in the several districts, shall be brought to final decree first in the Circuit Court of the United States for the Northern District of Illinois, and the final decree of that court, unless reversed by the appropriate appellate court on appeal, shall be conclusive on all questions determined therein, and shall be made effective by appropriate decrees on the bills in the other districts if deemed necessary by either party. But this clause shall not be construed to operate to the prejudice or delay of the government in any proceeding against other parties for accounting in districts other than the Northern district of Illinois, who may be claiming for themselves any part of said assets.

"(2) That as to the assets claimed by the government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income, and reinvestments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody, or control of said defendants, and have not heretofore been bona fide disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be reinvestments of said alleged trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation.

"(3) The said defendants shall waive their privileges and give all the information they can with regard to what property has been disposed of and its disposition, but no evidence which may be given by the said Carters in

this case shall ever be used against them in any criminal proceedings, unless on a charge of perjury committed in this case. And nothing in this agreement shall be construed as affecting the right of the government, if any it has, to recover any part of said assets disposed of by the said defendants and not turned over to the receiver.

"(4) L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers and file answers disclaiming any personal interest in the aforesaid assets in controversy in this litigation, including the real estate on Eighth avenue, New York, and at Orange, New Jersey, except as to the two bonds claimed by I. S. Carter as above.

"(5) Oberlin M. Carter shall dismiss all demurrers and exceptions and shall file promptly his answers to the bills and amended bills pending in said several districts.

"(6) All private books, papers, etc., of Oberlin M. Carter turned over to the court-martial shall be subject to the inspection of the counsel for said Carter, and his chief counsel shall have the right to have made, at the expense of the fund turned into court, a copy of any documentary evidence which has ever been used or referred to as evidence in the court-martial or Greene-Gaynor proceeding, or in this proceeding.

"(7) From said fund to be accounted for to the receiver the sum of \$5,000 shall be left in the hands of H. G. Stone, chief counsel of said Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case.

"(8) From said fund to be accounted for to the receiver, there shall be paid:

"(a) The fees, traveling expenses, and other expenses of Oberlin M. Carter's chief counsel and of his attorney at Chicago, to be fixed and allowed by the court. The importance of the case, and the means and methods taken to bring the same to a just determination speedily, and not the length to which the proceedings may be protracted, to be considered as the elements of merit in fixing such fees.

"(b) Also the fee of his attorney for representing said Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case.

"(c) The expenses of taking evidence on behalf of said Carter, including the services of an accountant at not exceeding \$10 per day for his services when needed and actually employed, plus his expenses, if any.

"(d) And if before the final determination of this cause the said Oberlin M. Carter shall be liberated from prison, he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence but with no compensation for his time. Such expenses to be determined by the court and paid out of the moneys in court.

"Payments and allowances under paragraph numbered '8' of this agreement to be determined by the court from time to time on petition, with the right of the United States to contest the same as unreasonable, or that any expense was not incurred as stated.

"(9) The assent of the United States to paragraphs numbered '1,' '7,' and '8' of this agreement is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been, prior to the receivership, bona fide paid out or pledged by them for attorney's fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession by receivers in this cause.

"Nov. 6, 1901.

United States of America,

"By Marion Erwin, Special Asst. to Attorney General.

"Oberlin M. Carter,

"Lorenzo D. Carter,

"I. Stanton Carter,

"By Horace G. Stone, Their Chief Counsel."

Other facts in evidence, in so far as deemed material for the purposes of review, are mentioned in the ensuing opinion.

Edwin W. Sims, U. S. Atty., and Marion Erwin, Sp. Asst. Atty. Gen.
Horace G. Stone and Nathaniel C. Sears, for Oberlin M. Carter
and others.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appeal and cross-appeals for review of the decree (in two parts) entered in this cause raise no questions of law, as we believe, in reference to the primary charge of liability under the bill, which are not elementary and well settled. With no special findings of fact in the record, however—beyond the recitals and deductions stated in the written opinions filed by the trial judge as premise for the decree—solution of the ultimate facts for the purposes of review has involved examination, not only of voluminous abstracts of the testimony contained in the printed arguments, but of many pages of testimony in the record, cited in the above-mentioned opinions and in the arguments of counsel. The basic averments of the bill, of great losses suffered by the United States, through payments made to the contractors, Greene and Gaynor, of prices for their work (furnished under successive contracts) grossly in excess of value, are supported by a mass of evidence, direct and circumstantial, which impresses us to be both sufficient and substantially uncontroverted.

1. In support of the charges against the defendant Oberlin M. Carter of primary liability for conspiring with such contractors to defraud the United States under the several contracts and thus obtaining a share of the illicit proceeds, the charge of fraudulent conduct on his part rests on circumstantial evidence, although the fact is proven and undisputed that he obtained, directly or indirectly, a large share of the profits arising from such contracts. The extent of testimony and multiplicity of facts and circumstances in evidence, upon the issues of conspiracy and the so-called "engineering features of the case" involved therein, preclude any attempt to analyze the conflicting testimony or make any summary within reasonable limits for an opinion; and we are impressed with no view which requires or justifies extended discussion of this class of testimony. The ultimate facts, however, upon which decision of this issue of primary liability may rightly rest, as we believe, are either uncontroverted facts in evidence, or inevitable deductions from facts well established, to be presently stated.

Under appropriations by the Congress and plans and estimates made by the engineering department for harbor improvements from time to time, in the Savannah district, the United States carried on the work in controversy from 1892 to 1897, with Capt. Carter in local charge as engineer and disbursing officer. Specifications were prepared by Capt. Carter, and upon approval by his superiors in each instance he advertised for bids and let contracts for the work. One of these contracts, made October 22, 1892, comprised expenditures in excess of \$3,000,000, and is the main subject of controversy; while another, made in 1896, amounted to \$2,000,000. Capt. Carter was an officer of the army, of exceptional ability both as an engineer of harbor work and for business qualities. The work as carried out under the successive

contracts, aside from dredging, mainly consisted of mattresses or "mats," made of brush fascines united by grillage poles; and all contracts for this class of work were (directly or indirectly) let to the Atlantic Contracting Company, as the lowest bidders, with all operations performed by Greene and the Gaynors, composing that corporation, who had long sustained relations of intimacy with Capt. Carter. Such discretion as was vested in the engineer in local charge, under department regulations, was exercised to employ this mattress structure for the major part of the work, instead of timber or stone work (included in the specifications and authorized under the contract), and as well, instead, of dredging specified; so that, under the contract of 1892, brush mattresses were used to the amount of 1,363,372.36 square yards, instead of 350,000 square yards, estimated in the specifications and contract; and this aggregate was kept within the appropriation by omitting other work specified. In reference to this undisputed fact of substitution and increase of mattress work, explanations appear in the testimony that it was found to be advantageous for harbor improvement, and its efficiency is upheld by the concurring opinions of many eminent engineers who testify thereupon; so the foregoing statement is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, or that such substitutions were not effective for a great work in the improvement of harbors. The extension of the contract rates of 1892, however, to include the large increase of mattresses, measured by the square yard—which were made by the contractors in so-called "multiple mats," in courses of 2 to 16 in number, thus built up on the barges, towed to the work, and launched in place, each course being measured for payment—together with continuance of like general specifications and estimates, in each subsequent call for bids and letting of contracts, are obviously entitled to consideration as circumstantial evidence upon the issues of fact, when linked with the above-mentioned fact of abnormal profits thus realized by the contractors, and other circumstances in evidence.

These further general facts are established by the evidence and not controverted: The contracts which are directly involved in the controversy were let to and performed by Greene and Gaynor (as the principal contracting parties) during the years 1892, 1893, 1894, and 1895, and work was paid for by disbursement checks issued by Capt. Carter periodically at Savannah. Upon receipt of the checks it was customary for Greene or Gaynor, or both, to visit New York, where their principal bank account was kept, and the proceeds of checks not used at Savannah for payments upon the work were there divided between the contractors and a third party—R. F. Westcott, who was the father-in-law of Capt. Carter, residing in New York, retired from active business, with large means, and not engaged in the transactions in any manner disclosed by the evidence, aside from such sharing in the proceeds. Discovery of these divisions and of innumerable details in evidence involved great skill and patient research through various bank accounts, books of account, checks, and other vouchers; but the proof is clear, both of the facts of division and of the actual amounts turned over—usually found in Westcott's account, but instances appear of corresponding amount deposited by Carter—and after 1892 the

shares are identified as exactly one-third of the entire proceeds retained in New York, presumably profits under the contracts. This line of proof states the aggregate of payments made to the contractors under the successive contracts (prior to the 1896 contract) to be \$2,567,493.18, while the proceeds thus divided into three shares aggregate \$1,815,941.62.

Investments in securities are traced which approximate in date and amount the receipts from these divisions, in numerous instances, and coming to the possession, first of Westcott and then of Carter, aside from occasional instances, contrariwise, but ultimately reaching the hands of Capt. Carter, mainly through a transfer made by Westcott, on October 29, 1897, of securities aggregating over \$400,000 in amount, for which Carter's receipt is in evidence and undisputed. The search for these transactions extended to many localities, through numerous entanglements, and the only disputes arising are upon various details of specific identity and course, which leave uncontroverted the systematic disposition above stated. Abundant evidence appears of the presence of Capt. Carter in New York, upon monthly visits which coincide in date with those of Greene and Gaynor, and of his intimate relations with Westcott—both before and after the death of Mrs. Carter, daughter of Westcott, who died in December, 1892, leaving no child—including attention to large financial interests of Westcott in 1895, under power of attorney, while the latter was absent in Europe. It does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott; nor is there any direct evidence that he was informed thereof, or was mentioned or intended in such transactions to be the beneficiary of such shares, unless an offer on behalf of the United States of purported testimony by Westcott (since deceased) as a witness for the government in extradition proceedings against Greene and Gaynor—in a record stipulated in evidence in other respects—is admissible to that end. Whether the objection raised on behalf of Capt. Carter in the first instance to this offer was not waived by counsel in a subsequent consent to its consideration by the trial court is not free from doubt. As Capt. Carter was not a party to such proceeding, however, we believe this testimony of Westcott to be inadmissible against him upon the issue referred to. It is, therefore, excluded from the present inquiry, while reserved for later consideration by way of notice to the defendants I. S. Carter and L. D. Carter, under admissions of record on their part.

We concur, therefore, in the view expressed in the opinion filed by the trial judge that the charge of conspiracy between Capt. Carter and the contractors to defraud the United States, under the contracts referred to, is (a) neither established by direct evidence; (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts; (c) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances. But these conclusions are not the tests of sufficiency of the entire chain of circumstantial evidence to sustain that charge. While the fact is established, as there

stated, "that a great wrong was practiced in this raid upon the government," we are not satisfied that the right of the United States "to a decree awarding to it" all property in question "arising from funds made up of profits realized by the contractors" therein may rightly rest, as there stated, upon the proposition that Carter must "as a conclusion of law be held chargeable with knowledge of what was being done in the premises."

Under the settled facts above recited, however, linked with cumulative evidence tending to prove actual knowledge on the part of Capt. Carter of the excessive profit in the mattress work and of divisions thereof with Westcott in New York, and complicity in the fraudulent transactions, of which (at one time or another) he acquired approximately one-third of the net proceeds, we are constrained to the belief that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Capt. Carter. Whether the parties conspired to that end at or prior to the letting of the contract of 1892 can neither be ascertained from the testimony, nor is such inquiry deemed material upon the issue. With the completion of the mattress work expressly stipulated in that contract, it cannot be doubted under the testimony that Capt. Carter, having personal supervision of the work, as an engineer of great experience and ability in harbor improvements, must have discovered the exorbitant profit afforded at the contract price of mattresses, measured by the square yard. Assuming, therefore, that the terms contracted for were fairly obtained and believed by him to be reasonable when made, and that the discretion vested in the officer in charge was rightly exercised in greatly extending mattress work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene and Gaynor contract), no just ground appears for continuing the same terms, for such extension from 350,000 to 1,363,372 square yards, yielding to the favored contractors another great ratio of excessive profit, if the unreasonableness of the contract terms was then understood, or was readily ascertainable under the circumstances. This transaction, moreover, was followed up by the succession of contracts in evidence for other improvements in the district of like nature, under the same form of specification and advertisement for bids, to cover alternative structures at a single price as ordered; so that no bid was entertainable for the mattress work alone, which was intended and used in the improvement, nor was the "multiple mat" structure (as used) mentioned in either notice, and all were obtained by Greene and Gaynor. All were carried out, measured, and accepted alike with the earlier contract work, up to the appointment of a successor to Capt. Carter. The fact alone of successive contracts thus let to these contractors, at prices far beyond the reasonable value of brush mattresses, whereby the United States was plainly defrauded in overpayments approximating \$2,000,000, without proof of tenable excuse for the letting through emergency or other cause, implies either participation in benefits or collusion on the part of the officer having direction of the work. As the evidence further establishes, not only personal and business intimacy between Capt. Carter and these contractors, but his constant presence with them in

New York upon the monthly visits to settle accounts and divide the proceeds between the contractors and Westcott as before stated, together with the cogent fact that Carter acquired the share of illicit profits turned over to Westcott, we believe the inference of fact to be inevitable that Capt. Carter connived with these parties in thus defrauding the United States. The question whether the relation of Westcott in these divisions was one of partnership in the contracts (as stated in the opinion below and contended in the argument of counsel for Carter on these appeals), or was that of a mere representative of Carter therein (as counsel for the government contends), may not be clear under the testimony; but neither contention requires discussion or solution under the foregoing view, for the reason that Carter is equally subject to the relief sought in this bill, whatever may be the actual relation of Westcott to either of such parties in the transactions.

The bill is voluminous—necessarily so in the light of the array of circumstances involved for equitable relief—and both bill and decree rest upon the well-settled principle of equity that property so obtained by Carter, in fraud of the United States, becomes trust property in favor of the defrauded party, which may be followed up and recovered, whether preserved in its original form or in substituted property. *May v. Le Claire*, 11 Wall. 217, 236, 20 L. Ed. 50. The testimony is convincing, if not substantially uncontroverted, that the share acquired by Carter from or through the divisions between the contractors and Westcott exceeded the entire amount of property and securities traced to the possession of Carter and impounded in this suit under the several bills; that the major portion of the property in the custody of the court is identified as directly derived from shares of proceeds so obtained, and constitutes the portion scheduled in the decree as a trust fund belonging to the United States, and thus awarded to it; and that Capt. Carter has expended and used from funds and securities in his possession, after so obtaining the share of fraudulent proceeds above stated, large amounts of money, greatly exceeding in the aggregate any amounts which can be assumed to be derived by Carter from other sources, under the most favorable view of his testimony in respect thereof. The provision of the decree, therefore, which awards to the United States the property and securities in custody which are above referred to as directly traced to the proceeds of the fraudulent transactions constituting a trust fund, is well supported by the testimony, as we believe, and will be affirmed accordingly.

Another provision of the decree, however, adjudicates that other securities and stocks, specified in a paragraph marked "2," were "not purchased with said trust fund, but with the private funds of Robert F. Westcott and Oberlin M. Carter," and awards such residue to Capt. Carter as not subject to the trust. We believe this provision to be erroneous, irrespective of the contentions on behalf of the government that these investments are otherwise fairly traced to the trust fund, either directly or indirectly, or by way of substitution in fact. Under the circumstances above recited, with the mass of investments coming to his hands (from whatever source) intermingled and secreted by Carter, asserting title as an entirety, we are of opinion that

the elementary doctrine of equity requires that his personal expenditures from the mass be made chargeable against any portion which may be his own; that he cannot be permitted (as sought through his testimony in this case) to segregate a portion from the residue, to be awarded to him as free from the trust, and thus impose the burden of all expenditures so made upon the trust fund; and that, for all purposes of the decree, all the property and securities (in custody) therein described are within the trust, either as original or substitute investments from the trust funds. So the decree must be corrected in respect to such provision, and award title to the securities and stocks mentioned to the United States, without award of any part or portion to Carter.

2. The decree denies the complainant a deficiency decree against the defendant Oberlin M. Carter, upon its election to take such judgment for proceeds of the trust fund which was "dissipated by Oberlin M. Carter and his agents prior to November 6, 1901," as established by the evidence. Upon this denial error is assigned by the appellant, United States (sixteenth assignment), and we disregard the order of the several provisions and assignments to consider the question thus raised as next in sequence. It does not appear upon what theory this election and motion was denied, nor is any tenable ground suggested therefor in the argument of counsel for appellees. The facts and items upon which the motion rests are undisputed, and it is unquestionable that the equitable relief may be thus extended where trust funds have been dissipated. The limitation named (November 6, 1901) for such charge appears to be predicated on a stipulation of that date, entered into between the parties, which embraces allowances to be made from the funds in court, pending final hearing, and thus resolves any possible doubt in reference to ultimate liability for such expenditures in favor of the defendants. For the amount of such deficiency judgment, the items of conversions from the trust property aggregate \$105,019.66, as scheduled from the evidence. In view, however, of the above-mentioned finding by the trial court that the securities set apart to Capt. Carter in paragraph 2 of the decree were not derived from the fraudulent transactions, and of our conclusions (as above stated) that such securities are, nevertheless, subject to the trust, as substitutes for securities dissipated, their face value (as scheduled) should be deducted from the above-mentioned aggregate, to ascertain the amount of the deficiency judgment. The decree will be corrected to grant a judgment for deficiency so ascertained.

3. The several provisions of the decree respecting the defendants Lorenzo D. Carter and I. Stanton Carter next arise for review, and, being of like class, are grouped for consideration. Those provisions upon which the appellant, United States, assigns error are: (1) Denial of a deficiency judgment against L. D. Carter; (2) adjudication against I. Stanton Carter for \$11,454.18, as the amount of trust funds in his hands not accounted for—and these in turn rest upon findings of a master (on reference of special issues involved in their possession of securities), and exceptions overruled, upon which various errors are assigned, for allowances made to these defendants for expenses and services. The relations of I. S. Carter and L. D. Carter

to the controversy may be briefly stated: They were brothers of Capt. Carter, and received from him the property in suit, for care and safe-keeping, pending the various proceedings against him, and were assiduous in its concealment and withholding from the complainant, until accounting and surrender were required under the present proceedings. It appears, not only from numerous circumstances in evidence, but through their admissions of record, that they were well advised of the charges against Capt. Carter of complicity with Greene and Gaynor (which were widely published), and as well of the testimony of Westcott (hereinbefore referred to) in the Greene and Gaynor proceedings, in effect that Capt. Carter was at all times the actual party in interest, and merely represented by Westcott in the transactions with Greene and Gaynor and in investments of the proceeds. I. S. Carter received and secreted in various places the larger part of the securities, about \$350,000 face value, while L. D. Carter received the residue of trust property. In answer to a rule of contempt entered against them, each denied either possession or control of such property; but each subsequently made confessions and entered into an accounting before the master, pursuant to a stipulation between all parties to the bill, dated November 6, 1901. The property and securities described in the decree came into the custody of the court through this source.

(1) The errors assigned for denial of a deficiency judgment against L. D. Carter are, in substance, that he failed to pay over trust funds traced to his possession and admitted by him as received, and that he was relieved from accountability therefor by allowances for expenses and services, which are alleged to be inequitable under the circumstances disclosed. The credits referred to are (a) for various claims for expenses incurred, aggregating \$2,379.43 in excess of undisputed expenses, which are complained of as excessive and unsupported by credible testimony; and (b) an allowance of \$12,916.66 for salary claimed due from Capt. Carter for services as attorney in fact, under an agreement for \$10,000 per annum. Upon the objections raised to items of expense allowed, we believe the findings of the master, approved by the trial court, should not be disturbed, as the stipulation (November 6, 1901) between the parties reserved for allowance assets theretofore "bona fide disposed of" by the agent. The credit for salary, however, is neither justly charged to the property thus withheld nor within the fair meaning of the stipulation, and, whatever may have been the agreement between the parties to the fraud, we are of opinion that error is well assigned for such allowance. The decree, therefore, must be corrected accordingly to adjudge recovery against the defendant L. D. Carter for \$12,916.66 of trust fund not accounted for.

(2) The decree awards recovery against I. S. Carter for \$11,454.18, as the balance of trust fund traced to his possession and reported by the master, not accounted for or paid over; and on behalf of the appellant, United States, error is assigned for insufficiency of this award, upon various credits allowed by the master, and approved by the trial court, for expenses and salary. As the sum of \$6,750 was allowed to this defendant by way of salary, the credit accordingly was errone-

cous under the above-stated view in reference to like allowance in favor of L. D. Carter; but the other objections are overruled, as within the doctrine there stated in respect of the findings of fact. The decree, therefore, must be corrected to make this deficiency award \$18,204.18.

4. The remaining assignments of error on the part of the United States relate to allowances made in the final decree for counsel services and other expenses incurred by the defendants under the stipulation entered into November 6, 1901, heretofore mentioned. That ample provision for defraying such expenses out of the fund in court was intended and authorized by the stipulation referred to plainly appears from its terms and is conceded; and the time, skill, and expenditures involved in the services of counsel for which the allowances were granted are neither disputed nor questionable in the light of the record. The only objection raised to either of the provisions for such counsel is that each is excessive. We are of opinion, however, that no abuse of discretion appears in the liberal awards made by the decree, within the purpose of the stipulation, and that no other reviewable question arises under these assignments.

The cross-appeals raised no question not passed upon in the foregoing opinion in reference to the appeal and errors assigned on behalf of the United States, and we are satisfied that neither cross-appellant has just ground to complain of the decree.

The decree of the Circuit Court is affirmed in respect of all provisions thereof not expressly mentioned in the foregoing opinion for correction, and the cause is remanded, with directions to correct the decree in the provisions so mentioned in conformity with this opinion.

WABASH RY. CO. v. COMPTON.

(Circuit Court of Appeals, Sixth Circuit. July 26, 1909.)

No. 1,899.

1. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF COURT AND MASTER.

The determination of questions of fact on an intricate accounting by a master selected for his special fitness for the work, and affirmed by the Circuit Court, will not be overturned by the appellate court on anything less than a demonstration of plain mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. RAILROADS (§ 190*)—FORECLOSURE OF LIENS—REFERENCE FOR ACCOUNTING.

The action of a master stating an account to determine the net earnings apportionable to a part of a consolidated railroad system which was being operated by the company as a trustee with respect to the claim of a lienholder on such part, in adding to the net earnings apportioned to such part of the line by the railroad company on an actual mileage basis a further sum based on a constructive mileage, *held* justified by the evidence showing that such part of the line included valuable terminal property, and also that an actual mileage basis was, for other reasons stated in the opinion, unjust to the Ohio Division.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 623; Dec. Dig. § 190.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
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3. RAILROADS (§ 190*)—FORECLOSURE OF LIENS—REFERENCE FOR ACCOUNTING.

Where, on an accounting to determine the net earnings of a line of railroad operated as a part of a consolidated system for a period of over 14 years, the report of the railroad company covering a short part of such time was unsatisfactory and showed earnings far below those of the period immediately following, the master was justified in rejecting such report and allowing earnings for the short time equal to the average made during the entire time covered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 623; Dec. Dig. § 190.*]

4. RAILROADS (§ 190*)—FORECLOSURE OF LIENS—REFERENCE FOR ACCOUNTING.

The action of a master as confirmed by a Circuit Court, stating an account to determine the net earnings of a line of railroad composing a part of a consolidated system, during a period of years, in disallowing certain credits and deductions, claimed by the railroad company, and in approximating the amount of other items of debit and credit not clearly shown by the evidence, affirmed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 623; Dec. Dig. § 190.*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This is an appeal from the final decree of the Circuit Court for the Northern District of Ohio, in equity, upon the report of the special master on the accounting directed by the Supreme Court under its mandate in the foreclosure suit of Jessup et al. v. Wabash, St. Louis & Pacific Railway Company, sustaining the validity of the lien asserted by James Compton as against the so-called "Ohio division" of the Wabash system, on account of his ownership of a large block of the series of equipment bonds issued in the year 1862 by the Toledo & Wabash Railway Company. *Compton v. Jessup*, 167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55.

In the cases of Adelbert College of the Western Reserve University et al. v. Wabash Railway Company et al. (No. 1,907), and Cyrus F. Pierson et al. v. Same Defendant (No. 1,908), decided by this court at the same time with this case (171 Fed. 805), both which cases involved claims upon other equipment bonds of the same series as those held by Compton, a history is given of the issue of that series of equipment bonds and of the prior litigation in respect thereto, including the litigation over the Compton claim. The earlier history of that litigation will also be found in the statement of facts accompanying the opinion of this court in *Compton v. Jessup*, 68 Fed. 263, 15 C. C. A. 397, as well as in the opinion of the Supreme Court in the same case (167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55). The *Compton Case*, as now presented, differs from the cases of Pierson and the Adelbert College, just decided by this court, in this important and controlling respect: By the decision of the Supreme Court of May 10, 1897 (*Compton v. Jessup*, 167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55), it was determined: That complainant had by virtue of the decree of the Supreme Court of Ohio of May 1, 1888 (*Compton v. Railway Co.*, 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380), a lien upon the Ohio division of the Wabash system on account of his ownership of such equipment bonds; that such lien was subject only to two prior underlying mortgages, both given before the consolidation of 1875, the one on September 8, 1853, by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, trustee, to secure a bond issue amounting to \$900,000, and the other given on October 5, 1858, by the Toledo & Wabash Railway Company to E. D. Morgan, trustee, to secure an issue of bonds amounting to \$1,000,000; that Compton's rights as such lienholder had been saved by the terms of the decree of the Circuit Court of the United States for the Northern District of Ohio, of March 23, 1889, which foreclosed the earlier mortgages, both divisional and otherwise, upon the Wabash Road; and that the Wabash Company, which had taken over the railroad property from the committee which had purchased it at the foreclosure sale, "should be regarded as a party in possession under the express terms of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order of sale, and as representing all parties in interest, including Compton"—and thus under a trust relation involving a duty to account for rents and profits until Compton's claim should be disposed of.

Under the mandate of the Supreme Court, this court made an order remanding the case to the Circuit Court, and providing: First, that upon the failure of the purchaser to pay Compton's claim in full, he was entitled to have that part of the Wabash Railroad extending from Toledo to the state line between Ohio and Indiana resold; second, that, in default of the payment by the purchaser of the amount due Compton upon his lien, a decree should be made directing the sale of the railroad covered by such lien, which was adjudged to attach to all the line owned by the Toledo & Wabash Railway Company at the time of the 1865 consolidation, together with all tracks, buildings, structures, and fixtures of every kind then or since erected thereon, but not to extend to any lands or structures thereon acquired by the successors in title of the Toledo & Wabash Railway Company after said consolidation; third, that before the sale a special master should be appointed to state the account of the annual net earnings of the entire so-called "Ohio division" and equipment from the time of the sale under the decree of March 23, 1889, down to the time of taking such account, over and above all operating expenses, taxes paid and cash paid, if any, in redemption of receiver's certificates, and other expenses properly chargeable against the railroad and property during that period, adding in the calculation of such expenses a reasonable rental or compensation for all property not covered by Compton's lien, but which contributed to the earnings, and such equipment as was used in the operation of the part of the railroad included in the Compton lien. The master was also directed to ascertain the amount due under the decree of March 23, 1889, on the two underlying divisional mortgages, with interest to the time of taking the account, and to deduct from said amounts the following items: First, net earnings calculated as above stated; second, the value of $\frac{75}{100}$ of all the cars, engines, and rolling stock and other equipment directed to be sold by said decree of March 23, 1889, as fixed therein, with interest upon said amount from the time of the sale under said decree down to the time of taking the account; third, the value of all additions of land to the railroad property in Ohio upon which Compton has a lien, to which additions said lien does not attach, but to which the liens of the prior divisional mortgages do attach, as of the date of the foreclosure decree of March 23, 1889, and to deduct the same, together with the valuation of any structures thereon, from the amounts found due on the mortgages. The decree of the Circuit Court further provided that, in the event of sale thereunder, the proceeds of such sale, after the payment of the expenses thereof and any costs or allowances which the court might fix as payable out of such proceeds, should be applied, first, to the balance of receiver's certificates, if any, properly chargeable to the Ohio property covered by Compton's lien and not discharged by the application of net earnings, as provided in said decree; next, to the payment of the amount due on the two underlying divisional mortgages, after deducting therefrom the net earnings as provided to be determined, and after making all other deductions above stated; and, next, to the payment of the amount due Compton on his lien.

The decree of the Circuit Court, which was entered October 5, 1897, appointed William H. H. Miller, of Indianapolis, Ind., "on account of his special fitness and experience in matters of accounting and all matters herein involved," special master to take and state the account provided by the decree and to make such sale as should be had thereunder. The master's report, dated May 10, 1907, shows in considerable detail the results of his accounting from May 15, 1889, to June 30, 1903, by which the charges taking precedence of Compton's lien, as found by the master, aggregated \$7,962,007, and the items applicable in Compton's favor against the above charges aggregating \$7,238,188. The report so made up showed \$723,819 still unpaid upon the underlying mortgages on June 30, 1903. The master further reported that in his opinion it would be fair to the railroad company to bring the accounting down to June 30, 1907, by charging the railroad company with an annual net earning of \$149,949 (above engine and car rentals, taxes, and use of terminal property), that being the average shown by the accounting had up to June 30, 1903; and that, after making such charge, the balance due on the underlying mortgages on June 30, 1907, would be \$21,542. Both parties excepted to the

master's report. The Circuit Court modified that report: First, by eliminating one of the items charged by the master against the railroad company on account of the value of rolling stock; second, by rejecting certain items of additions to terminal property found by the master; and, third, by allowing a credit to the claimant on account of engine rentals and repairs by striking out an item found to be duplicated, by having been previously credited to the railroad company in making up the net earnings account. The railroad company's exception to the master's adoption of an average net earning during the four years from June 30, 1903, to June 30, 1907, was disposed of by the action of the court in giving the railroad company the privilege of submitting actual accounts for that period. With the making of the modifications referred to, the account as stated by the Circuit Court and as brought down to June 30, 1907, showed the following results:

Charges Taking Precedence of Compton's Lien.

Due on underlying mortgages on March 23, 1889....	\$2,811,611.00	
Interest at 6 per cent. to June 30, 1907.....	3,083,927.00	\$5,895,538.00
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Allowed to the Wabash Railroad Company for rent and repair of engines to June 30, 1907, with interest thereon.....	\$1,040,437.00	
Less deduction on account of duplicated item, \$218-356, plus interest.....	485,759.00	554,678.00
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Allowed for car rentals and interest thereon to June 30, 1907.....		1,532,514.00
Allowed for rent of real estate not covered by Compton's lien, to June 30, 1907.....		113,382.00
Taxes to June 30, 1907, with interest thereon.....		835,048.00
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Total charges taking precedence of Compton's lien		\$8,931,160.00

Charges Against the Railroad Company

Net earnings to June 30, 1907, plus average interest thereon		\$8,216,343.00
Value of 75-900 of rolling stock sold under decree of March 23, 1889.....	\$172,277.00	
75-900 of payments on account of car trust purchase certificates, etc.....	131,618.00	
Interest to June 30, 1907.....	330,483.00	634,378.00
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Value of additions to real estate not covered by Compton's lien, as of March 23, 1889.....	194,000.00	
Plus interest to June 30, 1907.....	210,775.00	404,775.00
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Total		\$9,235,496.00

By this accounting the underlying mortgages are decreed to have been over-paid on June 30, 1907, by \$324,336. The decree also determined that there are no receiver's certificates outstanding entitled to any payment out of the proceeds of the sale of the property involved herein, and determined the amount of Compton's lien at \$532,202.02, with interest at 6 per cent. per annum from October 5, 1897. The sale of the railroad property in Ohio was directed in default of payment of the last-named amount.

From this decree the railroad company alone has appealed.

Rush Taggart, for appellant.

Judson Harmon and John H. Doyle, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). The master who conducted the accounting under consideration was selected for that position "on account of his special fitness and experience in matters of accounting and the matters herein involved." The record, including his report, shows that he performed the difficult task with ability and with painstaking care and fidelity. The opinion of the judge who passed upon the exceptions submitted in the Circuit Court shows that careful consideration was there given to the exceptions presented. So far as such exceptions are before this court, their subject-matter has passed the scrutiny of and been overruled by both the master and the presiding judge below. The matters sought to be reviewed here involve largely a determination of questions of fact, depending to a considerable extent upon the credit to be attached to the various witnesses seen and heard by the master. Under these circumstances, not only is the correctness of the decree in question presumed, but this court would not be justified in overturning the decision of these two courts upon anything less than a demonstration of plain mistake. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Ohio Valley Bank v. Mack*, 163 Fed. 155, 158, 89 C. C. A. 605.

There is no controversy here as to the amount of Compton's lien, nor as to the amount unpaid upon the underlying mortgages, except as that amount is affected by the application of the results of the accounting with reference to net earnings and the various charges and credits provided for by the decree. The exceptions argued here will be separately considered.

1. The most important of the exceptions urged here relates to the inclusion by the master, in the net earnings apportioned to the Ohio division, of the sum of \$1,413,601, as an addition on account of constructive mileage as against actual mileage. To a proper understanding of the question raised by this exception, a brief statement of the conditions attending the accounting is necessary. The main line of the Wabash system during the period covered by the accounting extended from Toledo, Ohio, to St. Louis, Mo. (437 miles); from St. Louis to Kansas City (277 miles); from Toledo to Hannibal, Mo. (461 miles); and from Hannibal to Kansas City (199 miles). The distance from Toledo to the Ohio state line is but 76 miles. This so-called "Ohio division" was not in fact a division during the period covered by the accounting. It was simply operated as a part of the main line from Toledo to Kansas City, by way of St. Louis and Hannibal. In 1897, shortly after the appointment of the master, the railway books relating to the operation of the system up to that time were accidentally destroyed by fire. Neither before nor since the fire has any separate account been kept by the railroad company of the 76 miles known as the "Ohio division." The master began taking testimony in January, 1898. Obviously, the only definite information of value must come from the railroad company. After the taking of testimony had proceeded about four years, the master prepared, at

the request of counsel, a preliminary or tentative report giving his then impressions as to the general principles upon which accounting should be had as it then stood. A few months later, in reply to requests of counsel for explanation regarding parts of the preliminary report, a fuller report was prepared. Both reports were submitted to counsel for each party.

The railroad company presented to the master its statement of account of the net earnings of the 76 miles in question, according to the basis which the railroad company claimed should be adopted. This statement showed a credit of net earnings to the 76 miles in Ohio from March 23, 1889, to June 30, 1903, of \$2,569,754.72, being the result of deducting from gross earnings, apportioned at \$7,571,997.18, operating expenses apportioned at \$5,002,242.46; the latter embracing the general classifications of maintenance of way and structures, maintenance of equipment, conducting transportation, and general expenses. In making up the gross earnings applicable to the 76 miles in question, the railroad company, after treating as local all earnings from one station to another in the Ohio division, apportioned freight and passenger earnings between points east of the Mississippi river and points in the Ohio division on an actual mileage basis. Mail earnings on each route extending over the Ohio division and express earnings east of the river were treated in the same way; but, as to freight earnings between points west of the river and points on the Ohio division, the same were first divided by giving to the part west of the river an arbitrary share larger, and usually from two to four times, than the actual mileage prorate, and then dividing the part so apportioned to the line east of the river (after deducting a substantial bridge charge) upon the basis of actual mileage. The testimony indicates that the passenger business to or from points west of the river was apportioned upon an actual mileage basis, after deducting a bridge charge. The freight earnings during the entire period covered by the accounting were greater than the combined mail, express, and passenger earnings, and much of the time at least three-fifths of the aggregate earnings of all kinds.

The master was of the opinion that the apportionment of earnings so made to the 76 miles of road in Ohio, upon an actual mileage basis, was unjust to that division for these reasons: First, that the railroad company, in violation of its duties as trustee, had taken steps in its own interest to divert traffic from the Ohio division over other routes secured by the Wabash Company, so that, according to its reports as made up while the traffic on the line generally had greatly increased, that on the 76 miles in question had not increased; the master stating in his report that it is "too plain for argument that since the rights of Compton accrued (and the railway company must be chargeable with knowledge of these rights from the time they accrued) by the use of the Eel River Detroit line, the Grand Trunk alliance, and more recently the Montpelier line and in various other ways, the natural traffic belonging to this line has been diverted." Second, that the arbitrary apportionment of constructive mileage to the portion of the road west of the river was wholly unjustified, at least to the extent to which it was practiced. Third, that in arriving at net earnings of

the Ohio division the railroad company had charged to operating expenses large amounts of betterments of every kind, and that the same policy had been followed with respect to rolling stock and engine renewals, to the serious prejudice of the Ohio division. And, fourth, that the Ohio division, by reason of its expensive and valuable terminals, was entitled to a greater proportion of earnings than indicated by the actual mileage.

Upon the question whether the apportionment of earnings to the 76 miles of road in Ohio was just to that division, or whether, on the other hand, an apportionment on a basis of a larger constructive mileage was justified, a large amount of testimony was taken. On the part of the railroad company there was presented a great deal of testimony to the effect that the Ohio division and its Toledo terminal originated no business, but that that portion of the road was merely an intermediate link in connecting business between the east and the west, and that an apportionment on the basis of actual mileage was as favorable as the Ohio division was entitled to. The master reports that some of the witnesses so testifying did not sustain themselves upon cross-examination. There was, on the other hand evidence of competent railway experts, whose testimony the master reports was credited by him, to the effect that the Ohio division was, largely by reason of its valuable terminals, entitled on business to or from points west of the Ohio line to an apportionment of constructive mileage greater than actual mileage; one witness of experience testifying that a proper apportionment would be double mileage on freight and actual mileage on passenger traffic, and another that $1\frac{1}{2}$ actual mileage as to both freight and passenger business was justified. The master adopted the latter basis, viz., constructive mileage of $1\frac{1}{2}$ to 1 with respect to all business to or from points west of Peru, Ind., which is about 150 miles from Toledo.

The accounts presented by the railroad company showed that upon this basis the gross earnings would be increased by \$1,413,601, and this sum was accordingly adopted by the master, and added to the net earnings otherwise reported by the railroad company. The sum so added was in fact about 18.6 per cent. of the gross earnings of the Ohio division as reported by the railroad company, on the basis of which the net earnings of \$2,569,755 had been arrived at.

The adoption of this constructive mileage is assailed by the railroad company as contrary to the clear weight of the testimony and as the result of palpable misapprehension. After giving careful consideration to the arguments of counsel for the railroad company, it is our opinion that the action of the master in adopting this constructive mileage apportionment is not subject to exception. There was competent testimony, believed by the master, sustaining the latter's conclusion that an apportionment of earnings to the 76 miles in Ohio on an actual mileage basis was unjust to that division. There was competent testimony to the effect that while the division of freights at the river was adopted many years ago as being a proper one, and while it may have been at the time of its adoption fairly just, it had long since ceased to be justified, at least to the extent to which the discrimination had been practiced. There was also competent proof that this discrimina-

tion greatly prejudiced the Ohio division in the apportionment of gross earnings, as also that such must have been the effect of charging betterments to operating expenses, and of the similar treatment of car and engine renewals. The master reports that he found himself unable, in view of the inability of the railroad company to present sufficiently definite reports, to ascertain the extent to which in these ways the Ohio division had been discriminated against. He did find, however, that the extent of such discrimination was substantial. The record amply sustains the propriety of adopting a constructive mileage apportionment in order to correct inequalities or injustice resulting from the use of actual mileage. It is clear that the evidence credited by the master justified him in increasing the apportionment of net earnings to the Ohio division, either by making an allowance for terminal expenses or by rejecting more or less items from the operating expenses, or by employing a constructive mileage. The adoption of constructive mileage was not arbitrary from the mere fact that it did not permit mathematical exactness. It is no more inexact than some of the figures the railroad company was compelled to rely on, and which the master reports in many respects unsatisfactory.

There is ample evidence sustaining the master's conclusion that the method employed was not unjust to the railroad company. It is urged, in support of the proposition that the Ohio division is not entitled to a constructive mileage apportionment, that the earnings of that division as reported by the railroad company are as great as the average per mile upon the entire system, that the terminal expenses at Toledo are no greater than borne on an average by all the lines of the system, and that the other lines east of the river are subject to the same low rates as the Ohio division.

It would appear that when the expenses incident to the Ohio division, by way of charges required to be made under accounting for the use of terminal property, taxes, and otherwise, are taken into account, the net earnings of the Ohio division, as apportioned by the Wabash Company, were below the average of the system; but, apart from this fact, the considerations mentioned are by no means conclusive upon the question of the propriety of a constructive mileage apportionment. The fact that other parts of the system are discriminated against affords no justification for discriminating, on this accounting, against the Ohio division. Moreover, the other arguments referred to fail to take into account the apparent fact not only that there is charged locally against the Ohio division large sums which benefit much more than the 76 miles of road in Ohio, but that about \$1,000,000 worth of terminal property at Toledo is maintained by the Ohio division for the benefit not only of that division, but of a much larger proportion of the system, including car shops appraised at \$650,000, of which the system generally has the benefit. The value of this terminal property at Toledo is shown to be about \$1,500,000, about two-thirds of which is owned by the Ohio division. There is competent testimony that the value of the Toledo terminals is at least from .66 to .75 as much as the entire 76 miles of railroad in Ohio aside from the terminals. It is also urged that the railway experts, whose views of the propriety of employing constructive mileage apportionment were adopted by

the master, based their views of the propriety of such apportionment solely upon the alleged expensiveness of the Toledo terminals. It appears, however, that the witnesses upon whose testimony the master relied gave as reasons for such apportionment not only the expense of the Toledo terminals, but the cost of moving business over so short a line as compared with a longer one and in view of the low rates accepted. It is true that these witnesses apparently did not, in reaching their conclusion that a larger constructive mileage was justified, take into account the consideration of diversion of traffic, or perhaps, definitely, the arbitrary division of freight rates at the river, or excessive charges to operating expenses; but even apart from these last-named considerations, we should hesitate to say that the master's action could not be supported upon the considerations alone advanced by the railway experts. The fact that other considerations of apparent injustice to the Ohio division fortified the master in his conclusion that the adoption of a constructive mileage did not operate unjustly against the Wabash Company furnishes no reason for rejecting that conclusion.

In view of all these considerations, we have no hesitation in confirming the action of the master in adopting the constructive mileage apportionment.

2. The net earnings account as prepared by the master was made up by taking the item of \$2,569,755 reported by the railroad company as net earnings for the 14-year period from July 1, 1889, to June 30, 1903, and adding the necessary amount to make a constructive mileage of $1\frac{1}{2}$ to 1, viz., \$1,413,601. The principal of the net earnings for the 14-year period thus aggregated \$3,983,356. This took no account of the period from May 15, 1889, to June 30, 1889, which should be included in the accounting period. The master arrived at the net earnings for this period of $1\frac{1}{2}$ months by taking a proportionate share of the net earnings for the 14-year period. This proportionate share was \$35,565, which, added to the other item, made the principal of net earnings to June 30, 1903, \$4,018,921. The addition of this \$35,565 is excepted to as an arbitrary allowance and as a duplication of figures. Reference to the record convinces us that it is not a duplication; that is to say, it is not included in the figures given for the 14-year period. It is true that the railroad company presented figures for the month and one-half in question showing gross earnings of \$51,392.10 and operating expenses \$46,292.57, leaving net earnings of \$5,099.53. These figures showed gross earnings of only about \$34,000 per month and net earnings of less than \$3,500 per month during the $1\frac{1}{2}$ -month period in question, as against gross earnings of nearly \$50,000 per month and net earnings of over \$22,000 per month for the fiscal year immediately following. The witness who presented the figures referred to was unable to explain this discrepancy or give any reason why there should have been so radical a change in the showing presented for the two periods. We think that under the testimony the master, for lack of more accurate data, was justified in adopting an average.

3. The railway company asked to be allowed, as against its liability for earnings of the Ohio division, a credit for $\frac{75}{100}$ of an item of

\$233,444.27, representing railroad freight and switching charges belonging to the Wabash Company and collected by the Lake Erie Transportation Company from consignees and connecting carriers and not paid over by the transportation company to the Wabash Company, but absorbed in its own business. The Lake Erie Transportation Company was a corporation controlled by the Wabash Company; all of its stock being owned by that company. It is sought to justify this credit upon the proposition that the freight carried by the Lake Erie Transportation Company came over the Ohio division, and that the transportation company was maintained for the benefit of the Wabash Road, including the Ohio division. The master disposed of this claimed credit in the following language:

"As to the Lake Erie Transportation Company, the evidence shows that this is a subcorporation owned by the Wabash Railroad Company, defendant, that it was operated by defendant for its own profit, that its officers had full control and management thereof, and the master is unable to see why if the defendant allowed that company to become indebted, in the large sum which is now claimed, namely \$233,444, for transportation charges not collected, the claimant, Compton, who has no lien upon the property of the Lake Erie Transportation Company and no interest in it and is not a creditor and has no connection therewith, should be charged with any part of such debt, nor why the defendant should be given an allowance on account thereof.

"For aught that appears in the evidence, the railroad company regarded the benefits accruing to it from the operation of this transportation company as a sufficient reason for allowing this debt to accumulate; and surely, in the absence of a clear showing that such accumulation was unavoidable, this trustee cannot under such circumstances put any part of the loss on the cestui que trust. If this enterprise had resulted in great profit, Compton would have been entitled to no part of those profits. This is illustrated by the fact that none of the profits of the Pacific Express Company or the American Refrigerator Transit Company are included in the accounting. * * * Why, then, should he share the loss, if it be a loss? Moreover, it is not shown that this debt is a total loss, or how much of it is uncollectible. * * * The claim on that account therefore, for an allowance of $75/100$, or \$19,493, and interest, is disallowed as a claim in favor of the railroad."

We approve both the reasoning and the conclusion of the master.

4. In determining the amount which should be allowed the railroad company for rent and repair of engines upon the so-called "Ohio division," the master found that for the work of the line in Ohio there were required during the period covered by the accounting 12 passenger and freight engines and 5 switching engines, and that a fair annual rental for each of the 17 engines was \$1,600, and a fair allowance for light running repairs was \$1.50 per day, or \$547.50 per year per engine. There was a conflict of testimony as to the extent of engine service required and its value, as well as of the cost of repairs. The railroad company contended that the engine service should be determined on the basis of the number of engine runs made, and that the value of the rental, as well as of the repairs, is much greater than found by the master. It is sufficient to say that the testimony presented purely a question of fact for the determination of the master, that there was testimony sustaining the conclusion reached by that officer, and that the record presented to us does not demonstrate that the master has made a mistake.

5. Car rentals.

The controversy here upon this subject is confined to the allowance made by the master on account of the rental of freight cars used upon the Ohio division. The railroad company claimed that the rate should be $7\frac{1}{2}$ mills per car per mile from May 15, 1889, to November 1, 1894, and 6 mills from the latter date until June 30, 1903. These rates were claimed to be justified as being the exchange rates between railroads during the periods mentioned. There is no controversy over the number of cars or the mileage; the railroad company's figures therefor being taken by the master. The latter allowed $6\frac{1}{2}$ mills per mile from May 15, 1889, to November 1, 1894, and $5\frac{1}{2}$ mills per mile after that date, with a pro rata allowance for the excess paid by the railroad company on account of foreign cars above that received. The master found from the testimony that the 6-mill interchange rate provided a modicum of profit to the owner, and that no railroad company which was in position to own its cars could afford to pay the interchange rates mentioned. It was the view of the master, apparently concurred in by the judge of the Circuit Court, that the railroad company under its trust relation was not entitled to a profit, and that the rates allowed provided ample compensation for the use of the cars. Upon a careful consideration of the arguments presented upon both sides, in connection with the conclusion of the master and of the judge below, we are unable to say that a mistake prejudicial to the railroad company has been made in the allowance criticised.

6. The Circuit Court determined the amount of the compensation for the use by the Ohio division of real estate not covered by the Compton lien, but which contributed to income, at the sum of \$113,382. This allowance is criticised as too small, although we find no assignment of error directed to this subject. The specific criticism is that the court found the value of the real estate not covered by the Compton lien as \$194,000, and that the interest upon this sum at 6 per cent. for 18 years $11\frac{1}{2}$ months would be \$210,975, instead of \$113,382 allowed by the decree. The master found the value of the property contributing to income, aside from parcels "C" and "C1," to be \$104,261. The latter parcels were by the Circuit Court rejected from consideration. It is our understanding that the Circuit Court adopted the value found by the master, viz., \$104,261, as the value of the property contributing to the earnings of the Ohio division, after eliminating parcels "C" and "C1." Interest on this last-named sum at 6 per cent. for 18 years $11\frac{1}{2}$ months amounts to \$113,382.60, as fixed in the decree.

7. By assignment No. 1 criticism is made upon the master's computation of net earnings, in that he did not state the account for each year nor compute interest thereon for each year, but computed interest upon the entire earnings for one-half the period. Obviously, the railroad company is not prejudiced by failure to state the net earnings yearly, unless the interest charge was increased by failure so to do. This assignment was not discussed in the main brief of appellant's counsel. In his reply brief, in answer to a discussion of appellee's counsel relating to a different exception, the master's addition of average interest is criticised as grossly unjust, from the alleged fact that the net earnings for the first half of the period average much less

than for the second half. The figures cited in support of this proposition are not controlling, for the reason that they are not the figures used by either the master or the Circuit Court in making up the aggregate net earnings on which interest is computed. During the first half of the accounting period, the average net annual earnings, as ascertained by the master and by the Circuit Court, appear to be slightly less than the average during the entire accounting period, and, if this item were alone to be taken into account, there would apparently be a slight discrimination against the railroad company.

In the master's report, however, attention is called to the difficulties connected with the ascertainment of net earnings, including the relation of the Toledo terminals, the division of rates at the river, what is a fair rental for the use of rolling stock, and what a fair charge for repairs. The master states that none of those questions "are settled by any decisive evidence," and that "the best that can be done is necessarily an approximation." Reference is also made to the uncertainty respecting taxes. The report then proceeds:

"In making such report the master has, as will be seen, made approximations based on averages, as the railway company employes did in much of their testimony. The master recently suggested that this was the best he could do, especially without the aid of an expert railway accountant, and, while the claimant assented to such method or to the employment of such accountant by the master, the railroad company objected to the method and also objected to the employment of an accountant by the master unless he was wholly paid by claimant and unless counsel for the railway company was permitted to cross-examine such accountant. As this would result in still further delay, the master submits his report based on approximations and averages believed to be fair. As much of the evidence is based upon similar approximations and averages mathematical accuracy is impossible."

The Circuit Court also said in its opinion, speaking of the net earnings assigned to the line in Ohio:

"These have been given as fully as the nature of the case permits. The apportionment must be largely an approximation."

The court also stated that "in the matter of taxes nothing but an approximation was possible," adding that in his opinion the master made a very large allowance in that respect, and that, if the amount of the allowance seriously affected the result which those figures brought, he should feel disposed to more narrowly scrutinize the items which go to make it up. The burden thus rests upon the railroad company to show affirmatively that it has been prejudiced by the adoption of averages.

We feel justified in disregarding the assignment in question in view of these findings of the master and of the Circuit Court, the fact that the subject in question was not discussed in the main brief of counsel, the further fact that the figures presented in the reply brief are not persuasive, and taking into account the comparatively small apparent difference between the average earnings for the 18-year period and the average for the 9-year period on the basis upon which interest has actually been computed in the accounting had, and the fact that it has not been pointed out to what extent this difference might be affected by other items as to which approximations have been made, including the uncertainty expressed by the master as to the correctness

of the net earnings accounts submitted by the railroad company by reason of the inclusion in operating expenses of amounts properly chargeable to betterments and renewals.

8. The order of October 5, 1897, appointing the master, provided that the amount of the net earnings of the Ohio division should be ascertained "over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against said railroad and property during such period." John McNulta was appointed, in September, 1888, receiver of the railroad property in the foreclosure proceedings instituted on behalf of the divisional mortgagees, which were consolidated with the then pending foreclosure proceedings on behalf of the Jessup and Knox consolidated mortgage. Upon the accounting the railroad company presented evidence: That the Wabash Railroad Company had paid liabilities of Receiver McNulta during the receivership in question from September, 1888, to April 30, 1889, aggregating \$493,185.80; that it had received credits from that receivership amounting to \$61,811.19 and supplies amounting to \$278,284.58. The amount of these payments thus exceeded the receipts by \$153,090.03. The railroad company claims that $\frac{75}{100}$ of this amount should be charged the Ohio division against net earnings, upon the contention that, while the evidence does not show any localizing of these payments against the Ohio division, the order appointing the master requires their allowance. The proposition that the operation of the Ohio division under Receiver McNulta did in fact show a loss equivalent to $\frac{75}{100}$ of the sum above stated is claimed to be supported by a separate report relating to the Ohio division filed by Receiver McNulta covering his operation from September 1, 1888, to April 30, 1889. This report shows net earnings above operating expenses of \$12,404.67. Against this sum is charged for car trust interest and expenses, \$6,106.75 and eight months' proportion of taxes, \$20,753.98, leaving a deficit for the period of \$14,456.06, which is a trifle more than $\frac{75}{100}$ of the \$153,090.03 above referred to. The master expressed himself as incredulous that "this piece of property 76 miles long and a part of one of the oldest systems of railroads in the West, with very large terminals in the great and growing city of Toledo, has in a natural and just way been operated at a loss."

If, in our opinion, the order appointing the master contemplated that items of this kind should be taken into account, we should find it necessary to make a more critical examination of the record than the view which we take of the right to a credit of this nature requires. It is true that the purchaser of the property at the foreclosure sale was required to assume the liabilities of the receivership, but that was merely a part of the price required to be paid for the property. It is also true that the order appointing the master provided for taking account not only of "cash paid, if any, in redemption of receiver's certificates," but also "other expenses properly chargeable against said railroad and property during such period." There were, in fact, no receiver's certificates issued for this alleged receivership indebtedness. If this indebtedness is to be taken into account, it must be because it is an "expense properly chargeable against said railroad and property dur-

ing such period," which we think plainly means during the period covered by the accounting, viz., from March 23, 1889, to the time of stating the account.

In our opinion, it was not the intention of the order that indebtedness representing purely a deficit from operation under the receivership should be credited to the trustee in reduction of net earnings since the receivership. It is, moreover, to be noted that paragraph 5 of the order provides for the application of the proceeds of the sale, first, "to the balance of receiver's certificates, if any, properly chargeable," etc., without reference to any other class of receivership indebtedness not evidenced by certificates. Upon the ground stated we approve the action of the master and of the Circuit Court in rejecting this claimed credit.

9. The decree appointing the master provided for an ascertainment of "the value of $\frac{75}{100}$ of all cars, engines, rolling stock, and other equipment directed to be sold by said decree of March 23, 1889, and as fixed therein, with interest upon said amount from the date of the sale under said decree down to the time of taking the account." The foreclosure decree of March 23, 1889, under which the railroad property in question was sold, provided that the purchaser of the Ohio division should take by his purchase $\frac{75}{100}$ of the rolling stock and equipment belonging to the entire system, and that in case of controversy over the claims of junior lienholders "the proceeds and value of the said equipment shall be determined by the schedules of Mark Miller Martin and Joshua B. Barnes, witnesses, given in evidence before the special masters in this case," etc. It is conceded that the undivided equipment, so far as contained in the schedules referred to was appraised by Barnes and Martin at \$2,067,334, $\frac{75}{100}$ of which is \$1,572,277. The master, however, held that Compton was not bound by these terms of the foreclosure decree, determined that the rolling stock in question was actually worth \$515,872, and, accordingly, added $\frac{75}{100}$ of this latter sum to the valuation charged against the railroad company.

The master also found that the purchaser under the foreclosure decree came into possession of further equipment purchased by the receivers, by way of car trust certificates and otherwise, amounting to \$1,579,421, and charged against the railroad company $\frac{75}{100}$ of this last-named sum. The Circuit Court held that Compton was bound by the terms of the foreclosure decree as to the valuation of the property referred to therein, and accordingly rejected the $\frac{75}{100}$ of the item of \$515,872. The item of $\frac{75}{100}$ of \$1,579,421 referred to was, however, allowed by the Circuit Court as a charge against the railroad company. It is this item alone, with reference to the value of rolling stock to be charged against the railroad company, which is in controversy here. There are some matters connected with the consideration of this item which are not entirely clear to us, and, if we were to base our ultimate determination of this item upon the merits, we should be disposed to ask for further argument. In view, however, of our decision upon the other matters involved, a determination of the correctness of the item now under consideration is unnecessary, for this reason: The decree of the Circuit Court found the underlying mortgages overpaid on June

30, 1907, by \$324,336. The item now under consideration, with interest thereon to that date, amounts to about \$274,562, or nearly \$50,000 less than the amount by which the mortgages have been found to be overpaid.

Counsel for appellant earnestly urge that the general result of the accounting had shows its injustice, from the fact that while other lines composing the Wabash system, under a smaller interest charge per mile, have not succeeded in paying off their indebtedness, this Ohio division has, under the system of accounting which has prevailed, been entirely relieved of its indebtedness; but this argument ignores the consideration which controlled the action of both the master and the Circuit Court, viz., that the 76 miles comprising the Ohio division, with valuable and expensive terminals in the large and growing city of Toledo, had an earning capacity sufficient to reach the result had.

In our opinion appellant has not sustained the burden which rests upon it of showing the incorrectness of the final determination of the Circuit Court that the underlying mortgages have been fully satisfied by the application of properly ascertained net earnings.

The decree of the Circuit Court is, accordingly, affirmed.

JOHNSON v. CITY OF ST. LOUIS.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1909.)

No. 2,863.

1. EMINENT DOMAIN (§ 112*)—DAMAGE TO ADJOINING BUILDING FROM LAYING SEWER NOT RECOVERABLE UNDER MISSOURI CONSTITUTION.

The damage to a four-story brick building and its contents by the laying by the city of St. Louis of a sewer in an adjoining alley below the plane of the foundation of the building, after the owner knew in time to prop and protect his building that the sewer was to be laid, and that there was danger that it would cause his building to crack and settle, whereby the lot in its natural state would not have been caused to settle or crumble, but whereby the building was cracked, and it and its contents were injured to the amount of tens of thousands of dollars, is, according to the decisions of the Supreme Court of Missouri, *damnum absque injuria*, and the owner is not entitled to any compensation therefor under the amended Constitution of that state (article 2, § 21 [Ann. St. 1906, p. 148]), which provides that private property shall not be taken or damaged for public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 112.*]

2. ADJOINING LANDOWNERS (§ 4*)—LATERAL SUPPORT—REMOVAL NOT ACTIONABLE IF LOT IN NATURAL STATE WOULD NOT SETTLE.

A private party is liable for damages caused to an adjoining lot by his removal of lateral support to such an extent that the lot in its natural state would settle or crumble, but for nothing more.

If his removal of lateral support would not have caused the adjoining lot to settle or crumble in its natural state, he is not liable for damages which result because the superincumbent weight of buildings or other ponderous things contribute to the settlement of the lot.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-37; Dec. Dig. § 4.*]

3. COURTS (§ 366*)—CONSTRUCTION OF STATE CONSTITUTIONS AND STATUTES—NATIONAL COURTS FOLLOW DECISIONS OF STATE COURTS.

In the construction of the Constitution and statutes of a state, the national courts uniformly follow the interpretation announced by the highest judicial tribunal of the state, where no question of general or commercial law or of right under the Constitution of the United States or the acts of Congress is involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

4. COURTS (§ 366*)—MUNICIPAL CORPORATIONS—POWERS AND LIABILITIES MEASURED BY STATE DECISIONS.

The character and extent of the powers and liabilities of the political or municipal corporations of a state are questions of construction of state Constitutions and statutes, upon which the decisions of the highest judicial tribunal of the state which creates them are generally controlling in the national courts, and when that court has decided one of these questions the decisions of the courts of other states and of the federal courts in the construction of the Constitutions or statutes of other states are immaterial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 963; Dec. Dig. § 366.*]

5. COURTS (§ 311*)—FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF TRUSTEE MATERIAL, THAT OF CESTUI QUE TRUST IMMATERIAL.

A citizen of one state, who holds the title to property in trust for others, may maintain an action for damage to it against a citizen of another state in the proper federal court, without regard to the citizenship of his cestui que trust.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

6. COURTS (§ 363*)—PRESIDENT OF JOINT-STOCK COMPANY AUTHORIZED BY STATE STATUTE HAS CAPACITY TO SUE IN FEDERAL COURT.

The president of a joint-stock company, the American News Company, empowered by the statute of New York, under which it was organized, to sue in its behalf, may maintain an action for injury to its property in a national court in the state of Missouri.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 363.*]

Jurisdiction as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

7. COURTS (§ 363*)—FEDERAL COURTS—JURISDICTION—PROHIBITION OF SUITS IN STATE COURTS DOES NOT AFFECT SUITS IN FEDERAL COURTS.

The Missouri statutes, which forbid unqualified foreign corporations doing business in that state from maintaining suits in the courts of the state, do not affect their right to maintain suits in the national courts, because the jurisdiction of the latter may not be revoked, annulled, or impaired by any act or law of a state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 363.*]

8. COURTS (§ 363*)—FOREIGN CORPORATION ACTS—FAILURE TO COMPLY WITH DOES NOT DESTROY LIABILITY FOR INJURY TO PROPERTY.

The failure of a foreign corporation doing business in a state to comply with qualifying statutes does not deprive it of the liability of one who injures or destroys property which it owns to pay for the legal injury

he inflicts, nor of its right to maintain an action upon that liability in the federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 363.*]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

See, also, 137 Fed. 439.

T. K. Skinker, for plaintiff in error.

Benjamin H. Charles and A. H. Roudebush, for defendant in error.

Before SANBORN, Circuit Judge, and CARLAND, District Judge.

SANBORN, Circuit Judge. Prior to 1875, the Constitution of the state of Missouri contained this provision:

"That no private property ought to be taken or applied to public use without just compensation." Section 16, art. 1, Const. 1865.

In that year this Constitution was so amended that it has since read in this way:

"That private property shall not be taken or damaged for public use without just compensation." Section 21, art. 2 (Ann. St. 1906, p. 148).

In 1903 the city of St. Louis caused a sewer to be laid in an alley by the side of the plaintiff's four-story brick building in a plane several feet below that of the foundation of this structure. The excavation for and the construction of this sewer did not encroach upon plaintiff's lot, and, if the lot had been in its natural condition, they would not have caused it to crumble or settle; but they so diminished the lateral support of the lot that it did not sustain the weight of the building, and in this way the laying of the sewer caused the walls of the building to crack, compelled the plaintiff to rebuild portions of them, and caused damage to the amount of tens of thousands of dollars to the building and its contents.

Notwithstanding the large amount of this damage, no recovery could have been had for it if the alley had been owned and the sewer had been built therein by a private party, because the plaintiff knew that it was to be constructed and was aware of the danger from it in ample time to have propped and protected his walls, and damage caused by the removal of support to a lot which would not have caused it to settle and crumble in its natural state form a part of that great mass of damages which inflict no legal injury and are commonly styled *damna absque injuria*. *Transportation Company v. Chicago*, 99 U. S. 635, 645, 25 L. Ed. 336; *Charless v. Rankin*, 22 Mo. 566, 571, 66 Am. Dec. 642; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *McGrath v. City of St. Louis*, 215 Mo. 191, 114 S. W. 611, 618.

But counsel for the plaintiff contends that, by virtue of the amendment of the Constitution in 1875, the injury to the building and to its contents was made a legal injury and an actionable damage which the plaintiff was entitled to recover thereunder. The court below was of a different opinion and instructed the jury to return a verdict for the city.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff's counsel concedes that the damage for which he seeks judgment was not the effect of the negligence of the contractor, and that the city had the right to lay the sewer because the construction and operation of sewers constituted one of the public uses to which the alley was subject by virtue of its original dedication to or acquisition for public use.

It is immaterial whether the title to the land adjoining the plaintiff's lot to the middle line of the alley was in the plaintiff or in the city, because in either case it was subject to the right of the city to use it for sewers, sidewalks, travel, and other urban purposes to which such alleys and streets are devoted, and the plaintiff must recover, if at all, because this use was by the Constitution subjected to the condition that the city should pay the damage to the building and the contents which was caused by the laying of the sewer. Nor is it material whether the sewer was constructed by an independent contractor or by an agent of the city, because in either case the sewer was laid by virtue of the lawful exercise of the power of the state delegated to the city to damage private property for public use, the damage was not the effect of negligence in constructing the sewer, and the Constitution conditions the exercise of this power with the liability of the delegate that exerts it to pay just compensation therefor.

The question therefore is directly presented whether or not damage inflicted upon a building and its contents, by the laying without negligence by a city of a sewer in an alley or in a street adjoining it which would not have injured the lot on which it stood in its natural state, is a legal injury recoverable by virtue of section 21 of article 2 of the Constitution of the state of Missouri, as it was amended in 1875.

Amendments to other Constitutions similar to that made in that year by the state of Missouri were introduced into the Constitutions of many states at about that time, and numerous and inconsistent opinions relative to the character and extent of the damages that may be recovered thereunder have been rendered in various jurisdictions. *Chicago v. Taylor*, 125 U. S. 161, 169, 8 Sup. Ct. 820, 31 L. Ed. 638; *United States v. Alexander*, 148 U. S. 186, 13 Sup. Ct. 529, 37 L. Ed. 415; *City of Chicago v. Le Moyne*, 56 C. C. A. 278, 119 Fed. 662; *Parker v. Boston & Maine R. R. Co.*, 3 Cush. (Mass.) 107, 114, 50 Am. Dec. 709; *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *City of Vicksburg v. Herman*, 72 Miss. 211, 215, 16 South. 434; *City of Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700, 39 L. R. A. 349; *Rigney v. City of Chicago*, 102 Ill. 64; *City of Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *City of Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135; *City of Quincy v. Jones*, 76 Ill. 231, 244, 20 Am. Rep. 243; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 483, 9 Atl. 871, 2 Am. St. Rep. 618; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 544, 13 Atl. 690, 4 Am. St. Rep. 659; *Railway Company v. Meadows*, 73 Tex. 32, 35, 11 S. W. 145, 3 L. R. A. 565; *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. 331, 339; *Dickerman v. City of Duluth*, 88 Minn. 288, 293, 92 N. W. 1119.

The Supreme Courts of Pennsylvania and Nebraska have decided

that like amendments to the Constitutions of their states include such damages as the plaintiff here seeks, and that parties were entitled to recover them from cities under like circumstances. *Ladd v. Philadelphia*, 171 Pa. 485, 33 Atl. 62; *City of Plattsmouth v. Boeck*, 32 Neb. 297, 300, 49 N. W. 167. And if this case involved the construction of the amended Constitutions of those states we should have no hesitation in following the interpretation of these courts, as upon a careful review of the authorities we did in a Nebraska case in *Mason City & Ft. Dodge R. Co. v. Wolf*, 78 C. C. A. 589, 148 Fed. 961.

But this case arose in Missouri. It involves the extent of the liability of a municipal corporation of that state, and that liability depends entirely upon the interpretation of the amended Constitution of Missouri. The national courts uniformly follow the construction of the Constitution and statutes of a state announced by its highest judicial tribunal in all cases which, like that in hand present no question of general or commercial law and no question of right under the national Constitution and the acts of Congress. The character and the extent of the powers and liabilities of the political or municipal corporations of a state are questions of local law upon which the decisions of the Supreme Court of the state which creates them are authoritative in the federal courts, and neither the decisions of the courts of other states nor the opinions of the national courts in cases involving the interpretation of the Constitutions or statutes of other states are material. *Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; *Madden v. Lancaster County*, 12 C. C. A. 566, 570, 65 Fed. 188, 192; *Blaylock v. Incorporated Town of Muskogee*, 54 C. C. A. 639, 640, 117 Fed. 125, 126; *City of Winona v. Botzet* (C. C. A.) 169 Fed. 321, 325, March 26, 1909.

In view of this established rule of law, consideration and discussion of the natural or rational meaning of the amendment to the Constitution of Missouri and a review of the opinions of the courts of other states would be useless, and we turn to the authoritative decisions of the Supreme Court of Missouri for the answer to the question which this case presents. We lay to one side as irrelevant *Heinrich v. City of St. Louis*, 125 Mo. 424, 428, 28 S. W. 626, 46 Am. St. Rep. 490, which permits the owner of abutting property to recover for the vacation of a street, and *Walker v. City of Sedalia*, 74 Mo. App. 70, 79, and *McAntire v. Joplin Telephone Co.*, 75 Mo. App. 535, 540, which authorize recoveries for the destruction of shade trees in streets in front of the property of abutting owners because such an owner has a valuable legal right to the open street and to the shade trees therein in front of his lot, and the vacation of the street or the destruction of the trees is a taking of his property. *Gulath v. City of St. Louis*, 179 Mo. 38, 56, 77 S. W. 744, in which a recovery was sought on account of negligence which was alleged to have caused the overflow of a sewer upon private property beyond the limits of the street, falls into the same category, because the damage was not the effect of the public use of the street, but of negligence in that use, and the clause of the Constitution under consideration was inapplicable. We come then to

the decisions which appear to be relevant and determinative of the question at issue.

Prior to 1875, the Supreme Court of Missouri had held, in a long line of decisions, that an abutting owner, who had constructed expensive buildings and had otherwise improved his property in conformity to and in reliance upon the established grade of a street in front of it, could recover nothing of the city which changed that grade so that his buildings were rendered inaccessible and the value of his property was practically destroyed, because the city had the right to make such changes, and it did not actually take any of the owner's property thereby. The Constitution of the state was amended by adding to its declaration that just compensation must be paid for property taken the words "or damaged," for the purpose of avoiding the effect of these decisions and to protect the owners of urban property from ruinous damages inflicted upon them by these arbitrary changes of grade. *Hickman v. City of Kansas*, 120 Mo. 110, 116, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684. Mindful of the reason for the amendment that Supreme Court has held ever since 1875 that when property is damaged by establishing the grade of a street, or by changing a grade already established, or by reducing a street to an established grade, it is damaged for public use within the meaning of the amendment to the Constitution. *Werth v. City of Springfield*, 78 Mo. 107; *State ex rel. v. City of Kansas*, 89 Mo. 34, 14 S. W. 515; *Sheehy v. Kansas City Cable Ry. Co.*, 94 Mo. 574, 7 S. W. 579, 4 Am. St. Rep. 396; *Davis v. Missouri Pacific Ry. Co.*, 119 Mo. 180, 188, 24 S. W. 777, 41 Am. St. Rep. 648; *Cole v. City of St. Louis*, 132 Mo. 634, 34 S. W. 469. And in *Mining Company v. City of Joplin*, 124 Mo. 129, 136, 27 S. W. 406, and *Smith v. City of Sedalia*, 152 Mo. 283, 302, 53 S. W. 907, 48 L. R. A. 711, that court declared that under the amended Constitution a city could not pollute with sewage the waters of a creek so as to depreciate the value of the property abutting thereon without liability to make just compensation therefor. But the Supreme Court of Missouri early held, and it has steadily maintained, that a city was not required by this amendment to the Constitution to make compensation for every damage which the owner of abutting property suffered by the city's lawful use of its streets, its alleys, or its other property.

In 1885 the city of St. Louis empowered the Bell Telephone Company to erect two poles on the line of Sixth street in that city in front of a building four stories high. The owner of the property had excavated the lot under the sidewalk to the line of the curb, had there built a heavy stone wall laid in cement, and had laid large slabs of stone 12 feet long and several feet wide from this stone wall to the line of its building. The telephone company was about to cut holes through these stone slabs and through the stone and cement wall large enough to receive poles 18 inches in diameter, and to place and permanently maintain them there. Its action would necessarily obstruct ingress and egress to the building, injure the sidewalk and wall, and impede the light and air. The owner applied to the court for an injunction, and cited *Werth v. City of Springfield*, 78 Mo. 107, and *Householder v. City of Kansas*, 83 Mo. 488, cases for damages for

changes of grade; but the court said that "such damages to be recoverable must be real and substantial, and flow from a sudden and extraordinary change of grade, and not from such improvements of the street in any ordinary and reasonable mode deemed beneficial to the public good, for, as to these, the lot owner must be assumed to have consented," that the use of the street for telephone poles was one of the uses to which Chouteau and Lucas dedicated it in 1816, that the right to this use was paramount to the right of the owner of the fee of the lot, and it denied that owner any relief. *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398.

In *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 257, the plaintiff owned property on High street 500 feet distant from a point where railroads crossed the street. By authority of the city the tracks were depressed from four to six feet, the street was made impassable for teams for three years, and the plaintiff's property was depreciated in rental value thereby and permanently injured; but the Supreme Court of Missouri held that he could not recover any damages on this account, and so are *Fairchild v. City of St. Louis*, 97 Mo. 85, 11 S. W. 60, and *Canman v. City of St. Louis*, 97 Mo. 92, 11 S. W. 60.

In 1891, in *Van De Vere v. Kansas City*, 107 Mo. 83, 88, 91, 17 S. W. 695, 28 Am. St. Rep. 396, the plaintiff owned two lots in a residence district adjoining a lot owned by the city upon which it was about to construct a fire engine house. He proved, and the court found, that the construction and use of the engine house would greatly depreciate the value of his lots and would render occupants of them uncomfortable. The cases involving a change of grade were again invoked; but the court again refused to apply the principle on which they seem to rest to other classes of cases. It held that the city had the right to build and operate the fire engine house upon its lot, that "whether the plaintiff must now, in all cases when claiming that his property has been 'damaged' for public use, show that the injury is one for which he might have maintained an action if the act had not been done by authority of law, we need not say in this case. What we do say is this, that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected." And, notwithstanding the conceded damage to the plaintiff's lot which the construction of the engine house would inflict upon the plaintiff, the court denied his prayer for an injunction.

In 1892, in *Gaus & Sons Mfg. Co. v. St. Louis, Keokuk & Northwestern Ry. Co.*, 113 Mo. 309, 318, 319, 20 S. W. 658, 18 L. R. A. 339, 35 Am. St. Rep. 706, the city of St. Louis had given to the railway company permission to construct and to operate with steam a railroad along Main street in that city directly in front of the plaintiff's lumber factory, which consisted of two stories and a basement and extended along the street 240 feet. It had been the custom of the plaintiff to receive and to deliver lumber from its factory across this street, and there was no other convenient access to it. The construction and operation of this railroad depreciated the value of the plaintiff's property (page 318 of 113 Mo., page 659 of 20 S. W. [18 L. R. A. 339, 35 Am. St. Rep. 706]), interfered with free access to it from the street, obstructed the light and air, threw smoke, cinders, and dust into the

factory from the engines and cars, increased noise, and jarred the ground; but the court held that the operation of a railroad by steam was one of the public uses to which the street was originally dedicated, that the city had the right to devote it to that use, and that the damage to the owner of abutting property therefrom, though actual and great, was *damnum absque injuria*, and that neither the city nor the railroad company was required to make just or any other compensation for it under the amended Constitution of the state of Missouri.

The fact may be here noted that the decisions which have just been cited are diametrically opposed to those of the courts of Nebraska which were reviewed and followed by this court in *Mason City & Ft. Dodge R. Co. v. Wolf*, 148 Fed. 961, 78 C. C. A. 589.

In 1904, in *Gerst v. City of St. Louis*, 185 Mo. 191, 209, 84 S. W. 34, 105 Am. St. Rep. 580, the plaintiff recovered a judgment against the city because when it was laying a sewer in an alley adjoining the plaintiff's lot and houses lower than their foundations, and there appeared to be danger that the houses would fall into the ditch, it failed to notify her to prop and protect them. The Supreme Court said:

"It is the duty of one who makes an excavation on his own land deeper than the foundation of a building on an adjoining lot, and so near to such building as to endanger it, to notify the adjoining owner of the proposed excavation and afford him reasonable opportunity to protect his property, and a failure to discharge such duty is negligence for which an action may be maintained for the injury resulting therefrom, unless the adjoining owner had actual knowledge of such proposed excavation, and there is no good reason why this rule should not be applied to municipal corporations and their contractors as well as to other persons."

And it held that an instruction to that effect was rightly given to the jury; but if, as counsel for the plaintiff insists in the case in hand, the city was absolutely liable under the amendment to the Constitution to pay for the damage caused to the buildings of Gerst by the construction of the sewer for public use, she was not, and the city was, required to prop and protect them, notice to her was immaterial, and the instruction regarding it was erroneous. It was only in case the city was not liable for such damages under the Constitution, but for negligence in failing to give the notice only, that the instruction approved in this case could have been right.

Finally, in 1908, in *McGrath v. City of St. Louis*, 215 Mo. 191, 114 S. W. 611, 613, 615, 616, a case arose in which the city and its contractor were sued because in laying a brick pavement in an alley they adopted and used a plan and method under which they excavated along and south of the north wall of plaintiff's buildings on the adjoining lot and caused them to crack and settle. The court held that the contractor was independent, and the city was not liable for his negligence in carrying out its plan, and that the city was not liable to the plaintiffs because it had the right to pave the alley and to excavate for that purpose to the line of the plaintiff's lot, and, if the plaintiffs knew it was so doing in time to prop and protect their buildings, they could not recover, although the buildings cracked and settled into the excavation. Thus the city answered that the plan of paving required the excavation to be done wholly in the alley, and that it was not necessarily dangerous to the buildings, and the court held that:

"The mere fact that the wall cracked and fell into the alley was not sufficient in itself to entitle the plaintiffs to recover."

And that:

"If the work contemplated would not, when properly done, necessarily cause injury to third persons, no right of action accrues on account of the plans alone."

The city alleged in its answer that the plaintiffs' damage resulted from their own negligence, in that they knew in ample time that the city was about to make the excavation to a plane below the foundations of their buildings, and that there was danger that they would fall into the opening, and yet they did not prop or protect them, and it denied that it was the duty of the city to support the walls of these buildings, and alleged that it was the duty of the plaintiffs so to do; and the court held that since the plaintiffs knew in time of the coming excavation the duty to protect the walls of their buildings rested upon them, and not upon the city, and that they could not recover the damage which they sustained by their fall. In our opinion this decision is fatal to the claim of the plaintiff in the case in hand. It is true, as counsel for the plaintiff urges, that McGrath and his coplaintiffs sought to recover of the city on the ground that it was negligent (1) in the execution of the plan, (2) in the adoption of its plan, and (3) in its failure to give the owners of the abutting property notice to prop and protect their buildings, and it is also true that no claim was made that the plaintiffs were entitled to just compensation for the damage to their buildings by virtue of the amendment to the Constitution; but in view of the repeated consideration and interpretation of that amendment by the Supreme Court of Missouri in the cases which have been cited and in many others, and in view of the fact that if abutting owners of property may recover the damage to their buildings sustained by a city's lawful excavation in a street or alley by virtue of this amendment regardless of the negligence of the city, as plaintiff's counsel claims, no acts of negligence on the part of the city were requisite to entitle McGrath et al. to a judgment against the city of St. Louis for just compensation for the damage to their property caused by the excavation in the alley below the foundation of their buildings, it would be an unwarrantable assumption to presume that this amendment to the Constitution was not in the minds of the judges of that court when they decided this and the last preceding case, and that they discussed and decided the questions of negligence there treated and rested their judgments upon the decisions of them when those questions were moot and immaterial. We cannot indulge such a presumption.

The fact that the court below, upon a preliminary hearing in 1905, expressed the view that the plaintiff in this case might recover, has not escaped attention (137 Fed. 439); but the decisive opinion in McGrath v. City of St. Louis had not then been rendered, and many of the cases which have been considered and reviewed do not appear to have been called to the attention of the court at that time.

It is not the duty nor is it the purpose of his court to seek out, to discuss, or to attempt to announce the guiding reason or prin-

ciple which has produced the interpretation of the amendment to the Constitution of Missouri which the Supreme Court of that state has developed. It is sufficient for this court that the construction of that Constitution has been plainly written by the Supreme Court of that state. That Constitution declares that private property shall not be taken or damaged for public use without just compensation. As we understand the decisions of that court, this is their result: The word "damaged" in that Constitution includes damage to adjoining property from the establishment or the change of a grade of a street or alley, from the reduction of a street or alley to an established grade, and from the pollution of the waters of a creek with sewage, and for these damages recoveries may be had thereunder, although they were lawfully inflicted. On the other hand, the word "damaged" in that Constitution excludes damage to adjoining property by depreciation of its value, by obstruction of access to it, by noise, by smoke, by cinders, by the cracking and falling of the walls of buildings from the removal of lateral support when these injuries are caused either by the opening of a stone sidewalk and basement wall and the erection of poles therein, or by the construction and operation of a fire engine house, or by the construction and operation by steam of a railroad upon the street just in front of a lumber factory, or by the laying of a sewer or a pavement in an alley lower than the foundation of buildings upon the abutting property, whereby their lateral support is weakened and they become cracked and injured. The case at bar falls in the latter class. The plan of the sewer in question here was not necessarily dangerous to the plaintiff's property. The city had the right to make and to use it. The excavation for it was to be made, and it was made wholly within the alley. The plaintiff knew that it was to be made and was aware of the danger that his building would settle and crack therefrom in time to have propped and protected it, and according to the decisions of the Supreme Court of Missouri his damage was *damnum absque injuria*, and he was entitled to no compensation for it under the Constitution of that state.

The title to the property injured by the construction of the sewer was in 1903, and ever since has been, held by the plaintiff as president and trustee for the American News Company, a joint-stock association organized under the laws of the state of New York, some of the partners in which were citizens of the state of Missouri; but Johnson, the plaintiff, was and is a citizen of the state of New York. Counsel for the defendant contend that on account of this fact the court below had no jurisdiction of the action, and that Johnson had no capacity to sue, and they cite in support of this contention *Chapman v. Barney*, 129 U. S. 677, 682, 9 Sup. Ct. 426, 32 L. Ed. 800, and *Weir v. Metropolitan Street Railway Co.*, 126 Mo. App. 471, 103 S. W. 583; but in the former case there was no satisfactory proof of the citizenship of Barney, the plaintiff, the decision of the Missouri Court of Appeals in the latter case is not controlling upon the question of the jurisdiction of a national court, and a citizen of one state who holds the title to property in trust for others may maintain an action for damage to it against a citizen of

another state in a federal court without regard to the citizenship of his cestuis que trust. *Bonnafee v. Williams*, 3 How. 574, 577, 11 L. Ed. 732; *Irvine v. Lowry*, 14 Pet. 298, 299, 10 L. Ed. 462; *Knapp v. Railroad Company*, 20 Wall. 117, 123, 22 L. Ed. 328; *Coal Company v. Blatchford*, 11 Wall. 172, 175, 20 L. Ed. 179.

Moreover, the statutes of the state of New York, under which the news company was organized, authorized its president to bring and to maintain this or any other like action (*Chase's New York Civil Procedure*, § 1919, as amended in 1900), and a statute of Missouri provided that:

"A trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted." Rev. St. Mo. 1899, § 541 (Ann. St. 1906, p. 578).

The plaintiff therefore clearly had capacity to sue, both as trustee and as a person expressly authorized by statute, and the Circuit Court had ample jurisdiction to entertain his action and to render judgment therein. *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *Boatner v. American Express Co.* (C. C.) 122 Fed. 714, 718; *Baltimore & Ohio R. Co. v. Adams Express Co.* (C. C.) 22 Fed. 404, 407, 408; *Maltz v. American Express Co.*, 1 Flip. 611, Fed. Cas. No. 9,002; *Reade v. Waterhouse*, 52 N. Y. 587; *United States v. Rundle*, 27 Wash. 7, 67 Pac. 395, 396; *Merchants' Loan & Trust Co. v. Clair*, 36 Hun (N. Y.) 362, 363.

The American News Company is not a corporation; but one of the reasons why the court below instructed the jury to return a verdict against it was that it had never qualified itself to do business as a foreign corporation under the laws of the state of Missouri, which impose a penalty of \$1,000 and a disability to maintain actions in the courts of that state for such a failure by a foreign corporation that engages in business in that state. Rev. St. Mo. 1899, §§ 1024, 1025, and 1026. While section 943 of the chapter in which the above provisions are now found declares that the term corporation as used in that chapter shall be construed to include joint-stock companies or associations, it is exceedingly doubtful that it has the effect to require foreign joint-stock companies to comply with the provisions of those sections, because they were enacted as parts of distinct acts of the Legislature after section 943 was in force. Conceding, however, without deciding, that it has that effect, the failure of the news company to qualify as a foreign corporation was not fatal to this suit.

In the first place, its disqualification by the law of Missouri to maintain actions in the courts of that state did not deprive it of its right to maintain them in the national courts, for the jurisdiction of the latter was not granted, and it may not be revoked, annulled, or impaired by the law or act of any state. *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 182, 156 Fed. 1, 16; *Dunlop v. Mercer*, 86 C. C. A. 435, 441, 156 Fed. 545, 551.

In the second place, the alleged liability upon which this cause of action was founded was not contractual in any such sense that it was destroyed because the Supreme Court of Missouri decided

that contracts of disqualified foreign corporations were invalid. *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 415, 419, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511; *Chicago Mill & Lumber Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086. While this action may have been technically an action *ex contractu*, it was really founded upon an injury inflicted upon real and personal property by the city and an alleged constitutional liability therefor. A meeting of the minds of the parties, a good or a valuable consideration, and mutuality are essential elements of an ordinary contract which do not inhere either in this alleged liability or in the transactions out of which it arose. It is a liability for damage to property owned by the plaintiff. A construction of the qualifying statutes of Missouri which would deprive a foreign corporation of the property it owned or of the liability of him who injured or destroyed that property, unless such a foreign corporation complied with the qualifying statutes of that state and did business in the state thereunder, would make those statutes confiscatory and unconstitutional. Such was not their purpose nor their effect, and the failure of the news company to comply with them did not deprive the plaintiff of his right to maintain an action in the court below for any legal injury which was inflicted upon his property by the city.

The judgment of the court below must be affirmed, for the reason first stated in this opinion; and it is so ordered.

MILLIE IRON MINING CO. v. MCKINNEY.

(Circuit Court of Appeals, Sixth Circuit. July 26, 1909.)

No. 1,905.

1. JUDGMENT (§ 956*)—ESTOPPEL—EVIDENCE.

Where the opinion of a Circuit Court is included in a bill of exceptions, and thus made a part of the record, it is admissible in evidence in another case for the purpose of determining what questions were concluded by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1823; Dec. Dig. § 956.*]

2. JUDGMENT (§ 587*)—CONCLUSIVENESS OF ADJUDICATION—MATTERS IN ISSUE.

Defendant entered into a contract with plaintiff which on its face was made by him as an individual. Plaintiff brought suit thereon against defendant and others as partners, alleging that defendant made the contract as agent for a partnership whose liabilities the defendants had assumed. The court found that such agency was not established and directed a verdict and rendered judgment for the defendants. *Held*, that such judgment was not a bar to a subsequent action on the same contract against defendant individually, although the court further expressed the opinion that he made the contract as receiver for the former partnership, which was a matter not material to the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1089; Dec. Dig. § 587.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jurisdiction in this case rests upon admitted diversity of citizenship. The cause came to trial before the court and a jury. At the close of the evidence offered by both sides, the court, on motion of defendant, directed a verdict to be returned in his favor. Motion for new trial being overruled and judgment entered on the verdict, the cause was brought here upon proceedings in error.

The action grew out of an agreement in writing consisting of two papers, each dated March 2, 1894. It is alleged: That under this agreement the Millie Company delivered to McKinney certain iron ore then on its stockpile near the city of Iron Mountain, Mich.; that McKinney agreed to accept the ore at \$14,500 and to ship it to Lake Erie ports, as soon as convenient and profitable, and there sell the same; and, further, that if the gross receipts exceeded \$14,500 and the cost of loading, railroad and lake freights, insurance and seller's commission of 10 cents per ton, and interest on the whole for six months at the rate of 6 per cent. he would pay the excess to plaintiff. It is alleged, further, that, in violation of his agreement, McKinney, on March 7, 1894, before the opening of navigation and before the ore was shipped to Lake Erie ports, sold the ore at \$2.50 per ton, which, if reasonably held and marketed, would have brought \$3.25 per ton, and that upon this price the Millie Company would have been entitled to a balance of \$10,995.91. Plaintiff alleged that it had been damaged by reason of defendant's breach of contract in that sum and prayed judgment.

The answer contains a general denial in the first defense. The second defense sets up estoppel, alleging: That an action was brought in the court below, January 20, 1897, by the Millie Company against the present defendant, McKinney, and James Corrigan and Stevenson Burke, wherein the same contract as the one now in suit was involved; that in the former suit McKinney had been charged with failure to perform the contract in the manner now complained of, and with having, together with his codefendants, as a firm known as "Corrigan, McKinney & Co.," assumed to pay his (the present defendant's) obligations and liabilities under the contract, and by reason of the premises asked judgment against him; that evidence was presented by plaintiff; that McKinney made separate motion to direct a verdict in his favor on the ground that the contract was not made by him as an individual, but as receiver of a firm known as Corrigan, Ives & Co., pursuant to order of the Cuyahoga common pleas; that his motion to direct was granted, and, after motion for new trial was overruled, judgment was entered on the verdict and is in full force and effect.

In the reply it is admitted that plaintiff brought action against Corrigan, Burke, and McKinney, alleging in its petition that the three were copartners as Corrigan, McKinney & Co., and that McKinney had entered into the contract now sued on as agent for the copartnership of Corrigan, Ives & Co., and that Corrigan, McKinney & Co., had succeeded to the business of that firm and had assumed and agreed to perform the obligations of Price McKinney under said contract, and that the joint answer filed therein by the three defendants admitted the making of the contract by McKinney, but denied that he made it as agent for Corrigan, Ives & Co., or that the other firm had assumed the contract. It admits that the case went to trial upon these issues, and that the plaintiff, having failed in the opinion of the court to make proof of the agency of McKinney for Corrigan, Ives & Co., and of the assumption aforesaid by the other firm, verdict was directed and judgment entered on the verdict. It denied that the liability of McKinney under the contract was put in issue, tried, or contested.

In the trial of the present case the two papers constituting the agreement of March 2, 1894, were read in evidence. They disclose the Millie Company and Price McKinney as the only parties to the agreement. Proofs were offered tending to show: That the ore was delivered to McKinney and sold as alleged in the petition; that it was fairly worth, and would, if reasonably disposed of, have brought, the price named. Defendant offered proofs tending to contradict the evidence concerning sale of the ore, and to show that in fact he made the contract as receiver, though under the advice of counsel he made it in his individual name. Evidence was received tending to show: That at the date of the contract the Millie Company owed Corrigan, Ives & Co. \$14,500; that the defendant was then receiver of that firm; and that,

through correspondence had by him as receiver with the Millie Company, it knew that the purpose of the agreement was to utilize the ore to discharge the indebtedness of the Millie Company. It was admitted during the introduction of the defendant's testimony that the amount actually received by him for the ore sold exceeded the consideration aforesaid, and all expenses by something more than \$900, and that, if the agreement was in fact the individual undertaking of defendant, the plaintiff would be entitled to that sum, with interest. The pleadings and the proceedings of the court in the former case, together with the opinions rendered therein, first, by Judge Hammond upon the motions made for directed verdicts, and, second, by Judge Tayler in overruling the motion for a new trial of that case and entering judgment on the verdict, were received in evidence. In granting the motion for a directed verdict, the court below, without determining any other matter, decided that the operation of the judgment in the former case prevented recovery in the present case.

The assignments of error relate to admitting the aforesaid copies of pleadings, also of the proceedings and judgment and opinions of the court, also of the briefs of plaintiff and appointment of McKinney as receiver of Corrigan, Ives & Co., also to granting motion to direct verdict and entering judgment.

A. C. Dustin, for plaintiff in error.

S. H. Holding and Tracy H. Duncan, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The assignments of error may be disposed of under the inquiry: Does the judgment in the former case operate as an estoppel against recovery in the present action?

The cause of action in each case was based upon the same instruments, and it was sought in each to recover the difference between the price received for the ore and the price alleged to be its true value, less charges and expenses. But the present action is upon the agreement as it was written; it is against Price McKinney as principal. The former action was not upon the contract as it was written. Recovery was sought upon the agreement as though a totally different principal had in name executed it through Price McKinney as agent.

The form of the present action appears in the statement. The former action was against James Corrigan, Stevenson Burke, and Price McKinney. Immediately after statement of jurisdictional facts, it was alleged in the petition: That Corrigan and Burke and one Ives were copartners under the firm name of Corrigan, Ives & Co.; that Corrigan, Burke, and McKinney organized a copartnership under the name of Corrigan, McKinney & Co.; that the last-named firm succeeded to the business of the prior firm, and assumed all the liabilities of Corrigan, Ives & Co. It was next alleged that Corrigan, Ives & Co., in March, 1894, had a claim against the Millie Iron Company, which on the second of that month was liquidated at \$14,500. Then followed a statement of the contract made between the Millie Company and McKinney on that date, and thereupon:

"Plaintiff further says that it is informed and believes, and so charges the fact to be, that the said Price McKinney acted, throughout, in said matters, in the interests and for the benefit and at the special instance and request of Corrigan, Ives & Co., and as their agent and representative, and that the contract and agreement aforesaid, although made by him in his own name, was the contract, agreement, and obligation of the said firm of Corrigan, Ives

& Co., and that all that the said Price McKinney did in and about said contract, and in and about the execution and attempted execution thereof, was done by him as their agent and representative, and with their full knowledge and approval."

After stating the quality and value of the ore and what under reasonable handling it would have brought, the petition charged that Price McKinney and Corrigan, Ives & Co. failed to carry out the contract and sell the ore as they should, to the damage of the plaintiff in a sum specified.

It is true that a breach was charged in the former case against both McKinney and his alleged principal; but in the same paragraph, not to speak of other portions of the petition, it was further charged that, if the contract had been performed, "said Corrigan, Ives & Co. and said Price McKinney, as their duly authorized agent and representative, would have realized" the excess sued for. Charging the breach of contract against McKinney as well as Corrigan, Ives & Co., must, we think, be treated as a charge against McKinney in his capacity as agent of that firm, for the petition as a whole is framed upon that hypothesis, and Judge Hammond so regarded it.

The only features of the answer in the former case that need be noticed are the averments that on July 11, 1893, an action was brought by Stevenson Burke in the Cuyahoga common pleas against his copartners, Corrigan and Ives, and that the firm of Corrigan, Ives & Co. was dissolved, and Price McKinney appointed and qualified as receiver; also, the admission that that firm had a claim against the Millie Company which on March 2, 1894, was liquidated at \$14,500.00; also, the further admission that on that date the Millie Company and McKinney entered into an agreement, but denial was made that it was correctly set forth in the petition. This is followed by a denial of every averment in the petition not admitted. The reply contained a denial of all allegations of the answer "except such as are admissions of plaintiff's petition."

The issues of the former suit may be stated thus: Was the contract made between the Millie Company and McKinney on March 2, 1894, correctly set forth in the petition? Was the firm of Corrigan, Ives & Co. the undisclosed principal of McKinney in making the contract? Had a breach of it been committed by Corrigan, Ives & Co.? Was that firm's liability, if any, assumed by Corrigan, Burke, and McKinney, as copartners under the name of Corrigan, McKinney & Co.?

The evidence taken at the former trial does not appear in the present record. However, admission was made in the pleadings, as before pointed out, that Corrigan, Ives & Co. had a claim against the Millie Company for money loaned and advances made to it, which, on March 2, 1894, was liquidated at \$14,500.

The order granting motions for directed verdicts shows that Corrigan and Burke made a motion to that effect in their own behalf, and that McKinney thereupon made a like motion in his favor; but the judgment was joint and not several. Plaintiff's motion for new trial was thereby overruled, and the judgment proceeds:

"It is therefore considered that said defendants go hence without day and recover of said plaintiff their costs herein."

To show that this judgment operated as an estoppel, defendant below offered in evidence the opinion rendered by Judge Hammond on the motions to direct verdicts for defendants, and it was received against exception of counsel for plaintiff. We think the court properly received the opinion in evidence. The opinion was made part of the bill of exceptions. It contains this statement:

"I desire to place here, in record form, the most pertinent ground for that judgment."

Being thus a part of the record, and seemingly having been so intended by the judge delivering the opinion, its evidential character is, we think, analogous to that of an opinion which is filed pursuant to a constitutional provision, as in *Stearns v. Lawrence*, 83 Fed. 739, 743, 28 C. C. A. 66; and it is also within the requirements pointed out by Mr. Justice Harlan when discussing a somewhat similar question in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 481, 21 Sup. Ct. 174, 45 L. Ed. 280. See, also, *Yates v. Utica Bank*, 206 U. S. 181, 183, 27 Sup. Ct. 646, 51 L. Ed. 1015; *Nat. Fdry. Co. v. Oconto Water Supply Co.*, 183 U. S. 216, 234, 22 Sup. Ct. 111, 46 L. Ed. 157; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 690, 15 Sup. Ct. 733, 39 L. Ed. 859; *Cromwell v. County of Sac*, 94 U. S. 351, 359, 24 L. Ed. 195; *Hubbell v. United States*, 171 U. S. 203, 208, 18 Sup. Ct. 828, 43 L. Ed. 136.

The opinion of Hammond, Judge, is too long to be quoted. The learned judge stated: That the most that could be claimed for plaintiff on the facts was that Corrigan, Ives & Co. had a balance due from plaintiff and were entitled to payment, that McKinney was appointed receiver of that firm, and that the contract was negotiated during such receivership; that it was not "signed by him as receiver *eo nomine*," but was in the judgment of the court the "contract of the receiver"; that the debt due the receiver was largely increased by advancements of moneys from the receiver's fund; that McKinney sold the ore, applied the proceeds upon the debt, advances, and expenses, and had a balance of \$980.

Coming, then, as he stated, to the "chronological relation of the facts," the court's inferences were, in substance: That, notwithstanding the receivership, McKinney carried his transactions as receiver upon the books of Corrigan, Ives & Co. until April 1, 1894, when the firm of Corrigan, McKinney & Co. was formed; that then all the accounts of the old firm were transferred to the books of the new one, and kept as its accounts, including that of plaintiff; and, further, that McKinney quite "thoroughly ignored the relationship of receiver, and all this business was conducted pretty much as if no receiver had been appointed."

Allusion was made to the fact that the petition ignored the relationship of receiver; also, to the averment that Corrigan, McKinney & Co. had succeeded to the business of Corrigan, Ives & Co., and had agreed to pay all the liabilities of the latter firm; and, also, to the averment that McKinney made the contract at the special instance and request of Corrigan, Ives & Co. as their agent and representative. It was then stated by Judge Hammond:

"That there is not the least proof of such an agency, either express or implied, and that such a theory of the legal rights and remedies arising to the plaintiff out of the facts which have been proved is wholly untenable."

Then followed a repetition of the earlier statement, before noticed, that McKinney was not dealing with the contract as agent of others, but in his capacity as receiver; but, after some discussion of the statute of frauds, the learned judge said of the petition in that case:

"This petition makes a case of direct contract by the defendants with the plaintiff, through their authorized agent, McKinney, and, in my judgment, presents no other cause of action."

The rest of the opinion was devoted for the most part to suggestions as to how recovery might be made, and was closed thus:

"With this view of the case, I see no escape from granting the motions that have been made, to direct a verdict for the defendants, and it is so ordered accordingly."

The first thing to be observed of the opinion is that the denial made in the answer that the agreement admitted to have been entered into by the Millie Company and McKinney on March 2, 1894, was correctly set forth in the petition, is practically cleared away, for, instead of questioning its form or identity, the opinion recognizes it as being the one signed by McKinney and containing provisions identical with those of the one now in suit. This is in accord, too, with the allegations of the second defense of the answer in the present case. So far, then, as concerns the form of the contract and McKinney's individual signature thereto, they may be treated as facts found, if not admitted, in that case. Hence whatever liability, McKinney legally incurred in his individual capacity, as distinguished from his capacity as receiver, must not escape attention.

The next thing to be noticed is that, when describing what plaintiff's cause of action was, the learned judge did not anywhere state that plaintiff sought to hold McKinney individually liable upon the contract as principal. It is also to be remarked that, when he stated the case as made in the petition, he found a total failure of proof tending to support it; that is to say, that there was no evidence purporting to show that McKinney had made the contract for Corrigan, Ives & Co. as his undisclosed principal. It scarcely need be added that, with this failure of proof, the alleged assumption of that firm's liabilities by the new firm fell to the ground. Plainly, this was enough to dispose of the case.

But it is true, as contended, that in the judgment of the learned court the contract was made by McKinney as receiver. In spite of the statement that "McKinney quite thoroughly ignored the relationship of receiver," the evidence elicited the opinion so expressed. It is not easy to perceive the theory upon which evidence of the receivership and of McKinney's entering into the contract as receiver was calculated to support any issue tendered by the petition; much less, that such evidence was essential in that regard. The burden was on the plaintiff to offer some proof of its allegations of agency and undisclosed principal. If evidence tending to show execution of the contract as receiver would have been competent to meet evidence of

agency in McKinney (of Corrigan, Ives & Co.), still the former was not necessary until something of the latter nature was offered. Judge Hammond found that there was "not the least proof of such an agency." How then could evidence tending to show that McKinney made the contract as receiver be material, and why was it not purely collateral? How, too, could anything in the opinion, which was based on such evidence, have any other quality than the evidence itself?

In determining the operation of the judgment in that case as an estoppel in the present case, we must not overlook the distinction between the demands made in the two suits. We have pointed out the differences between those demands, and need not repeat them. Until the present action was brought, McKinney was never sued in his individual capacity for a breach of the contract as principal. If he chose to do so, there is no perceivable reason why he could not bind himself personally, although he was at the time a receiver. *Wolf v. Lovering*, 159 Fed. 91, 93, 86 C. C. A. 281; *Gill v. Brown*, 12 Johns. (N. Y.) 385. The contract on its face purports to create a personal obligation. No suggestion is made of fraud or mistake in either its preparation or execution. On the contrary (although we do not pass upon its competency), testimony was received at the last trial that McKinney entered into the contract in its present form purposely and under the advice of counsel. Can it be, then, that the former judgment is in itself an estoppel, forbidding a suit to enforce personal liability upon such a contract?

We think the demand made in the present action is so far different from the one made in the former suit that the principles applied in *Cromwell v. County of Sac*, before cited, must control here. Mr. Justice Field said of the judgment, which was relied on in that case as an estoppel (page 352 of 94 U. S. [24 L. Ed. 195]):

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action."

In *Northern Pac. Ry. Co. v. Slaght*, 205 U. S. 122, 131, 27 Sup. Ct. 446, 51 L. Ed. 742, a case different in principle from the present one, Mr. Justice McKenna distinguished *Cromwell v. County of Sac*, with other kindred decisions, from the one then under consideration, by the use of language nearly identical with that just quoted.

Furthermore, there is another principle, before alluded to, which we regard as also applicable and controlling. It is that matters immaterial or only incidental to the issues and judgment in one action, even though heard and passed upon, do not work estoppel in a subsequent action between the same parties.

It is hardly necessary to repeat the proposition so often cited upon questions of this character from the *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. (8th Ed.) 734, that a judgment is not "evidence of any matter which came collaterally in question, * * * nor any matter incidentally cognizable."

In *Reynolds v. Stockton*, 140 U. S. 254, 269, 11 Sup. Ct. 773, 777, 35 L. Ed. 464, Mr. Justice Brewer said:

"But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352b. And in a note to the *Duchess of Kingston's Case*, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or were not material.'"

In *House v. Lockwood*, 137 N. Y. 259, 270, 33 N. E. 595, 598, it appeared that Lockwood and wife had conveyed their joint property by deed to House, and that House in turn had executed a deed in form conveying the same property to Mrs. Lockwood. The Lockwoods claimed that the deeds were intended merely to transfer the property to Mrs. Lockwood, but House insisted that the transaction in fact was to secure a loan. Mrs. Lockwood brought suit to recover her deed, and failed; it being held that House's claim was correct. House then brought foreclosure proceedings, and to meet the Lockwoods' claim offered the former judgment. In the course of the opinion rejecting the judgment as an estoppel, Earl, Judge, said:

"But it has never been held that a judgment is an estoppel as to all the litigated facts and all the evidence which the one party or the other may choose to introduce upon the trial of the action, however important such evidence may have been. The estoppel extends to the material facts which are in issue between the parties to the action, and to such as necessarily bear upon, control, and are essential to the adjudication made."

See, also: *Del. & L. R. R. Co. v. Kutter*, 147 Fed. 51, 56, 57, 77 C. C. A. 315; *Werckmeister v. American Tobacco Co.* (C. C.) 138 Fed. 162, 163; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.* (C. C.) 50 Fed. 151, 154; *Stokes v. Foote*, 172 N. Y. 327, 341, 65 N. E. 176; *Matter of Locust Avenue*, 185 N. Y. 115, 125, 77 N. E. 1012; *Gilbert v. Thompson*, 9 Cush. (Mass.) 348, 349; *Lessee of Lore et al. v. Truman*, 10 Ohio St. 45, 54; *Rempe & Son v. Ravens et al.*, 68 Ohio St. 113, 125, 67 N. E. 282; *Bank of Visalia v. Smith*, 146 Cal. 398, 402, 81 Pac. 542; *Cavanaugh v. Buehler*, 120 Pa. 441, 457, 14 Atl. 391; *Ford v. Ford's Adm'r*, 68 Ala. 141, 143; *Lorance v. Platt*, 67 Miss. 183, 6 South. 772; *Freeman on Judgments*, § 258, p. 468; *Black on Judgments*, §§ 611, 614.

We conclude that there was error in holding that the first judgment operated as an estoppel in this cause. The very careful consideration given to the case by the learned judge at the trial, as shown by the record, satisfies us that he did not really pass upon any other question when directing the verdict and entering judgment.

The judgment must be reversed, and a new trial awarded; and it is so ordered.

UNITED STATES v. ERIE R. CO.

WILSON et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. July 14, 1909.)

Nos. 1,827, 1,830.

1. COLLISION (§ 20*)—DUTY OF VESSELS TO AVOID COLLISION—OBSERVANCE OF RULES.

All navigation rules pertinent to a given situation are to be construed together, and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules, or a passing agreement, when it becomes evident that either is not doing so it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 17; Dec. Dig. § 20.*]

2. COLLISION (§ 40*)—STEAM VESSELS CROSSING—BOTH VESSELS IN FAULT.

A collision occurred in the daytime in calm and clear weather on Lake St. Clair between the steamers Hancock and Binghampton. The vessels were on crossing courses, the Binghampton having the Hancock on her starboard side, and therefore required by rules 18 and 20 of Act Feb. 8, 1895, c. 64, 28 Stat. 648, 649 (U. S. Comp. St. 1901, p. 2891), to keep out of the way, while the Hancock kept her course and speed, and a passing agreement was made in accordance with such rules. The Hancock, however, almost immediately began to slow down, and finally reversed, while the Binghampton kept her speed under a port helm until she struck and sunk the Hancock. *Held*, that both vessels were in fault; the Hancock for not keeping her speed as required by the rules and her agreement, and the Binghampton for not sooner observing that the Hancock had practically stopped and governing her own course accordingly, as required by rule 27.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 40; Dec. Dig. § 40.*]

Appeal from the District Court of the United States for the Eastern District of Michigan.

This was a libel in admiralty of the United States of America, as owner of the steamship Hancock, against the steamer Binghampton, of Buffalo, to recover damages sustained by a collision occurring August 15, 1905, between the two vessels in Lake St. Clair. The Erie Railroad Company, appellee, appeared and claimed exclusive ownership of the Binghampton, accepted service of the writ, and waived formal seizure, and thereupon filed its answer. An intervening libel was filed by the master and others of the crew of the Hancock and certain engineers aboard at the time of collision, to recover for loss of personal effects. The Hancock was employed at the time in surveying for purposes of the ship channel, in pursuance of an act of Congress.

Among averments of the libel is one in explanation of the conduct of the Hancock after a passing agreement had been made between her and the Binghampton. It states:

"Immediately after the said signal had been exchanged, the vessels were about 1,500 feet apart, each holding its said course and speed. That the said vessels so continued upon their said courses and speed, until they were about 200 feet apart. That it then clearly appeared that if the said vessels should further continue their respective courses and speed, collision between them would be unavoidable, and the Binghampton not checking her speed or materially altering her course, the master of the Hancock, in order to avoid such collision, then and thereupon signaled his engineer to stop and back the Hancock, which the said engineer immediately did. That the Binghampton still maintaining her speed of about 12 miles an hour, then and about

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

then, sheered about one point towards the stern of the Hancock, and, immediately thereafter, continuing at the same speed, straightened up on her former course; the Hancock continuing to back. That almost immediately thereafter the Binghampton" struck the Hancock, sinking her.

In an amended answer of appellee, it was, in substance, averred that, when the Binghampton assented to the passing agreement, she promptly put her wheel hard aport, and had started swinging well to starboard, without anything to indicate that the ships would not clear until they were in close proximity, when it appeared to the Binghampton that the Hancock was not "head reaching as fast as she had been. Directly thereafter the Hancock sounded two blasts on her large whistle. In the positions the boats then were, with the Binghampton swinging to go under the Hancock's stern, it was impossible for the Binghampton's starboard swing to be stopped sufficiently to alter her undertaking and go contrary to the passing signals as originally initiated by the Hancock. The Binghampton thereupon immediately reversed strong, * * * and with the Hancock also apparently backing strong, the two boats came together. * * * That the little steamer filled and sank in about five minutes. The Binghampton was uninjured in the impact."

Appellee also filed answer to the intervening libel of the master and others, in form substantially the same as its answer to libelant. Upon trial on pleadings and proof, the court below ordered that the original libel and also the intervening libel be dismissed. Appeals were allowed in favor of both libelant and intervening libelants. It is agreed in the briefs of counsel that of the rules of navigation contained in Act Cong. February 8, 1895, c. 64, 28 Stat. 645 (U. S. Comp. St. 1901, p. 2386), 2 Fed. Stat. Ann. 167, rules 18, 20, 21, and 23 are involved; and counsel for libelant claims rules 27 and 28 also to be involved. The assignments of error concern the navigation of the two vessels after their passing agreement was made.

F. H. Canfield, for appellants.

J. C. Shaw, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The collision between the Hancock and the Binghampton resulted in sinking the Hancock while engaged in surveying for purposes of the ship canal of Lake St. Clair. The boundaries of the space under survey were marked by two lines of buoys bearing serial numbers; the width between these lines being about 3,500 feet. The object of the survey was to take soundings. This was done by means of a bathometer attached to the Hancock. The instrument automatically recorded the depth of the channel and the speed of the Hancock as she was moved back and forth between the lines of buoys. When the Hancock was near buoy 98 and bound across the channel in a northwesterly direction for buoy 97, the Binghampton was bound up the channel on the usual course N. E. $\frac{1}{2}$ E., and was from one-half to three-quarters of a mile below the Hancock. The vessels were thus approaching on crossing courses; the Hancock having the Binghampton on her port hand, and, of course, the Binghampton having the Hancock on her starboard hand. When the vessels were relatively so located, the Hancock sounded a signal of one blast, indicating her own course to the Binghampton, and insisting that the Binghampton should pass under the starboard rule. At that time the steamer Majestic, bound down the channel, was in such position as to prevent the Binghampton from making immediate reply to the signal of the Hancock without confusing the Majestic. When the Binghampton was nearly abreast with

the *Majestic*, she assented to the signal of the *Hancock* by sounding one blast of the whistle. At that time the distance between the *Binghampton* and the intersection of the crossing courses of the two vessels was variously estimated, but was probably a little less than 2,000 feet. The distance at that time between the *Hancock* and such intersection is likewise uncertain, but perhaps was about one-half the distance of the *Binghampton* from such point. The *Binghampton* is a large freight vessel, 285 feet in length, and with her load had a draft of about 9 feet forward and about 14 feet aft. The *Hancock* was a steamer of 100 feet in length and between 7 and 8 feet draft. The speed of the *Binghampton* was 11 miles an hour and that of the *Hancock* about $5\frac{1}{2}$ miles.

If the distances before mentioned could be relied on as approximately correct, it is plain that the two vessels by keeping the passing agreement could have been easily and safely so navigated as to avoid a collision. When the *Binghampton* responded to the *Hancock* with a one-blast signal, she announced under the rule, "I am directing my course to starboard"; while the *Hancock* was under the rule required "to keep her course and speed." But we need not rely upon the evidence as to the relative distances of the two vessels from the intersection of their sailing lines. The passing agreement committed the navigators of the vessels to the proposition that the vessels could safely pass, and their masters so testified. When it is considered, then, that the collision occurred in broad daylight, in clear weather, with very light wind, and with abundant room to maneuver, gross carelessness becomes manifest. In the presence of these admitted conditions, it might naturally be expected that the evidence would distinctly point out and locate the faults which brought about the collision. However, examination of the record and the briefs shows the evidence on a number of important points to be very conflicting and hard to reconcile. It was said by Mr. Justice Brown, in *The Albert Dumois*, 177 U. S. 240, 249, 20 Sup. Ct. 595, 599, 44 L. Ed. 751:

"In short, the conditions were all favorable to safety, and the collision could not have occurred without egregious fault on the part of one or both vessels. In endeavoring to locate this fault we are at liberty to consider the movements of each vessel from its own standpoint, and without attempting to reconcile the conflicting statements of the two crews, or to settle disputed questions of fact, to inquire upon the showing made by each whether that vessel was guilty of fault contributing to the collision."

It is alleged in the libel, as pointed out in the statement, that as the vessels approached the point of disaster, the master of the *Hancock*, "in order to avoid such collision, * * * signaled his engineer to stop and back, * * * which the said engineer immediately did; * * * the *Hancock* continuing to back." The proctor for libellant insists that the *Binghampton* brought about conditions which were attended with such danger and imminent peril, as in the judgment of the master of the *Hancock* required stopping and reversing as a matter of self-preservation; and, further, that when rule 20, requiring the privileged vessel to keep her speed, is read in connection with rule 27, imposing due regard to all danger of collision and special circumstances

rendering a departure from the rules necessary to avoid imminent danger, the master was not violating, but was complying with, the rules.

The stopping and reversing being thus admitted, the first question is whether the master of the Hancock, at as early a stage as practicable, discerned and sought to avert the conditions making for danger which finally resulted in disaster.

The master of the Hancock testified that he had the Binghampton in view and gave close attention to her from the time of receiving her reply signal until the vessels collided. He thought, at the time the Binghampton answered his signal, she was from 1,500 to 2,000 feet from the Hancock. He testified that, when he saw the Binghampton swing to starboard, he had already stopped his engine without signal to the Binghampton. It is doubtful how far the Binghampton had progressed when he noticed her swinging to starboard. Indeed, it is uncertain when or how much her wheel was ported, or when in her progress she began to swing to starboard. While not unmindful of the rule that the testimony of officers as to what was actually done on board of their own ship is entitled to greater weight than that of witnesses on other vessels (*The Alexander Folsom*, 52 Fed. 403, 411, 3 C. C. A. 165), yet the circumstances, including the fact of collision, are convincing that the wheel of the Binghampton could not from the time of her reply signal have been put and kept hard aport; but we think her wheel was in some degree ported, and that she began to swing to starboard at an earlier time than that observed by Wilson, master of the Hancock.

If, then, we accept Wilson's testimony that he was vigilant in watching the Binghampton, and that he had stopped his engine before he saw the Binghampton swing to starboard, the reason for so stopping and for failing to give timely notice to the Binghampton is not explained. Wilson also claims to have given a signal to his own engineer to reverse his engine, when the Binghampton was within 200 to 300 feet of the Hancock; but he says that his own ship had then come to a practical standstill, which he explained to signify a speed of one-half mile an hour. Manifestly it took some time and distance to reduce his original speed of $5\frac{1}{2}$ miles to $\frac{1}{2}$ mile an hour.

It necessarily follows, as it seems to us, that if Wilson did observe a change to starboard of the Binghampton at a stage materially earlier in her progress than that stated by him, and nevertheless checked or stopped his engine without signal of any kind to the Binghampton, he was guilty of neglect. If, on the other hand, the Binghampton did not make any change in her course until she was within practically her length of the Hancock, Wilson should at an earlier stage have seen that she was guilty of a departure from the rule requiring her to keep out of his way, and should have taken seasonable precautions through signal and otherwise to avert a collision. We are therefore of opinion that the Hancock was in fault. But was she alone in fault? In view of the experience of the court below in determining causes in admiralty and of the fact that the witnesses appeared before the court, as well as before the inspectors, we hesitate to express our belief concerning the Binghampton.

Of course, if the Hancock were solely at fault, as held below, the rule of law as stated in the opinion under review and the authorities there relied upon, would be applicable and controlling; but if both vessels were in fault, and the fault of each was a concurrent cause of the collision, the first one of those decisions would require the damages to be divided. *The Pennsylvania*, 19 Wall. 126, 137, 22 L. Ed. 148. The other cases are not apposite, if both vessels were in fault; but decisions alluded to by counsel for appellee and cited in *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218, are the same as the one in *The Pennsylvania*, where both vessels concurred in bringing about the collision. *The Agra*, L. R., 1 P. C. 501; *The General Lee*, Irish Rep. 3 Eq. 155.

Was the Binghampton in fault? What has been said in respect of the conduct of the Hancock will necessarily have a bearing on what must be said in regard to the Binghampton. Indeed, the relation of the evidence to both vessels makes it difficult to speak of either without involving the other.

Capt. Gebhard, master of the Binghampton, testified that, when the Hancock gave her signal of one blast of the whistle, his ship was about $\frac{3}{4}$ of a mile below the Hancock and was 300 feet west of the sailing line. He further states that the Hancock at that time was 700 or 800 feet east of his course. This placed the Hancock at that time 400 or 500 feet east of the sailing line. He says, however, that the collision occurred at a point about 400 feet "to the eastward of the sailing line." Gebhard thus states that, between the time the Hancock blew her one blast and the time of the collision, the Hancock had either not moved at all, or at most had moved only 100 feet on her course. If these estimates be at all reliable, the Hancock must have been stopped almost immediately after she gave her signal blast, because Gebhard himself says elsewhere that she was moving at that time at four or five miles an hour.

Now, as Gebhard describes the situation at the time his ship gave her reply signal, she was between one-quarter and a half mile below the Hancock, and he says her wheel was put over hard aport almost immediately thereafter; but if we understand his testimony, as just pointed out, the Hancock had not kept her speed. If this hypothesis were accepted, it would, to say the least of it, challenge the wisdom both of accepting the Hancock's one-blast signal and of placing the wheel of the Binghampton hard aport. Gebhard and his first mate, Dorn, both of whom were responsible for delivering the reply signal, knew that the Hancock was obligated to keep her speed, and that the Binghampton had agreed to pass astern of the Hancock and keep out of her way. Could these officers of the Binghampton close their eyes to the situation or movements of the Hancock?

Dorn appears to have given the reply signal of the Binghampton and the order to place its wheel hard over to port, and Gebhard approved of this. Gebhard stated that the situation as he saw it did not require any violent porting on his boat. He reached the top of the pilot house, just after Dorn had given the reply signal, and said that he (Gebhard) "stood there watching the Hancock." After stating that his boat was swinging at a "very lively gait," he described a sit-

uation indicating a sudden awakening in him to conditions that must have consumed time in forming. He said:

"I got up within I should judge a couple of lengths of him, and the fellow did not seem to be going ahead as he ought to. Well, I sung out in a very loud voice, 'Why in hell don't you go ahead with your steamboat?'"

He was then asked whether the Hancock was going four or five miles an hour. He answered:

"Oh, no, he was not. Q. State whether he was going at all. A. He didn't look to me as though he was moving any."

Raymer, wheelsman of the Binghamton, testified before the inspectors, that he was "keeping lookout on the Hancock's movements" after he received the order to hard aport. After stating that the Binghamton seemed to be heading near the bow of the Hancock, he said:

"The Hancock seemed to be stopped, or something, I thought, until the last swing, she went under" the bow of the Binghamton.

McDowell, the lookout on the Binghamton and standing in the "eyes of the ship," testified that, when the signal of the Hancock was sounded twice (it being doubtful whether this was from the engine whistle or the deck whistle), the Hancock appeared to him to "be backing up, for the water was running ahead on her," and Dorn said the same thing.

There must be added to all this the fact that the speed of the Binghamton was not slackened from the time the reply signal was given until the sounding of the two whistles either from the engine or the deck of the Hancock, save only through the retarding effect of porting her wheel; nor at that time was any signal given by the Binghamton or anything else done by her after porting her wheel, which looked to safety in passing the Hancock.

It is true that Capt. Gebhard says that he was watching the Hancock, just as Capt. Wilson says that he was watching the Binghamton; but why did not Gebhard, or his mate, or his wheelsman, or his lookout, make earlier discovery than they claimed they did of the movements of the Hancock? There was a consensus of opinion among those in charge of the Binghamton that if the Hancock had kept her speed no collision could have happened.

The course of the Hancock was across that of the Binghamton, thus giving the Binghamton the surest means of testing the progress of the Hancock, no matter how much or how little the wheel of the Binghamton was ported. The time consumed by the Binghamton in reaching the point of danger, although in one sense short, must have been abundant for experienced men, claiming to have been keenly alert, to gauge the movements of the Hancock. Why should not those watching from the Binghamton have noticed the slowing down of the Hancock to her "standstill"—the reduction of her speed from about five miles to one-half mile an hour? Her speed could have been slackened only gradually; and, as we understand the evidence, she was being slowed down before the order to reverse her engine was given. It is scarcely credible that such change of speed should not have been sooner detected. Capt. Gebhard's impression of distances between the ves-

sels, and between the vessels and the sailing line, at the time of the Hancock's one-blast signal, as before pointed out, should have excited his attention concerning the location and movements of the Hancock, at the time of his reply signal.

It is to be observed that Capt. McIntosh of the *Majestic*, moving in an opposite direction, was so far impressed with the idea that a collision would occur, as to keep the two vessels in view until they collided. He testified that he gave an order to his wheelsman to starboard, and that he started to come around, before he heard the two whistles of the Hancock. Why should his suspicions of danger have been so aroused, while the captains of the two approaching vessels remained so long oblivious? The very direction of the *Binghampton*, together with the position of the Hancock, should have excited caution and care on the part of the masters of both vessels, for it appears that the *Binghampton* was headed toward one portion or another of the Hancock nearly if not quite all the time.

It is claimed, however, by both sides, that each was entitled to rely upon the observance of the rules by the other. It is true that the rules of navigation are statutory, and that the courts are, as they ought to be, insistent upon the observance of such rules, and reluctant ever to allow the introduction of an exception. However, all rules that are pertinent in a given situation should be considered and construed as a whole. It therefore was not for the *Binghampton* to rest supinely upon the duty of the Hancock to keep her speed, if the officers of the *Binghampton* either saw, or by the exercise of reasonable caution could have seen, that the Hancock was not doing so. Nor could the master of the Hancock shut his eyes to the maneuvers of the *Binghampton* or its failure to maneuver, and so rely upon her keeping out of his way, if by similar caution he could seasonably have discovered her failure to do so and have provided against it.

It is not meant to say that recovery would be accorded to a ship whose master departs from the obligation of a passing agreement and the rule involved under it, while the master of another approaching ship prudently and faithfully keeps his agreement and observes the rule. What we are considering is a case of negligent departure and failure, concurring in the conduct of both masters. There can be no difference, upon the hypothesis and the point now under discussion, as it seems to us, between a case involving a passing agreement and a case where such agreement has been declined, or for any reason has not been made; for that would be to accord greater sanctity to the agreement, than to the law.

The *Albert Dumois*, cited above, presented the question, among others, whether recovery could be had by the owner of a steamer, the *Argo*, where his steamer and the other steamer, the *Dumois*, "approached end on or nearly end on," and the signal of neither was accepted by the other, and the *Argo*, in the face of apparent departure from the rule by the *Dumois*, continued her speed until she sank in the collision that followed. Both vessels were found in fault and the damage divided. Mr. Justice Brown said (page 253 of 177 U. S., and page 600 of 20 Sup. Ct. [44 L. Ed. 751]):

"This court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require. *The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; *The America*, 92 U. S. 432, 23 L. Ed. 724; *The Lucille*, 15 Wall. 676, 21 L. Ed. 247; *The Sunnyside*, 91 U. S. 208, 23 L. Ed. 302."

After commenting on the decision in *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, from which the learned justice had dissented, he said (page 254 of 177 U. S., and page 601 of 20 Sup. Ct [44 L. Ed. 751]):

"Now, as it appears from the testimony of the *Argo's* crew that they not only heard the signal of two whistles from the *Dumois*, but saw her turn under her starboard wheel, and exhibit her green light when she should have ported, they were at once apprised of the fact that she was violating a rule of navigation, and that prompt action was required to avoid a collision. * * * We are of opinion that the *Dumois* was primarily in fault for this collision, in starboarding instead of porting when she first sighted the *Argo*; and, while the case with respect to the *Argo* is by no means free from doubt, the majority of the court are also of opinion that the *Argo* was in fault for failing to observe the twenty-first rule, which required her to stop when risk of collision was involved. * * *"

Hall v. Chisholm, 117 Fed. 807, 813, 55 C. C. A. 31, 37, involved a question of duty under circumstances disclosing nonobservance of rules and consequent danger of collision. Judge (now Mr. Justice) Day, said:

"No matter how flagrant the fault of the navigators of the raft may have been, that would not excuse the *Wade* from adopting every proper precaution to avoid a collision after it became apparent that it was likely to occur."

In *Lake Transp. Co. v. Gilchrist Transp. Co.*, 142 Fed. 89, 73 C. C. A. 313, this court recognized the rule that prompt and decisive measures must be taken to avoid collision where violation of a passing agreement is apparent. When distinguishing the case of *The Elphicke*, 123 Fed. 405, 59 C. C. A. 286, Judge Lurton said (page 97 of 142 Fed., and page 321 of 73 C. C. A.):

"The collision involved in that case between the *Poe* and the *Elphicke* occurred in broad daylight. The *Poe* saw that the *Elphicke* was not doing her duty, and 'was out of her proper place and taking measures to right herself'; but she depended upon the *Elphicke* being able to retrieve her fault, and refused to vary her own course. It was a clear case of apparent danger of collision with time to avoid it."

Again, in the *Elphicke Case*, Judge Severens said (page 406 of 123 Fed., and page 287 of 59 C. C. A.):

"The law gives no countenance to such perversity, but, on the other hand, exacts of each vessel that, notwithstanding the errors of the other, it shall to the end do all in its power to avoid the consequences of the fault."

The Delaware, 161 U. S. 459, 467, 16 Sup. Ct. 516, 520, 40 L. Ed. 771, involved a discussion of the mutual rights and duties of steamers approaching each other as here upon crossing courses. The preferred steamer, the *Talisman*, kept its course and speed—exactly opposite conduct from that of the *Hancock*. The *Talisman* was found blameless and the *Delaware* in fault. Mr. Justice Brown said:

"The main fault charged upon the *Talisman*, however, is that of not stopping and reversing, when the failure of the *Delaware* to take measures to

avoid her became apparent. In *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, which was also a case of a starboard-hand collision, the preferred steamer, the *Beaconsfield*, was held to have been in fault for stopping and reversing under similar circumstances—in other words, for doing what it is claimed the *Talisman* should have done in this case. Two members of the court dissented upon the ground that the *Beaconsfield*, having been brought into a position of peril by the negligence of the *Britannia*, was not in fault for stopping and reversing; the substance of their opinion being that, under such circumstances, the master might exercise his judgment as to the best method of avoiding a collision, and that an error in judgment should not be imputed to him as a fault. In neither opinion, however, was it intimated that, if the *Beaconsfield* had kept her speed, she would have been in fault for so doing. * * * The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. * * * The cases of *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, and *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, 2^d L. Ed. 680, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

We are constrained to hold that the *Binghampton* was in fault through the failure of her master, in performance of his duty to keep out of the way of the *Hancock*, and to avoid risk of collision, earlier to discover the change in conditions as they existed at the time of assent to the *Hancock's* one signal on her whistle, and for failure thereupon materially to slacken the speed of the *Binghampton* and stop and reverse her engines before coming into close proximity to the *Hancock*. The *Binghampton* thus violated rules 18, 21, and 27. The faults found as to the two vessels were concurrent in causing the collision.

The result is that the damages must be divided.

The decree therefore in each appeal is reversed, and each cause is remanded, with an order of reference as to each to ascertain the damages.

BOND et al. v. JOHN V. FARWELL CO.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1909.)

No. 1,921.

1. ESTOPPEL (§ 22*)—BY DEED—CONSIDERATION.

Where certain guaranties recited a consideration of \$1 to the subscriber in hand paid, the receipt whereof was thereby acknowledged, the guarantors were estopped to deny that any consideration had been in fact paid.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 35; Dec. Dig. § 22.*]

2. GUARANTY (§ 7*)—ACCEPTANCE—NECESSITY.

In order to obtain credit for a corporation, two of its officers executed certain instruments reciting that, for a consideration paid, they guaranteed plaintiff payment in full for all merchandise sold and delivered to the corporation from time to time, not to exceed a specified amount, to continue until notice of discontinuance given to plaintiff in writing. *Held*, that such contract was not a mere offer of guaranty requiring notice of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acceptance, but was complete from delivery and sale of goods in reliance thereon.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. § 7.*]

3. GUARANTY (§ 28*)—CONSTRUCTION—WHAT LAW GOVERNS.

A corporation doing a mercantile business in Jackson, Tenn., desiring to purchase goods on credit from plaintiff in Chicago, two of its officers executed contracts of guaranty, both of which contained nothing to show the residence of either of the guarantors, except that the first was dated "Jackson, Tenn." Both contracts were silent as to the place of performance. The goods sold thereunder were delivered to the buyer in Chicago, and it paid both the cartage in Chicago and the freight thence to Jackson. Payments on account were made by the corporation's checks drawn on a Jackson bank payable to the seller without collection charges. *Held*, that the contracts were made to be performed in Chicago, and were therefore governed by the law of Illinois.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 29; Dec. Dig. § 28.*]

4. EVIDENCE (§ 29*)—JUDICIAL NOTICE—STATUTES.

Courts of the United States, being required to take judicial notice of the laws of the various states, whether depending on statutes or judicial opinions, such courts may look to the whole of a statute which it is required to apply, though merely a portion thereof is pleaded.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 29.*]

Judicial notice of public laws and regulations, see note to *Smith v. City of Shakopee*, 44 C. C. A. 4.]

5. COURTS (§ 366*)—DECISIONS OF STATE COURTS—CONCLUSIVENESS.

Interest being a matter of local regulation only, the decisions of the state courts of last resort thereon are binding on the courts of the United States.

[Ed. Note.—For other cases see Courts, Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

6. GUARANTY (§ 38*)—CONSTRUCTION—PRESENT AND FUTURE SALES—"ON AND AFTER THE DATE HEREOF."

Where guaranties were in terms to apply to sales made "on and after the date hereof," they applied alike to present and future sales.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 38.*]

7. INTEREST (§ 34*)—STATUTES—"DUE AND OWING."

Where there had been no sale and delivery of goods by plaintiff to a corporation prior to the execution of certain guaranties by its officers to secure subsequent contemplated sales, there was no loan of money in any manner due and owing, within 2 Starr & C. Ann. St. Ill. 1896, c. 74, par. 6, declaring that it shall be lawful to agree that 7 per cent. per annum may be taken for money loaned or in any manner due and owing, etc.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 34.*]

8. GUARANTY (§ 38*)—CONTINUING GUARANTY—CONSTRUCTION—INTEREST.

Where certain guaranties of payment expressly applied to all goods sold on credit on and after their dates, from time to time, and for any balance or balances of account of such goods, including interest thereon "after maturity," and which were made to continue until notice of their discontinuance of further liability thereon, given by the subscribers in writing to the seller, the guaranties were continuing, notwithstanding the amount of the liability was limited, and were applicable to all future sales made prior to notice of discontinuance.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 38.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. INTEREST (§ 34*)—GUARANTIES—STATUTES—"DUE AND OWING."

2 Starr. & C. Ann. St. Ill. 1896, c. 74, par. 6, provides that it shall be lawful to agree that 7 per cent. per annum shall be paid for money loaned or in any manner "due and owing," etc. *Held*, that it was not essential, to entitle a party to recover interest under such section on contracts of guaranty, that there should be a sum "due and owing" at the time the guaranties were executed, but that it was sufficient that the guaranty was made to apply to the principal's obligations as they were incurred; the guarantor's promise being operative whenever there was money "due and owing" by the principal.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 34.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This was an action at law upon two instruments of guaranty. It was tried upon the second and third counts of the declaration, with nine separate pleas, and replication; demurrer to the first count having been sustained, and demurrer to the eighth plea having been overruled. All questions arising at the trial were determined by the court, except the one of amount. Motion for a new trial was overruled and the cause brought to this court upon proceedings in error.

The first instrument of guaranty was as follows:

"For and in consideration of the sum of one dollar to the subscriber in hand paid by John V. Farwell Company, the receipt whereof is acknowledged, and for the further consideration that said John V. Farwell Company sell and deliver unto Bond-Penn Dry Goods Company of Jackson, Tenn., goods, wares and merchandise on credit, on and after the date hereof, ———, do hereby guarantee payment unto the said John V. Farwell Company for all goods, wares and merchandise so sold and delivered from time to time, and for any balance or balances of account such goods, wares and merchandise so sold and delivered, and for interest on such account or sales at the rate of 7 per cent. per annum after maturity.

"This guaranty shall extend to all sales of goods, wares and merchandise made on and after this date, by the said John V. Farwell Company, to the said Bond-Penn Dry Goods Company, and shall continue until notice of its discontinuance as to further liability therein is given by the subscribers, in writing, to the said John V. Farwell Company, but the liability of the subscriber, upon this guarantee shall not exceed the sum of one thousand dollars and we do also waive notice of purchase and maturity of bills.

A. K. Jobe.

"B. F. Bond.

"Dated Jackson, Tenn., November 18, 1904."

The second guaranty was the same as the first, except that the city and state mentioned in the body and at the end of the first paper are omitted in the second, and the word "we" was inserted in the second at the blank line appearing in the first; and, further, the second paper was dated January 27, 1905, and limited to \$1,500. A. K. Jobe died, and Annie L. Jobe was appointed his executrix.

Special instructions to the jury were asked by defendants below and refused. The court charged the jury thus:

"I instruct you that these contracts are not Tennessee contracts, but they are Illinois contracts, and are governed by the laws of the state of Illinois, and that they are such contracts as are provided for by the laws of Illinois which are here in proof that may bear 7 per cent. interest and that under the proof as adduced here that these defendants are liable for whatever amount, not exceeding \$2,500, that Bond-Penn Dry Goods Company owed these people after these guaranties were executed, that they were continuing contracts, and that they were valid and binding until notice was given by the guarantors that they no longer stood for them."

The subjects of the special instructions requested and of the assignments of error may, so far as necessary to notice, be summarized thus: That no consideration passed between guarantee and guarantors, and no notice of acceptance was given, and that the papers sued on are Tennessee contracts and void

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the usury statutes of that state; and, if Illinois contracts, are in conflict with the interest statutes of Illinois.

W. H. Biggs, for plaintiffs in error.

W. G. Timberlake, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). Under the pleadings and proofs it is clear that the instruments sued on were signed by Jobe and Bond, and that the sum stated in the judgment represented the balance due for merchandise sold and delivered by the Farwell Company on the faith of those instruments to the Bond-Penn Company, with 7 per cent. interest from commencement of suit. The questions claiming our attention are: (1) Whether, under the guaranties, there was lack either of consideration moving from the Farwell Company to Jobe and Bond, or of notice of acceptance; and (2) whether those instruments were intended to be made as contracts of Tennessee or Illinois, and how the interest laws of the one state or the other, as the case may be, affected the contracts.

Each instrument is commenced:

"For and in consideration of the sum of one dollar to the subscriber in hand paid by John V. Farwell Company, the receipt whereof is acknowledged,
* * * do hereby guarantee * * *."

Proof was offered and properly excluded, tending to show that the \$1 mentioned was not in fact paid or received. After the guarantee has parted with his goods, it is too late for the guarantor to complain that he has not received the consideration. He may recover it; but he is estopped to deny receiving it. In *Davis v. Wells*, 104 U. S. 159, 167, 26 L. Ed. 686, in passing upon a guaranty containing a similar clause, Mr. Justice Matthews said:

"It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence v. McCalmont*, 2 How. 426, 452, 11 L. Ed. 326, and was overruled. Mr. Justice Story said: 'The guarantor acknowledged the receipt of the \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it.'"

The contention made that no notice of acceptance was given by the Farwell Company to Jobe and Bond is quite as effectually disposed of by the decision just cited, as is the question of consideration. The claim made here, like that urged in *Davis v. Wells*, is that these guarantors made merely an offer which could not bind them until accepted by the guarantee. In *Davis v. Wells*, the guaranty was given by Davis and Patrick to Wells, Fargo & Co., and was not different in the respect now under discussion from the guaranty in question. Mr. Justice Matthews said (page 167 of 104 U. S. [26 L. Ed. 686]):

"We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, 'for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we

hereby guarantee,' etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledged."

It is true that in the present case neither instrument was delivered in person by either Jobe or Bond to the Farwell Company; but the instruments were signed by Jobe and Bond, and were each turned over by Jobe to the manager of the Bond-Penn Company for the purpose of delivery. Upon this question, then, the instruments must, we think, be treated the same as if they had been personally given by the guarantors to the guarantee, and the consideration had at that time been in fact paid and received. Thus a privity and an obligation were created.

In *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480, relied on by counsel for plaintiffs in error, the guaranty did not state whether the person guaranteed or the person in whose behalf the guaranty was given paid the consideration, and consequently the instrument was treated as a mere proposal, requiring notice of acceptance before a privity or an obligation could be said to have been established. The distinction between the two classes of instruments was elaborated by Mr. Justice Matthews in *Davis v. Wells*, and was approved by Mr. Justice Gray in *Davis Sewing Machine Co. v. Richards*.

It is to be observed, further, that, at the times these papers were signed and delivered, both Jobe and Bond were stockholders and directors of the Bond-Penn Company, a Tennessee corporation. Jobe was its president, and Bond its assistant treasurer. Jobe owned one-third of the capital stock, and was so far in active control of the company as to dominate the manager, F. E. Bond. True, the other guarantor, B. F. Bond, owned only a nominal interest in the stock, and did not remember that he had been assistant treasurer; but the important fact remains that he and Jobe were interested in the company, both financially and officially. As evidence of their interest in securing credit for their company, it will be observed that they agreed that the guaranties should continue until notice of discontinuance was given by them in writing, and that they waived "notice of purchase and maturity of bills."

Jobe died after the goods were delivered. A representative of the Farwell Company testified that Jobe acknowledged after bankruptcy of the Bond-Penn Company that the guaranties would have to be met, but that he wished the claim to be first presented to the trustee. This was done and credit given of the amount received. Jobe's testimony does not appear to have been taken. The other guarantor, Bond, testified that he did not know of the delivery and receipt of the goods. Both of these corporate directors and officials knew, however, that the instruments of guaranty had to be executed in order to obtain the goods. Why, then, should they not be chargeable with knowledge of the receipt of the goods, and, for that additional reason, with knowledge that their guaranties had been accepted? The goods were for their benefit, no matter how great or how small the benefit. It is settled that knowledge in this respect need not be acquired in any particular mode;

for, obviously, knowledge is notice. *Barnes Cycle Co. v. Reed*, 91 Fed. 481, 483, 33 C. C. A. 646.

In *Doud v. National Park Bank*, 54 Fed. 846, 847, 4 C. C. A. 607, 609, a guaranty was under consideration which had been signed and delivered to the Park Bank by five persons who were stockholders and directors of the National Bank of Sheffield, Ala., to secure loans and discounts or other advances made to the latter bank; but the instrument did not state who had paid the consideration of \$1. It was held:

"Concede that the writing is an offer of guaranty; it is given on a consideration moving to the guarantors through their bank, and in such cases the performance of the consideration by the guarantee implies its acceptance, completes the contract, and imposes the liability."

See, also, *Jones v. Britt* (C. C. A.) 168 Fed. 852, 856.

We are thus brought to the question: Whether these contracts are governed by the laws of Tennessee or Illinois.

The first contract states the place of business of the Bond-Penn Company as Jackson, Tenn., and is dated November 18, 1904; but the first contract is silent as to the location and place of business of the Farwell Company, and the second one is as to both companies. There is nothing in either contract to show the residence of either of the guarantors, save only that the first guaranty is dated at Jackson. Both contracts are silent as to place of performance.

It is not difficult, however, to ascertain the real intent of the parties. It was admitted on the record that the Farwell Company was an Illinois corporation, located and carrying on a mercantile business in Chicago, and that at the dates of the contracts the Bond-Penn Company was a Tennessee corporation, located and carrying on its business at Jackson, and that the guarantors were residents of that place. On November 14, 1904, at Jackson, one of the guarantors, Jobe, addressed and sent a letter to the Farwell Company by the manager of the Bond-Penn Company, stating:

"Mess. Bond-Penn Dry Goods Company will probably want a few goods of you between now and December 15th. As they have never bought from you, I write to say I will guarantee all their purchases made in that time.

"Respect,

A. K. Jobe."

The manager, F. E. Bond, presented this letter to the Farwell Company. That company preferred its form of guaranty to that expressed in the letter, and requested F. E. Bond to have substitution made. The new paper was signed by Jobe, and he obtained Bond's signature. Bond explains this by saying that his conversation with Jobe "was in regard to goods that they needed, and it was a guaranty for the goods, and he felt that I should go on that paper with him, and I did, without reading the paper, as I remember." The paper was then given to the manager, and by him mailed at Jackson to the Farwell Company, at Chicago. F. E. Bond testified that the reason he took the letter of Jobe to the Farwell Company was "to get the goods quickly. We needed them, and usually you would have to wait for references. We had never bought any goods from this house before, and they would investigate us before shipping goods, and we hadn't been able to pay our bills promptly, and, of course, I didn't know whether these would be shipped out promptly." After stating that Jobe was president of the

company, and that he owned a third interest in the stock, F. E. Bond stated that he "was under instructions from him (Jobe) a great deal of the time." He further testified:

"Q. 12. He (Jobe) was the ostensible and real head of your business, was he not? A. Yes, sir."

This alone would indicate that Jobe was endeavoring to secure a line of credit from the Farwell Company for the Bond-Penn Company; also, that B. F. Bond was trying to do the same thing. True, Jobe may have stimulated him to act when he told Bond that they needed the goods, that the paper was a guaranty for them, and that he felt that Bond "should go on that paper with him." Why should such a statement have been made except upon the hypothesis that they were jointly interested in a company needing a line of credit? Indeed, F. E. Bond, the manager, testified that both papers were made for the purpose of obtaining for the Bond-Penn Company "a line of credit of \$2,500."

It will not do to say that the Farwell Company requested Jobe and Bond to sign the guaranties. As stated, Jobe opened negotiations for the line of credit by offering himself as guarantor, and he later associated Bond with him. When the first paper in suit was signed by the two guarantors, it was not responsive to the change of papers which the Farwell Company had suggested. It is therefore difficult to perceive how the transaction could be regarded as closed until the paper reached the Farwell Company. The second paper was given simply to increase the line of credit, and may be treated the same as the first one.

Moreover, the goods were delivered by the Farwell Company, to the Bond-Penn Company in Chicago. The Bond-Penn Company paid both the cartage in Chicago and the freight thence to Jackson. True, payments were made on account of the goods by sending to the Farwell Company checks of the Bond-Penn Company, drawn upon and paid by a bank of Jackson; but, since no question as to payment of the checks is made, we see no reason why they should not have been treated, as they evidently were for all practical purposes, as payments at Chicago. Nothing in the way of exchange or cost of collection is shown to have been paid by either of the parties.

Now, it was with respect to the conditions thus pointed out that these contracts were made and kept in force by the guarantors. Can it be doubted that the contracts were meant to be performed in Chicago? Must they not be read and interpreted with reference to the place of purchase and delivery of the goods? The contracts had no reason to exist except only to secure payment for goods to be purchased and delivered at Chicago.

We are therefore of opinion that, in view of the objects of these contracts of guaranty and of the circumstances under which they were made, they were intended to be fulfilled in Illinois; and consequently that they are to be governed by the laws of Illinois.

Johnson v. Chas. D. Norton Co., 159 Fed. 361, 363, 86 C. C. A. 361; *Buchanan v. Drivers' Nat. Bank*, 55 Fed. 223, 227, 5 C. C. A. 83; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 110, 12 Sup. Ct. 150, 35 L. Ed. 951; *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; *Neal v. New Orleans, etc., Association*, 100 Tenn. 607, 613, 46 S. W.

755; First Nat. Bank of Geneva, Ohio, v. Shaw, 109 Tenn. 237, 240, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. Rep. 840; Railway Co. v. Sheppard, 56 Ohio St. 68, 78, 46 N. E. 61; Montana Coal & Coke Co. v. Cin. Coal & Coke Co., 69 Ohio St. 351, 357, 69 N. E. 613.

As to the interest: The contracts provided for 7 per cent. interest after maturity of accounts. It is alleged in the declaration that the statute law of Illinois is that it shall be lawful to agree that 7 per cent. per annum shall be taken and paid upon every \$100 of "money loaned or in any manner due and owing from any person or corporation to any other person or corporation." This is denied in the ninth plea. In rendering their verdict, the jury found that there was \$251.26 of accrued interest, and this sum was included in the judgment. The fourth paragraph of the statute was offered in evidence; but since courts of the United States are bound to take judicial notice of the laws of the various states, "whether depending upon statutes or upon judicial opinions," we may look at the whole of the statute. *Lamar v. Micou*, 114 U. S. 218, 223, 5 Sup. Ct. 857, 29 L. Ed. 94.

The point urged is that these contracts when made did not represent "money loaned or in any manner due and owing." This can be aimed only at the interest, because, even if the rate reserved could be treated as usury, the only penalty imposed by paragraph 6 of the act is forfeiture of the interest, not the principal (2 Starr & C. Ann. St. Ill. 1896, p. 2295, c. 74). No decision of any court of Illinois construing the language just quoted upon an objection like the present one has been cited; nor have we been able to find one. This is unfortunate, for, interest being a matter of only local regulation, the decisions of the courts of last resort of the states are binding upon the courts of the United States. *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Bolles v. Town of Amboy* (C. C.) 45 Fed. 168. It is plain, however, that, unless the present contracts for interest are sustainable under the statute in question, no recovery of interest can be allowed. *Fowler v. Harts*, 149 Ill. 592, 597, 36 N. E. 996; *Felt v. Bell*, 205 Ill. 213, 229, 68 N. E. 794.

Each guaranty was in terms made to apply to sales made "on and after the date hereof." Clearly, the guaranties were intended to be applied alike to present and future sales of goods. We think a fair preponderance of the testimony shows that no delivery of goods was made until after the first contract was received by the Farwell Company, and we do not recall any testimony of a definite character in this regard concerning the second contract. We are bound therefore to assume that no money was "due and owing" from the Bond-Penn Company to the Farwell Company when the contracts were executed, and no "loan" of money was involved in any of the transactions.

But these are continuing guaranties. Each guaranty of payment is expressly made to apply to all goods sold and delivered on credit on and after their dates "from time to time, and for any balance or balances of account of such goods," including interest thereon "after maturity"; and each is expressly made to "continue until notice of its discontinuance as to further liability therein is given by the subscribers, in writing," to the Farwell Company. True, the liability was limited, as stated, to the sum of \$1,000 in the first and \$1,500 in the second guaranty; but this did not detract from the continuing nature of the

guaranties, nor prevent them from applying to all future sales made, so long as no notice of discontinuance was given, and no demand was made or recovery allowed beyond the limit fixed. We think the continuing character of the contracts is manifest under the decision of Mr. Justice Story in *Douglass v. Reynolds*, 7 Pet. 113, 123, 8 L. Ed. 626. See, also, *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *Hatch et al. v. Hobbs*, 12 Gray (Mass.) 447; *Nottingham Hide Co. v. Bottrill*, L. R. 8. C. P. 694, 701, 702.

The very nature of such a guaranty is that its obligation shall apply to the liabilities of the principal as they arise, and to the interest to accrue upon them as they severally become payable. Both the evidence and the language of the contracts show that sales were in contemplation immediately upon the execution of the guaranties. If a contract intended to guarantee interest at 7 per cent. could not be given before a single sale was actually consummated, it clearly could not be as to a succession of sales. Nor could such a contract be made under any other provision of the statute relating to interest, for each provision giving a right either to agree upon or exact interest is limited by words apparently as exclusive of a guaranty like the present, as are the words "due and owing." It is not to be presumed that the lawmaking power intended to forbid contracts of guaranty which assure both principal and interest, any more than it did to prohibit guaranties of principal without interest. This would be opposed to well-known commercial necessities for contracts of guaranty.

We therefore hold that it is not essential that there should be a sum "due and owing" at the time of the execution of contracts like these. We think it is enough if the guaranty is made to apply to the principal's obligations as they are incurred, for the promise of the guarantor will become operative, as obviously intended, whenever there shall be money "due and owing" by the principal.

The assignments of error need not be further considered.

The judgment must be affirmed.

HIBBARD v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 18, 1909. On Rehearing, May 28, 1909.)

No. 1,481.

1. POST OFFICE (§ 48*)—USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment, under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to defraud, *held* sufficient.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

2. CRIMINAL LAW (§ 363*)—EVIDENCE—DOCUMENTARY EVIDENCE.

On the trial of a defendant, charged with having devised a scheme to defraud, which was carried out by the use of the mails, consisting of advertising by letters and circulars as a medical institute and defrauding persons secured thereby for treatment, where the government introduced witnesses, who had answered such advertisements and who testified as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the transactions between them and defendant, the file wrappers in defendant's office, containing the correspondence between him and every patient secured for treatment, were admissible in his behalf as part of the res gestæ, showing the real nature of the business done by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805-810; Dec. Dig. § 363.*]

3. CRIMINAL LAW (§ 656*)—TRIAL—REMARKS OF JUDGE.

On the trial of a criminal case in a federal court, it was error for the court to comment on the failure of defendant to produce certain letters, which witnesses had testified were written to him, as in derogation of his constitutional right not to furnish evidence against himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

4. POST OFFICE (§ 50*)—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.

Under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), making it a crime to devise a scheme to defraud, to be carried out, and which is, or is attempted to be, carried out, by the use of the mails, the intent to defraud is an essential element of the offense, to be determined by the jury as a question of fact from all of the evidence; and an instruction in such a case that "the law presumes that every man intends the natural, legitimate, and necessary consequences of his acts," is erroneous, as tending to mislead the jury into the supposition that, if the scheme in its operation resulted in defrauding persons, the law raises a conclusive presumption of an intent to defraud.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 50.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The plaintiff in error was tried and convicted under each of three counts in an indictment alleging violations of section 5480, Rev. St., as amended (3 U. S. Comp. St. 1901, p. 3696), in reference to fraudulent use of the post office establishment; and this writ of error is brought for review of the judgment. The indictment alleges that the plaintiff in error, under the name of the Boston Medical Institute, "devised a scheme and artifice to defraud" persons named "and a class of persons afflicted" with various sexual (genito-urinary), diseases mentioned, by false representations (specified at length), which include a medical staff of eminent physicians and specialists to consider each case submitted; assurance that compliance with directions would restore the patient to perfect health; that cure was positively guaranteed for every case undertaken by the Institute, or all money paid would be refunded to the patient; that the Institute was "the oldest medical institute in the country," with the "most extensive laboratory in the country," and its high standing "was acknowledged by the medical profession generally." It specifies the negative of each representation so made, and then avers that the plaintiff in error intended thereby to induce and procure the sending of money to him by the "persons so intended to be defrauded" and to convert such money to his own use, "without rendering medical service of any value, or any service of value, therefor," and that the scheme was to be effected by inciting such persons to open communication with the plaintiff in error, under the name referred to, by means of the post office establishment, and to carry the scheme out through such means. Each count then sets out a particular communication which was sent by the plaintiff in error (as alleged) by placing or causing it to be placed in the post office at Chicago, addressed to the person named. The nature of the testimony and of the errors assigned sufficiently appears in the opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Benjamin C. Bachrach, for plaintiff in error.
Edwin W. Sims, U. S. Atty., Francis G. Hanchett, and Seward S. Shirer, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). This writ of error is predicated on a formidable assignment of errors (extending over 98 pages of the printed record); but we believe the propositions embraced therein, which require discussion for the purposes of review, may be simplified under a few heads, and we are impressed with no difficulty in the solution of either under well-settled doctrines of the criminal law. Thus grouped, the contentions are: (1) That the indictment is insufficient; (2) that no offense was proven; and that the trial court erred (3) in rulings upon the reception and rejection of testimony, (4) in remarks thereupon during the course of the trial, and (5) in instructing the jury.

1. Objections to the indictment as insufficient were raised by demurrer, and again on motion in arrest of judgment. Its statement of representations entering into the alleged fraudulent scheme is diffuse—containing matters not deemed essential, with negative thereof not well stated—and the scheme is not (as counsel for the government frankly conceded on the argument) concisely described, nor in the direct terms which would seem apt for the purpose. We are of opinion, however, that the nature of the scheme which was devised (as the indictment charges) to defraud persons of the class described, and the means devised and used to that end in representations (specified) which were false in fact, together with the execution of such fraudulent scheme through use of the mails, are definitely and completely averred and described. Moreover, the indictment unmistakably avers the ultimate facts upon which evidence was introduced at the trial, in support of the counts, respectively, so that the objection for insufficiency is untenable, unless the evidence thus appearing fails to establish a *prima facie* case within the statute; and it remains for consideration under that contention.

2. The proof is undisputed that the plaintiff in error, who was not a physician, operated in Chicago, under the name of "Boston Medical Institute" (incorporated), an establishment which carried on an extensive business in correspondence with patrons in various states for treatment of alleged sexual diseases, having a considerable force of clerks and helpers and a physician as "medical superintendent"; that pamphlets and other printed matter, calculated to arouse the fear of boys and young men over symptoms described, and induce correspondence with the "Institute" for treatment, with application blanks for such purpose, were widely distributed to reach that class of persons, especially in country districts; that many were so induced to send money for instructions in treatment of symptoms described by them and for supplies of (so-called) remedies; and that such printed matter contained the representations averred in the indictment, which were untrue in material inducements (as averred) and plainly tended to deceive young and unwary readers, to excite their alarm

and direct their patronage to the "Institute" for treatment, under the promises then made of complete cure or return of money sent. Details of the general scheme thus appearing in evidence do not require specification, beyond remark that stock forms of advice and need for treatment (printed in imitation of typewritten letters) and stock supplies of medicine were usually sent such applicant, and use of the mails was intended and adopted for all the transactions.

On the part of the prosecution the testimony of medical experts tends to prove that the most noticeable so-called "symptoms" mentioned in these publications, as signals of disease and serious danger from causes referred to, are of well-known frequency among the class of young persons thus addressed, and do not ordinarily indicate disease, nor need of treatment, nor dire results thus stated; that such persons are readily impressed with fear and the usual nervous effects, which are not only harmful in themselves, but conduce to the patronage sought; that no such course of medical treatment as appears in evidence was either needful or helpful to these applicants; and that serious injury in nervous conditions resulting from such course was not only probable, but appeared in fact in instant cases. Witnesses were also called from various states, appearing as young men of the class described in the indictment, who testified in reference to execution of the scheme, and stated facts which do not require mention beyond a remark that they tend to support the opinion evidence above summarized. We believe, therefore, that the testimony authorized submission of the issues to the jury under each count, and that the various objections to the indictment were rightly overruled.

3. Whatever the force of this testimony as viewed by the trial court, the issues of fact were for the jury to determine, within the established rules of law, after hearing all admissible evidence offered by way of defense. With or without dispute upon the plan and means of operation as conducted under the name of "Boston Medical Institute," the crucial inquiry remained for answer by the jury whether the evidence established beyond reasonable doubt that a scheme to defraud within the meaning of the statute was devised therein and intentionally carried out as such by the plaintiff in error. By way of defense to the case thus presented, it was the indisputable right of the accused to introduce evidence which tends in any degree to prove the true nature and purpose of the alleged scheme, or his intent in its execution, and have such evidence heard and submitted to the jury for consideration. We are of opinion that the well-settled rules of the law for preservation of the right referred to were not observed in the trial of the plaintiff in error, and that the judgment must be reversed for errors well assigned upon rulings of the court, whereby admissible evidence thus tendered on his behalf was excluded. While complaints of error for this cause are numerous, the following exemplifications and statement of the rule to be applied are deemed sufficient for correction upon a new trial:

(1) Seven witnesses were introduced on the part of the government as patrons of the Institute, and their testimony in reference to their respective cases and transactions was mainly relied upon for support of the charge of fraud in the scheme and its execution. For

the defense, Dr. Edmondson, medical director of the Institute, was one of the chief witnesses. After stating his qualifications and experience, this witness testified as to the purposes of the business and its methods of advising and treating patients through correspondence and supply of medicine, and that records of all applications and correspondence were kept in each case in a file wrapper, containing the original papers received from patients and carbon copies of letters and instructions sent by the Institute, all under supervision of the witness. In the course of such testimony, one of these file wrappers was identified by him and offered in evidence. Counsel for the government raised objection that it was "hearsay and incompetent without having the witness [patient] here to cross-examine"; and such counsel further stated, in answer to an inquiry by the court whether it would then be competent, that he thought it would not, but that it was clearly inadmissible upon the ground first stated. The offer was explained by counsel for the accused as intended to show the course of treatment and business in such cases, and "take it up seriatim with each patient treated," to disprove the charges of fraud in the scheme as executed. It was, nevertheless, excluded by the court; and upon like tenders of "13 large cases" of these file wrappers, alleged to contain the entire record of the business, objections were sustained, and all such testimony disallowed. Moreover, the court expressly stated in these rulings (in effect) that the proof by way of defense must be limited to the cases of treatment in evidence on the part of the government, and that other instances were inadmissible.

These rulings were erroneous and prejudicial, as we believe, whether the evidence was ultimately excluded upon one or the other theory above mentioned. The elementary rule in reference to hearsay testimony, cited in support thereof, is inapplicable to either of the tenders of file wrapper contents. While it is true that the applications and correspondence thus appearing are incompetent to prove that facts existed as therein stated, they were expressly produced and offered for another purpose, well recognized for their admissibility under the rules of evidence. In connection with the testimony of the witness Edmondson, the initial exhibits were admissible (as offered) by way of illustration; and the subsequent tender of the 13 cases, alleged to contain the record of the entire course of business, became admissible as original evidence of the nature of *res gestæ*. With a fraudulent scheme charged, these records (as described) were competent, as circumstances in the course of the business which may tend to prove its real nature as carried on. In so far as such circumstances are fairly contemporaneous with the proofs offered to establish fraudulent device and execution, the doctrine is elementary that they constitute parts of the *res gestæ* "and may always be shown to the jury, along with the principal fact." 1 Greenleaf on Evidence (15th Ed.) § 108. So the numerous authorities called to attention in the supplemental brief submitted by counsel for the government—with *Lemon v. United States*, 164 Fed. 953, 958, 90 C. C. A. 617, as the leading citation—are distinguishable as mere exemplifications of the general rule as to hearsay evidence, and do not affect the exception above stated. The files, therefore, were competent evidence for the pur-

pose stated, subject to proper limitation of their reception within the business and period embraced in the charge and under proper instructions to the jury for their consideration as above mentioned.

In reference to the further theory which appears to have been entertained for excluding the testimony thus offered by way of defense—namely, that instances of treatment by the Institute other than those in evidence on the part of the government were inadmissible—we deem it sufficient to remark that proof, direct or circumstantial, which tends to show either the true nature of the business or the intention of the accused in carrying it on is admissible under this charge, and the restriction thus imposed or stated by the trial court was erroneous.

(2) Evidence was likewise excluded, which was offered for defense in connection with the testimony of Dr. Edmondson, consisting of correspondence on file tending to support his testimony, in denial of the averment in the indictment that “cases of hydrocele” were treated by the Institute. This line of correspondence was offered as occurring in the course of the business in numerous instances, and was admissible, as we believe, within the rule above stated. The contention of counsel for the government that the error was harmless, if the correspondence was admissible, for the reason that the witness was permitted to state the fact of refusal to treat such cases, cannot be upheld.

4. Error is assigned for another cause, in the course of the introduction of the testimony, which requires mention. It relates to remarks made by the court, to counsel for the accused, while cross-examining a witness for the prosecution, who had testified, without objection, to the contents of letters sent by the witness to the Institute (as stated) which intimated, to say the least, that counsel should produce the letters referred to. We deem it sufficient to state that comments upon the nonproduction of such letters were repeated, over objection stated, which were in derogation of the constitutional right of the accused to furnish no evidence in aid of the prosecution, and were presumptively prejudicial in the inference thus left in the minds of the jurors when the letters were not brought in, so that error is well assigned thereupon. *McKnight v. United States*, 115 Fed. 972, 981, 54 C. C. A. 358, and cases cited.

5. Numerous errors are assigned upon the instructions submitted to the jury and various requests on behalf of the accused which were refused. On examination of the charge as an entirety, however, we believe the only question of reversible error arises under one of the assignments, and that the others will not require discussion in the light of our opinion expressed thereupon. The alleged error referred to is the giving of this instruction:

“The law presumes that every man intends the natural, legitimate and necessary consequences of his acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the acts determines the complexion of the intent. The intent to injure or defraud may be presumed upon an unlawful act which results in loss or injury, if proved to have been knowingly committed.”

The general rule of presumption, thus referred to, is stated in 1 *Greenleaf on Evidence*, § 18, in these terms:

"A sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts."

Of course, no such rule is applicable to the case at bar; and it appears from other instructions, submitting the issue of intent to determination by the jury from all the evidence, that the court intended no such conclusive effect to be understood from the above-mentioned instruction. Nevertheless, the unqualified terms so stated, as a presumption of law, are erroneous, and their liability to mislead the jury is undoubted, irrespective of the contention on behalf of the plaintiff in error that no presumption of specific intent to defraud—which is the statutory offense charged in the indictment—arises from the fact that fraud may appear to be the natural consequence of the act committed. The distinction between presumptions of law and mere inferences of fact is not observed in this instruction; and, assuming it to intend a disputable presumption of law (1 Greenleaf on Ev. § 33), its effect must be to cast the burden upon the accused to disprove fraudulent intent, which is unauthorized. *McKnight v. United States*, 115 Fed. 972, 974, 54 C. C. A. 358, and authorities cited. So neither class of presumptions of law—the one conclusive and the other disputable—is applicable to the issue of specific intent to defraud presented under the indictment. The statute (section 5480) prescribes as the offense devising and executing a scheme with intent to defraud. While the fraudulent character of the scheme, as executed, is necessarily charged and must be established by proof, conviction cannot rest on the fact that the scheme is fraudulent in its operation, for commission of the statutory offense requires specific intent on the part of the accused to defraud the patrons of the Institute. *Durland v. United States*, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709. In other words, however fraudulent in tendency or fact the scheme may appear to be, neither the scheme nor its execution is punishable under the statute, unless the evidence, direct or circumstantial, establishes as well (and beyond reasonable doubt) the essential ultimate fact charged as the violation—that it was devised and carried out by the accused with intent to defraud the patrons of the Institute, as described in the indictment. Proof of the nature of the scheme and its effects upon the patrons constitutes circumstantial evidence, together with the facts appearing in its execution, from which the intent of the accused in such execution may legitimately be inferred, in the light of all circumstances bearing upon that crucial issue. The accused, however, is entitled to the benefits of the presumption of innocence and good faith, created by the law in his favor, and to have the jury instructed accordingly, in terms which involve no doubt of their meaning, so that the question of intent is thus presented, as an issue of fact alone, upon which the accused must be acquitted, unless both presumption of good faith and evidence introduced in his favor are overborne by direct and circumstantial proof, establishing beyond reasonable doubt his intent to defraud the patrons by the efforts and means employed in use of the mails.

Although the cardinal rules (a) that innocence must be presumed and (b) that intent to defraud must be proven beyond reasonable doubt are repeatedly stated in the instructions, we are of opinion that

the above-mentioned instruction as to intent presumed by law was erroneous and confusing upon that issue, and not cured (as counsel for the government contends) by the other instructions referred to. The intent may rightly be inferred from the circumstances in evidence; but it is an inference of fact—not a presumption of law.

The judgment of the District Court is reversed, therefore, and the cause remanded, with direction to grant a new trial.

On Rehearing.

PER CURIAM. The petition for rehearing is denied. We do not wish, however, that there should be any misunderstanding respecting our holding on the instruction referred to in subdivision 5 of the opinion. Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error consists in applying it to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven. The instruction as given (bearing in mind the case to which it was applied), though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error.

EADIE et al. v. CHAMBERS.†

(Circuit Court of Appeals, Ninth Circuit. July 6, 1909.)

No. 1,595.

1. DEEDS (§ 47*)—REQUISITES AND VALIDITY—ATTESTATION.

The requirement of Civ. Code Alaska, § 82, that deeds of lands or any interest in lands executed within the district shall be executed in the presence of two witnesses, who shall subscribe the same as such, does not make such attestation necessary to the validity of the deed as between the parties, but is a formality necessary to entitle the deed to record.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 104; Dec. Dig. § 47.*]

2. ALTERATION OF INSTRUMENTS (§ 12*)—DEEDS—ALTERATION BY CONSENT OF PARTIES.

A deed is not rendered invalid by an alteration made by consent of the parties reducing the interest conveyed from three-fourths to one-half of the property.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 89; Dec. Dig. § 12.*]

3. MINES AND MINERALS (§ 56*)—NATURE OF MINING LEASE—ALASKA STATUTE—"REAL PROPERTY"—"CONVEYANCE."

Under Civ. Code Alaska, § 181, which defines "real property" as including "all lands, tenements and hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another," a lease of a mining claim for years conveys a chattel interest only and not an interest in the land, and is not a "conveyance," within the meaning of section 98, the recording of which will protect the lessee against a prior

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 4, 1909.

unrecorded deed; nor is such lessee an innocent purchaser in good faith for a valuable consideration within such section, where he is to work the same and pay the lessor a royalty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1575-1584; vol. 8, p. 7619; vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The defendant in error brought ejectment against the plaintiffs in error to recover the possession of a one-half interest in the Bon Voyage mining location, in the Cape Nome recording district in Alaska, and to recover damages for the wrongful detention thereof. To prove his title the defendant in error introduced in evidence a deed to him from Whittren, the original locator of the claim. The deed was dated April 21, 1902, and upon its face purported to convey an undivided one-half interest in the Bon Voyage and certain other mining claims. There was but one witness to its execution, and he was the notary public before whom it was acknowledged. An indorsement on the deed indicated that it had been recorded in the records of deeds of the Nome district about four years after its execution. It was conceded that the deed on its face appeared to have been altered in a material part, to wit, in the interest conveyed. The defendant in error testified that on May 23 or 24, 1906, Whittren, the grantor, had, with his consent and in his presence, changed the deed from a conveyance of a three-fourths interest to a conveyance of a one-half interest. Whittren, on the other hand, testified that the alteration was not made at the time so stated by the defendant in error, but at a date prior thereto, and that it was made by the defendant in error, who confessed to him that he had altered the description from a one-fourth interest to a one-half interest. The plaintiffs in error objected to the introduction of the deed in its altered condition; but the objection was overruled.

It was proven that on September 24, 1905, the plaintiff in error Whittren made to the plaintiff in error Eadie a deed of an undivided one-half interest in the claim, and that the deed was properly witnessed, acknowledged, and recorded a year prior to the recording of the deed to the defendant in error. The consideration for the deed to Eadie was the promise of the grantee to do the assessment work on the claim for the year 1904. It was further shown: That on June 11, 1906, Whittren and Eadie made a lease to the plaintiff in error Waskey of the westerly 220 feet of the claim for a term of two years; that the lease had been filed for record on August 22, 1906; that Waskey entered into the possession under said lease and began to prospect and mine the leased property; that thereafter on June 20, 1906, Whittren leased to Eadie and Waskey the remainder of the claim for a period of two years; that the lease thereof was recorded on August 30, 1906; that Waskey and Eadie entered into possession under said last-named lease, and began to prospect the leased property for gold, and were in the active prosecution of development and operation when the action of ejectment was commenced. The case was submitted to a jury, and a verdict was returned in favor of the defendant in error, finding that he was the owner of an undivided one-half interest in the Bon Voyage claim, and entitled to damages against the plaintiffs in error in the sum of \$20,483.

Ira D. Orton, Albert Fink, F. E. Fuller, O. D. Cochran, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for plaintiffs in error.

C. D. Murane, William A. Gillmore, and Albert H. Elliot, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GILBERT, Circuit Judge (after stating the facts as above). The principal question in the case is whether the deed from Whittren to the defendant in error, attested as it was by but one witness, was sufficient to convey the title as between the parties thereto. At common law a deed is valid between parties and their privies, if signed, sealed, and delivered, and attestation is no part of its execution. 2 Blackstone, Com. 307; *Dole v. Thurlow*, 12 Metc. (Mass.) 164; *Hepburn v. Dubois*, 12 Pet. 345, 9 L. R. A. 1111. In adopting systems of registration of conveyances, about one-half of the states have enacted statutes requiring that the execution of deeds be attested by witnesses, who shall subscribe their names thereto as such. It is the decided weight of authority that the purpose of such a statute is to entitle the conveyance to be recorded, and that, while compliance therewith is essential to registration, a failure to comply does not affect the common-law rule that a deed signed, sealed, and delivered is good as between the parties. The statute of Alaska, which was adopted from the statutes of Oregon, is not essentially different from that which is in force in the states hereinafter referred to. Section 73, c. 11, of the Civil Code of Alaska, provides:

"A conveyance of lands or of any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever."

Section 82 provides:

"Deeds executed within the district, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such."

Section 113 is a curative statute, also adopted from the statutes of Oregon. It provides:

"All deeds to real property heretofore executed in the district which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment whatever, and such deeds so executed shall be received in evidence in all courts in the district, and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

If it be argued from the language of this curative statute that it was the understanding of the lawmakers that an unattested deed was insufficient to pass title between the parties without the aid of a curative statute, the answer is that the defects intended to be cured by the statute are other and more vital than the mere omission of attesting witnesses. It was the intention to make valid as between the parties unsealed deeds, deeds which lacked one of the essential requisites of a common-law conveyance even as between the parties.

In adopting the Oregon statute for Alaska, there was adopted with it the construction placed upon it in *Moore v. Thomas*, 1 Or. 201, in which the court held that an unacknowledged, unrecorded mortgage was good between the parties thereto, for the principle involved is the same whether a deed lack acknowledgment or subscribing witnesses. The court, by Williams, Chief Justice, said:

"When said mortgages were signed, sealed, and delivered by Thomas to Moore, they were certainly good at common law, and there is no reason to suppose that the design of the registry act was to prevent the operation of a deed so made or to protect the parties thereto as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior secret conveyances."

In *Goodenough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534, Judge Deady, after referring to the fact that at common law a deed is valid between the parties though not witnessed, acknowledged, or recorded, inquired:

"Does the statute of Oregon change this rule? Section 1 of the act relating to conveyances (Laws Or. 1854-55, p. 519) declares that 'conveyances of land or of any estate or interest therein may be made by deed signed and sealed,' and although in the same section and sentence it is further provided that such deeds may be 'acknowledged or proved and recorded' as therein directed, yet it is not declared, and evidently was not intended to make either such acknowledgment, proof or record any part of the execution of such instrument. * * * But section 10 of the act aforesaid does declare that 'deeds executed within this state of lands or any interest in lands therein, shall be executed in the presence of two witnesses who shall subscribe their names to the same as such,' and, while this provision may not make such attestation an essential part of the execution of the deed, yet it is probable that, where the execution is controverted, it cannot be shown if not so attested. It is not a part of the execution, but the means by which it must be proven if necessary."

In *Brewster on Conveyances*, § 251, it is said:

"Generally speaking, in those states where statutes provide that conveyances shall be attested by witnesses, the requirement is not essential to the validity of the deed as between the parties, but, like the requirement as to acknowledgment, is a formality necessary under the statute to entitle the deed to be recorded."

In *Wisconsin in Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. 683, the court reviewed its prior decisions, holding that attestation and acknowledgment of deeds required by the statute were but formalities to entitle the deed to be recorded, so as to operate as notice to subsequent purchasers, but were not essential to the transfer of the title as between the parties. That doctrine, the court said, was "in accord with the great weight of authority upon this subject."

In *Pearson v. Davis*, 41 Neb. 608, 59 N. W. 885, the Supreme Court of Nebraska, following a line of its prior decisions, held that a deed to real estate executed, acknowledged, and delivered by the grantor is valid between the parties to it, although the same is not witnessed.

In *Howard v. Russell*, 104 Ga. 230, 30 S. E. 802, the court said:

"While the Code of this state requires such paper to be attested by two witnesses, it does not declare that a deed attested by but one witness is void. The main object of the attestation by two witnesses is to comply with the registration laws of the state."

Of similar import are *McLane v. Canales* (Tex. Civ. App.) 25 S. W. 29; *Robison v. Gray et al.* (Ky.) 97 S. W. 347; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Stone v. Ashley*, 13 N. H. 38; *Hastings v. Cutler*, 24 N. H. 481.

As opposed to this construction we are referred to decisions in Connecticut, Ohio, Alabama, Michigan, and Minnesota. The Michigan

case which is cited is *Crane v. Reader*, 21 Mich. 24, 4 Am. Rep. 430. In that case, in determining the validity under the territorial law of 1820 of an unattested deed made in 1823, the court held that the ordinance of 1787 requiring the attestation of two witnesses, which was in substance re-enacted in 1820, was intended to supplant the common law of the territory of Michigan, and that since the law in force in that territory prior to the ordinance was the French law, under which deeds were required to be attested by witnesses, a deed without witnesses was void; but in *Dougherty v. Randall*, 3 Mich. 581, the court held that the statute of Michigan of 1840 requiring two subscribing witnesses to a deed of real estate was a provision for registration only, and that by the common law title passes by an unwitnessed deed. Such has been the ruling of that court ever since. *Price v. Haynes*, 37 Mich. 487; *Baker v. Clark*, 52 Mich. 22, 17 N. E. 225; *Fulton v. Priddy*, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 201; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576. The Minnesota case which is cited is *Meighen v. Strong*, 6 Minn. 177 (Gil. 111), 80 Am. Dec. 441, in which it was held that a statute which requires that a conveyance shall be executed in the presence of witnesses, who shall subscribe their names thereto as such, is imperative and must be complied with to give the instrument any validity as a conveyance; but under the statute of Minnesota as amended in 1868 (Laws 1868, p. 100, c. 61, § 1) which provided:

“Deeds of land or any interest in lands within this state shall be executed in the presence of two witnesses who shall subscribe their names to the same as such”

—the court held in *Morton v. Leland*, 27 Minn. 35, 6 N. W. 378, that, to pass title from the grantor to the grantee, nothing more was necessary than the execution and delivery of the deed, and that neither witnesses nor acknowledgment were requisite. The same was held in *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889, and in *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880.

In the light of the authorities, and especially the construction given by the Oregon courts to the Oregon statute before its adoption for Alaska, we find no error in the ruling of the trial court that the deed was sufficient to convey title from Whittren to the defendant in error.

Error is assigned to the instruction of the court to the jury on the subject of alteration of the deed. The court, in substance, instructed the jury that if they found that the deed was altered or changed by the consent of the parties or by the grantor Whittren, or that the change was made with Whittren's consent, and that the alteration was made by reducing the amount of property conveyed, the deed was a good and valid conveyance, if redelivered, of an undivided one-half interest in the property. That the court in so instructing the jury correctly stated the law of the case is too clear to require discussion. If a three-fourths interest was vested in the grantee by the deed as originally made, the alteration could at the utmost operate no further than to divest him of an undivided one-fourth interest.

Error is assigned to the instruction to the jury concerning the rights of the lessees Waskey and Eadie under their leases from Whittren as against the title of the defendant in error. The court charged the

jury that a lease for a term of years of a mining claim is personal property under the Alaskan Code, and not a conveyance of land or real property such as to raise the question of priority of record between a deed and a lease, and that under the law the question of innocent purchaser does not arise in the case. The action had been begun on October 8, 1906. The plaintiff in error Waskey answered the complaint, setting forth the lease of June 11, 1906, and the lease of June 20, 1906, whereby the lessees were given authority to operate the mine at their own expense upon the payment of a royalty to the lessors; that possession was taken under said leases in good faith, for a valuable consideration, without knowledge or notice of the interest of the defendant in error in said claim; and that the lessees operated the leased property for a long period of time in good faith and at great expense without knowledge or notice of said interest of the defendant in error. The leases were for a term of two years. The amount of money expended thereunder by the lessees is not set forth in the answer. The Civil Code of Alaska (chapter 11, § 98) provides:

"Every conveyance of real property within the district hereinafter made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser, in good faith and for a valuable consideration, of the same real property or any portion thereof, whose conveyance shall be first duly recorded."

There are two reasons why Waskey and Eadie cannot avail themselves of the defense of innocent purchaser. In the first place, their leases for a term of two years were not conveyances. In several of the states, the term "conveyance" is defined by statute; but there is no such definition in the laws of Alaska or in those of Oregon from which they were taken. At common law a "conveyance" is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. 9 Cyc. 860; *Prouty v. Clark et al.*, 73 Iowa, 55, 34 N. W. 614; *Brigham v. Kenyon* (C. C.) 76 Fed. 30. Section 181, c. 18, of the Civil Code of Alaska, declares that real property "includes all lands, tenements and hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another." In construing the Oregon statute from which this was taken, the Supreme Court of Oregon, in *Edwards v. Perkins*, 7 Or. 149, held a lease of land for a term of years to be a chattel interest, and not an interest in the land. The court said:

"The statute provides for the conveyance of land by deed, and we think embraces only such conveyances as purport to convey a freehold estate, such as may descend to the heirs, or is for the life of the grantee, and does not include leases."

In the second place, the lessees were not purchasers for a valuable consideration. By the terms of their leases, they were to operate the mine, and out of the proceeds pay a royalty to the lessor. It is true that they expended money in developing and in operating the leased property; but the evidence shows that they have been reimbursed by the product of the mine.

We find no error for which the judgment should be reversed. It is therefore affirmed.

ROSS, Circuit Judge (dissenting). I dissent. Section 301 of chapter 32 of the Alaska Code of Civil Procedure, prescribing who may bring actions to recover the possession of real property, is as follows:

"Sec. 301. Any person who has a legal estate in real property and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof." Act June 6, 1900, c. 786, 31 Stat. 383.

The present being an action at law to recover the possession of real property, with damages for its withholding, it was essential to its maintenance for the plaintiff to establish in himself a legal estate in the property sued for, and a right to its possession; and so the court below in effect instructed the jury.

The plaintiff attempted to do that by means of the deed from Whittren to him. The primary objection made by the defendants to that deed was that it was only witnessed by one person. The validity of the deed in that respect is, of course, to be tested by the provisions of the Alaska statutes. Sections 73 and 82 of the Civil Code enacted by Congress June 6, 1900, for that District, are as follows:

"Sec. 73. A conveyance of lands, or of any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged, or proved, and recorded as directed in this chapter, without any other act or ceremony whatever."

"Sec. 82. Deeds executed within the district of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the district court, notary public, or commissioner within the district, and the officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand."

It is contended on behalf of the defendant in error that:

"The attesting witnesses and acknowledgment are no part of the deed, but are the means by which it is prepared for record, so that it may constitute constructive notice."

And such seems to have been the view of the trial court.

The provisions of the act of June 6, 1900, in respect to the acknowledgment, proof, and recording of deeds, are as follows:

"Sec. 88. No acknowledgment of any conveyance having been executed shall be taken by any officer unless he shall know, or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed such conveyance.

"Sec. 89. Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgment of deeds, and shall be made by a subscribing witness thereto, who shall state his own place of residence, and that he knew the person described in and who executed such conveyance, and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument.

"Sec. 90. When any grantor is dead, out of the district, or refuses to acknowledge his deed, and all the subscribing witnesses to such deed shall also be dead or reside out of the district, the same may be proved before the dis-

strict court or any judge thereof, by proving the handwriting of the grantor and of any subscribing witness thereto.

"Sec. 91. Upon the application of any grantee or of any person claiming under him, verified by the oath of the applicant setting forth that the grantor is dead, out of the district, or refused to acknowledge his deed, and that any witness to such conveyance refuses to appear and testify touching the execution thereof, and that such conveyance cannot be proven without his evidence, any officer authorized to take the acknowledgment or proof of conveyance, except a commissioner of deeds, may issue a subpoena requiring such witness to appear and testify before such officer touching the execution of such conveyance."

"Sec. 93. Every officer who shall take the proof of any conveyance shall endorse his certificate thereon, signed by himself on the conveyance, and in such certificate shall set forth the things hereinbefore required to be done, known or proved, together with the names of the witnesses examined before such officer, and their places of residence and the substance of the evidence by them given.

"Sec. 94. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

From the foregoing provisions of the statute in relation to the execution, proof, acknowledgment, and recording of deeds in the district of Alaska, it is apparent, I think, that the attesting of the two witnesses is an essential part of the execution. Congress thus made provision for the execution of deeds covering lands in Alaska, for their acknowledgment by the grantor before an officer authorized to take such acknowledgments, and for the proof before such an officer of such execution by one or both of the two witnesses it provided should sign all such deeds as attesting witnesses. Perhaps one of the reasons for those provisions lies in the peculiar conditions existing in the extensive region of country with which it was dealing, the roaming character of its people, going into it with a rush in the spring and coming out of it with a rush in the fall, with many practical difficulties while there in the way of making either acknowledgment or proof of such instruments; but, whatever the reason, the courts have no power to dispense with the requirement by Congress that such an instrument shall be attested by two witnesses. If so, they have the same power to hold that there may be no attesting witness at all.

A similar case came before the Supreme Court from Ohio, one of the statutes of which state at the time required all deeds of land therein to be executed in the presence of two witnesses, who should subscribe their names thereto. The case is reported in 6 Wheat. 577, 5 L. Ed. 334, under the title of *Clark v. Graham*, where the Supreme Court said:

"The deed of Massie was executed in the presence of one witness only; whereas, the law of Ohio requires all deeds of land to be executed in the presence of two witnesses. It is perfectly clear that no title to the lands can be acquired or passed unless according to the laws of the state in which they are situated. The act of Ohio, regulating the conveyance of lands, passed on the 14th of February, 1805, provides: 'That all deeds for the conveyance of lands, tenements and hereditaments, situated, lying and being within this state, shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within

this state, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the court of common pleas, or a justice of the peace in any county in this state.' Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void, yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and, in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case not being executed according to the laws of the state, the evidence was properly rejected by the Circuit Court."

In a recent case brought here from Alaska (*Alaska Exploration Company v. Northern Mining & Trading Company*, 152 Fed. 145, 81 C. C. A. 363), we held that a deed to an interest in a mining claim in Alaska, which was neither witnessed by two witnesses nor acknowledged as required by sections 5342, 5350, 5354, 5355 of the Oregon statutes (*B. & C. Comp.*), made applicable to Alaska by the act of Congress of May 17, 1884 (chapter 53, 23 Stat. 24), was not entitled to record, and hence that the record thereof was not constructive notice to a subsequent purchaser.

That Congress meant what it said when by section 82 of the act of June 6, 1900, above quoted, it required all subsequent deeds to lands in Alaska to be attested by two subscribing witnesses, is, I think, further manifested by sections 108, 111, and 113 of the same act, which are as follows:

"Sec. 108. All conveyances of real property heretofore made and acknowledged, or proved in accordance with the laws of the district in force at the time of such making and acknowledgment of proof, shall have the same force as evidence and be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of the provisions of this chapter."

"Sec. 111. All defective and informal acknowledgments of deeds, powers of attorney, mortgages or other instruments for the conveyance of land or interest therein heretofore made by any person or persons in good faith, whether the acknowledgments were taken by or before any clerk, deputy clerk or judge of any court of record within the district, or any commissioner or notary public of the district, shall be and the same are hereby legalized."

"Sec. 113. All deeds to real property heretofore executed in the district which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees without any other execution or acknowledgment whatever; and such deeds so executed shall be received in evidence in all courts of the district and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

These are remedial sections, and the very fact that Congress thereby provided that all deeds theretofore made and acknowledged or proved in accordance with the laws of the district of Alaska in force at the time of such making and acknowledgment or proof should be received in evidence notwithstanding the provisions of the act of June 6, 1900, and that all deeds to real property theretofore made in Alaska by the mere signing by the grantor, without any other execution, should be deemed sufficient in law to convey the legal title to the premises therein described from the grantor to the grantee, and be received in evidence notwithstanding the provisions of the act of June 6, 1900, makes the conclusion quite irresistible, in my opinion, that its intention was that, in respect to deeds executed after the passage

of that act, those only which conformed to its provisions should be held to be valid conveyances of the legal title to the premises therein described, or receivable as evidence of such title.

TOLEDO, ST. L. & W. R. CO. et al. v. BARTLEY.

(Circuit Court of Appeals, Sixth Circuit. July 22, 1909.)

No. 1,918.

1. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—RAILROADS—OPERATION OF CARS—WARNING RULE—VIOLATION.

Movement of a string of freight cars on a storage track, in violation of a rule enacted to protect persons at work in the yard, requiring warning to be given that the cars were about to be moved, resulting in injury to plaintiff, a section water boy, constituted negligence sufficient to support a recovery therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269-278; Dec. Dig. § 137.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN—QUESTION FOR JURY.

Plaintiff, a section water boy, was injured by the sudden movement of a string of freight cars coupled together on a storage track, as plaintiff attempted to cross the track 10 feet from the end of the last car. There was a curve in the track, which, together with the train of standing cars thereon, and other cars on an adjacent track, obstructed the view and prevented seeing the approaching engine and cars by which the train was moved. Plaintiff had also for hours prior to his injury heard another engine working in and about the place from which the engine and cars were brought, nor was any warning given, as required by a rule, that the cars were about to be moved. *Held*, that plaintiff was not negligent as a matter of law in failing to look and listen before attempting to cross the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 96*)—INJURIES TO SERVANT—RAILROADS—PERSONS LIABLE.

Where the S. Railroad Company used a railroad yard owned by the T. Company under a contract with the latter, and plaintiff, an employé of the T. Company, was injured by the movement of a train of cars on a storage track by an engine belonging to the S. Company, without warning, in violation of a rule, and the evidence was sufficient to justify an inference that both companies were negligent, the T. Company was not entitled to relief from liability, on the theory that it had leased the right to use its yards to the S. Company, and was therefore not liable for the latter's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 158; Dec. Dig. § 96.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action brought in the Circuit Court of the United States, Northern District of Ohio, to recover damages for personal injuries. It was brought by Earl Bartley (a minor, 16 years old), through his guardian, against Toledo, St. Louis & Western Railroad Company and Detroit & Toledo Shore Line Railroad Company; jurisdiction having been obtained through diverse citizenship. The cause of action, in substance, was: That on October 19, 1905, under some contract not known to plaintiff, the defendants jointly used a

certain railroad yard, which was owned by the first-named company, at a place known as M. C. Junction, at Toledo; that plaintiff was in the employ of the first-named company as a water boy and helper to its section foreman; that it was the custom of the companies, before setting cars in motion, to give notice thereof to persons employed in the yard, which custom was well known to both defendants; that plaintiff, in the performance of the services required of him, started across the tracks in the yard to secure water for the men employed upon the section; that to do this it was necessary to cross various tracks; that, while he was attempting to pass over a track on which a number of cars were standing, plaintiff having no notice and being unable to see that the cars were about to be set in motion, the defendants wrongfully, carelessly, and negligently caused a locomotive with cars attached to be backed upon the track upon which these cars were standing, and to strike them with such force and violence as to drive them against plaintiff and cause four of the cars and part of the fifth to pass over him, to his serious injury; and that plaintiff was without fault.

The defendants filed separate answers, which were similar in all respects, except that the Toledo, St. Louis & Western admitted owning and operating the railroad yard, and that plaintiff was in its employ. Both companies denied negligence on their part and charged contributory negligence against plaintiff.

The cause was tried to court and jury, and resulted in a verdict for plaintiff. Motions for new trial were overruled, and judgment was entered upon the verdict. Both companies are prosecuting error in this court, with bill of exceptions containing the evidence and proceedings.

Charles A. Schmettau, for plaintiffs in error.

Charles A. Thatcher, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). There are five leading complaints of error. They relate, first, to the alleged custom or rule of the yard to give notice before commencing any movement of cars; and, second, to the court's refusal: (1) to direct verdict for both defendants; (2) either to grant special instructions stating, or in the general charge to state, that plaintiff was bound to look and listen before attempting to cross the track; (3) to grant certain special charges touching plaintiff's infancy; and (4) on its separate motion to direct verdict for the Toledo, St. Louis & Western on the ground that the only negligence shown was that of its codefendant.

The errors alleged will be better understood through brief description of the tracks of the yard and the location and use made of the track upon which the injury occurred, with an explanation as to the standing cars and the line of approach thereto by plaintiff and the line along which the moving engine and cars were driven, as these matters are disclosed by the evidence.

At the time of the accident there were 14 yard tracks south of the main line and 4 tracks north of it. These tracks ran approximately northeast and southwest. The tracks south of the main line were numbered from 1 to 14, commencing at the main track. The lead track, from which the yard tracks extended southwesterly, was located at the northerly end of the yard and curved northwardly. Tracks 12 and 13 were used mostly, if not entirely, for storage purposes and doubling in of trains. Cars containing grain were frequently stored on these

two tracks, and the grain was there inspected. The accident occurred on track 12, and at that time there were 18 refrigerator and furniture cars standing upon it. The distance between the point where plaintiff attempted to cross track 12, and the point in the lead track from which the moving engine and cars were brought upon track 12 is not certain, but must have been close to 1,000 feet. The cars of the standing train were connected by automatic couplers, and, according to the evidence, could be set in motion as a unit if struck by a moving train.

Plaintiff started from a point northeast of these standing cars, and, going in a southwesterly direction, crossed the yard tracks until he reached the standing train one car length from its southwest end. He stopped to read an advertisement on a car, and then walked to a point 10 feet beyond the end last mentioned of the standing train, when he attempted to cross the track and was injured. Shortly before plaintiff reached this point, a train belonging to the Shore Line Company had been divided by placing a portion of the cars on track No. 1, and the rest with the engine in rear were then moved to track 12, and were driven thence against the end of the standing train opposite to the end near which plaintiff was crossing the track. The standing train was struck with such force that four cars and a portion of the fifth were driven over plaintiff. This train had been kept in that place, and plaintiff had seen it there throughout his employment, a period of nine days.

Under the issue as to a custom, rather a rule, to notify persons employed in the yard before moving cars once placed and left upon a yard track, there was conflict of testimony; some witnesses testifying that it originated in a purpose to protect all persons engaged or having business in the yard, and others that its object was to protect persons inspecting grain on cars stored on the track and persons working upon the cars themselves. But there was no conflict over the acts done under the rule, in this, that whenever a road engine and cars, as here, were taken upon a yard track on which there were standing cars, a man was sent to the further end of the standing cars to give warning. The court, in its charge, stated the claims of the parties respectively in regard to the rule, also that proofs had been offered by plaintiff in support of his claim, as well as by defendants in support of their claim. The court instructed the jury, in substance, that, if the claim of defendants were true, then that no negligence had been proved against them, and that plaintiff could not recover, but, on the other hand, stating:

"So, * * * the first question is: What was the rule or custom? And if the plaintiff, by a preponderance of the proof, * * * has made it appear that the rule or custom in that yard was as I have last stated it, that it was that a man should be sent down there for the purpose of warning anybody who might be on or near the track to prevent his being run over by the cars, then the plaintiff would have a right to recover in this case, unless he himself, as I shall define it to you, was not exercising ordinary care for his own safety."

In view of such submission and of the verdict, the issue of fact in this respect must be treated as determined in favor of the plaintiff. It was not claimed by the defendants that any notice or warning had

been given that the cars were about to be set in motion, and no such warning or notice was in fact given. The clear result of this was to find that both defendants were negligent.

Now, as to contributory negligence. Plaintiff testified that he did not look or listen for approaching cars when crossing the track, and this failure is claimed to be fatal to his right of recovery. Was the general rule to look and listen the only one by which plaintiff's conduct could be rightly tested?

There was testimony, including that of plaintiff, tending to show that to have looked or listened would have been futile. It appears that there was a curve in track No. 12, which, together with the train of standing cars thereon, and other cars on an adjacent track, obstructed the view and prevented seeing the approaching engine and cars; also, that plaintiff had for hours heard another engine working in and about the place from which the engine and cars mentioned were brought. With this obstructed view and the confusion of distant noises necessarily arising from the two engines, plaintiff, in the absence of warning or knowledge that any movement of the train of standing cars was intended, undertook to cross, not at the immediate end of the train, but at a point 10 feet away from it.

Despite the failure to look and listen; it will not do to say that plaintiff did not exercise any care and caution. It is plain enough that he would have crossed in safety if the train of standing cars had not been struck with extraordinary force and violence. There is no conflict in the testimony that the stroke was so sudden and unexpected that he had not time to escape. The evidence shows that, owing to the connecting automatic couplers, the effect of the stroke delivered at the further end of the train of standing cars was immediately communicated to the end which struck plaintiff. There is evidence, too, that the stroke was so great as to injure one or more of the cars.

Does such a case present a mere question of law, to be determined by the court? Or should it be governed, rather, by the class of decisions declaring, under the peculiar circumstances involved, that the conduct of the injured party presents a question of fact for submission to the jury?

In *Cincinnati, N. O. & T. P. Ry. Co. v. Farra*, 66 Fed. 496, 499, 13 C. C. A. 602, 605, this court had occasion to consider circumstances which would and would not present a question only of law touching the conduct of a person attempting to pass over a public railroad crossing, without looking and listening. Judge Lurton said:

"The only question arising upon the errors assigned is as to the contributory negligence of the defendant in error. Were the circumstances so clear, and the inference of law so plain, that the court should have instructed for the plaintiff in error? That the defendant in error did not stop for the purpose of looking and listening was an admitted fact. If the omission of that precaution was negligence per se, then the instructions asked for at the conclusion of the evidence should have been granted. To have given the instruction in the language of the request would have been equivalent to an instruction for the plaintiff in error, for there was no dispute as to the fact that Mrs. Farra's view of the track was obscured from a point 400 feet back on the road until her horse was upon the track, and in danger from a passing train. The request to charge as to the duty of stopping was rested upon the single fact that the view was obstructed."

After commenting upon *Railway Co. v. Ives*, 144 U. S. 408, 500, 12 Sup. Ct. 679, 36 L. Ed. 485, the learned judge further said (66 Fed. 500, 13 C. C. A. 606):

"It is true that in the *Ives Case* it did appear that the deceased had stopped some 80 feet before reaching the track, 'presumably to listen'; but it was also shown that from that place he had no view of the railroad, and could not get a view until he was within 15 or 20 feet of the track. He did not therefore avail himself of an opportunity to stop and look and listen at the only place near the crossing, familiar to him, which was available for observation."

Again (66 Fed. 501, 13 C. C. A. 606):

"Neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances, as in the *Ives Case* and in the case at bar, where the duty is debatable, and proper for the consideration of the jury. Mrs. Farra's case presented quite as many circumstances calculated to modify the duty of stopping as were presented in the *Ives Case*, and we think should be controlled by that case."

That decision was considered again and approved by this court in *Erie R. R. Co. v. Weinstein* (C. C. A.) 166 Fed. 271, 273.

In *McGhee v. White*, 66 Fed. 502, 504, 13 C. C. A. 608, 610, Judge Taft announcing the opinion, the decisions in the *Ives* and *Farra Cases* were followed. That was an action of *White*, as administrator, against *McGhee* and *Fink*, receivers of a railway company, to recover damages for causing the death of one *Kennedy*. One circumstance requiring the case to be submitted to the jury was an obstructed view of approaching trains, and the other was the proximity of a second train following the first train and behind which *Kennedy* attempted to pass over the track. The learned judge said:

"* * * The evidence quite clearly establishes that *Green Kennedy* could not see the engine coming east until he was within 20 feet of the track, and until the engine was within 120 feet of the crossing."

Again (66 Fed. 505, 13 C. C. A. 611):

"*Kennedy* might therefore reasonably presume that, in the 40 yards he had to go to reach the track, another train would not pass the crossing. At least, this circumstance prevents us from holding as a matter of law that his failure to look was contributory negligence. It required the submission of the issue to the jury."

Baltimore & Ohio Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274, was another case of an obstructed view from the approach to a highway crossing, in which it was claimed that on the undisputed evidence the defendant in error was in law guilty of contributory negligence, and, consequently, that the refusal to direct a verdict was error. The decision in the *Ives Case* was followed.

In *Northern Pacific Railroad v. Freeman*, 174 U. S. 379, 384, 19 Sup. Ct. 763, 765, 43 L. Ed. 1014, a majority of the court held that the intestate of plaintiff below was as matter of law guilty of contributory negligence in approaching a railroad through a deep descending cut, where the track was not visible to one driving until he had reached a point about 40 feet from it; but in the course of the opinion the rule theretofore established in that court touching obstructions or peculiar

circumstances calculated to confuse or mislead was recognized. Mr. Justice Brown said:

"The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions, or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track."

See, also, *Bonnell v. Del., Lack. & West. R. R. Co.*, 39 N. J. Law, 189, 193; *French v. Taunton Branch R. R.*, 116 Mass. 537, 540; *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 353, 46 N. W. 543, 9 L. R. A. 521; *York v. Railroad Co.*, 84 Me. 117, 124, 24 Atl. 790, 18 L. R. A. 60.

It is true that the foregoing decisions relate to railway crossings of highways and to the duties of travelers on the highways in the circumstances there pointed out; but when it is sought, in the presence of the custom proved here, to apply the familiar and settled rule to look and listen under conditions not interfering with a useful exercise of those senses, there is no reason why there may not be exceptions to the rule in railroad yards any more than at railroad crossings. Indeed, Mr. Justice Brewer, in the *Elliott Case* (150 U. S. 245, 248, 14 Sup. Ct. 85, 86, 37 L. Ed. 1068), seemed to regard the duty of the traveler on the highway as similar to that of a railroad employé; for, in speaking of Elliott as an experienced railroad man, who "with nothing to obstruct his vision," started across the track with cars approaching within 25 or 30 feet of him, the learned justice said:

"But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employés on the road, affirmed to be negligence."

We do not overlook *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, in which the opinion was announced by the same learned justice. It was there said that the measure of duty to the plaintiff was not the same as it was to a passenger or stranger; but this is consistent with what was said in the *Elliott Case*, as just pointed out. This is made clear by the point recognized in *Aerkfetz v. Humphreys*, as well as in the *Elliott Case*, that one reason for holding the injured person guilty of contributory negligence was that there was nothing to obstruct the view. As said by Mr. Justice Brewer in the *Aerkfetz Case* (145 U. S. 419, 12 Sup. Ct. 836, 36 L. Ed. 758):

"The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. * * * The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars."

In *Nelson v. N. O. & N. E. R. Co.*, 100 Fed. 731, 40 C. C. A., 673, plaintiff's intestate had been in the employ of the railroad company and engaged in mixing mortar and carrying it to a new depot, which required him to cross the main track of the road in going to the building, and while so doing he was killed by a passing train. Reference

was made to *Railroad Co. v. Freeman*, *supra*, and after quoting the portion set out in this opinion from Justice Brown's decision, Judge Shelby said (100 Fed. 737, 40 C. C. A. 679):

"This case indicates distinctly that, where there are obstructions interfering with the view of approaching trains, or other peculiar circumstances tending to mislead the injured party, the question of contributory negligence would at least be one for the jury."

Railroad Co. v. Margrat, 51 Ohio St. 130, 139, 37 N. E. 11, 12, involved the case of a brakeman, Margrat, who was directed to assist in coupling cars, and while upon the main track was run down by a locomotive coming behind him. It was claimed that he should either have kept off the track or maintained a lookout for locomotives and cars. Although the syllabus (which under rule of that court is agreed upon by all the concurring judges) is silent upon the subject of duty to look and listen, in the course of the opinion Judge Bradbury said:

"We are not disposed to ignore or doubt the rule that, under ordinary circumstances, one who goes upon a railroad track should be held to the duty of using his senses of sight and hearing, and, if injured by reason of failing to do so, must abide the consequences; but this rule is not to be extended so as to deny, in all cases, relief to one who may be injured on account of such failure. Conditions may exist which will excuse him."

In view, then, of the peculiar circumstances of the present case, we are of opinion that plaintiff's failure to look and listen while approaching and attempting to cross the track ought not as matter of law to defeat his action. The defendants had voluntarily adopted a rule, called a "custom," for the protection of plaintiff, among others, which, if observed, would have prevented the injury. Plaintiff knew of this rule. The defendants chose to use tracks with curves, which, when occupied by cars, obstructed the view of engines with cars starting at the lead track and running toward the portion of the yard that plaintiff in discharge of duty was crossing. The cars had been standing on one of the two storage tracks without being moved during the period of plaintiff's employment. What would a reasonably prudent person of full age have anticipated, or what would such a person have done in attempting to pass over the track under such circumstances? Would looking and listening have availed anything? Would such a person have chosen a point more than 10 feet, as plaintiff selected, beyond the end of such standing cars to cross the track? If such a person had thought at all of the possible movement of the cars, or of their movement in violation of the rule, could he have rationally expected that this train of 18 cars would have been struck with such violence as to injure some of the cars, and project them in an instant four or five car lengths?

As it seems to us, enough has been said to show that the case falls well within the rule so often expressed, and as stated by Mr. Justice White in *Warner v. Baltimore & Ohio Railroad Co.*, 168 U. S. 339, 348, 18 Sup. Ct. 68, 71, 42 L. Ed. 239:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." *Hackfeld & Co. v. United States*, 197 U. S. 447, 25 Sup. Ct. 456, 49 L. Ed. 826.

Therefore the joint motion of defendants for a directed verdict was properly overruled. In the forms of the special instructions asked, defendants failed for the most part to make due allowance for the special circumstances and conditions under which plaintiff attempted to cross the track. This was especially so touching the general rule to look and listen. We think, however, that the court substantially complied with the requests of defendants in respect to any duty of plaintiff to look and listen, when it instructed the jury in effect that showing the existence of a rule to give warning before causing cars to be put in motion would not of itself excuse plaintiff's failure "to look at all" or to "concern" himself as to whether the last car would be moved. This instruction is to be considered in connection with the whole charge and with the conditions which manifestly interfered with the view and the hearing of plaintiff, and also with the undisputed fact that he chose a point for crossing 10 feet from the last car.

The claim that the jury should have been instructed as matter of law that plaintiff's responsibility was the same as that of an adult need not be considered. The special instructions asked did not, we think, present the question, and we do not discover that exception was taken to the general charge so far as it may be said to relate to plaintiff's infancy. Moreover, this court recently decided adversely to counsel's claim. *Erie R. R. Co. v. Weinstein*, *supra*.

The separate motion made by the Toledo, St. Louis & Western Railroad for a directed verdict was based on the ground "that the only negligence shown was that of Detroit & Toledo Shore Line Company." In support of this motion, counsel contend that the relation between the companies was that of lessor and lessee. Citation is thereupon made of the decisions which hold that a lessor company is not responsible to one of its own employés, for injuries suffered through the exclusive negligence of its lessee. The question argued under these citations does not arise. As pointed out in the statement, the precise relation between the two railroad companies is not set out in the pleadings; and, furthermore, it is not shown by the evidence. The decisive feature, however, is that it is a mistake to say that only the Shore Line Company was negligent. In addition to the inference of concurring negligence in defendant companies arising from the verdict, we think the evidence warranted the court in refusing to hold as a conclusion of law that the Shore Line Company alone was negligent.

We have considered all the assignments of error, and we are convinced that no prejudicial error occurred in the court below.

The assignments must be overruled, and the judgment affirmed.

LOY v. ALSTON et al.

ALSTON v. LOY.

(Circuit Court of Appeals, Eighth Circuit. July 12, 1909.)

Nos. 2,972, 3,005.

1. MINES AND MINERALS (§§ 97, 100*)—MINING PARTNERSHIPS—HOW FORMED—CONVEYANCE BY ONE PARTNER DOES NOT DISSOLVE.

Mining partnerships may be formed (1) by the customary agreement of partnership, or (2) by the operation of a mine by some of the joint owners with the consent or acquiescence of the other joint owners.

The conveyance by one joint owner of his interest in the mine to a stranger does not dissolve the partnership in its operation; but the grantee becomes a partner in the place of the grantor, who ceases to be a member of the partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 222-225; Dec. Dig. §§ 97, 100.*]

Mining partnerships, see note to G. V. B. Min. Co. v. First Nat. Bank of Halley, 35 C. C. A. 515.]

2. PARTNERSHIP (§ 87*)—WRONGFUL EXCLUSION OF MAJOR OWNER FROM PARTNERSHIP BY AGREEMENT BARS ENFORCEMENT OF CONTRIBUTION FOR SUBSEQUENT LOSSES.

A partner, who, in violation of a stipulation of a partnership agreement to the effect that the owner of the major interest should superintend and control the conduct of its business, excludes him therefrom, and thereafter incurs losses by his own management of the partnership business, may not recover any share of them from the excluded owner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 135; Dec. Dig. § 87.*]

3. COURTS (§ 264*)—FEDERAL COURTS—DEPENDENT BILL—NEITHER DIVERSITY OF CITIZENSHIP NOR FEDERAL QUESTION REQUISITE TO JURISDICTION.

A bill in equity dependent upon a former action, of which the federal court had jurisdiction, may be maintained in a national court, in the absence of diversity of citizenship and of a federal question: (1) To aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. § 264.*]

4. ESTOPPEL (§ 68*)—INCONSISTENT POSITIONS—RECOVERY OF DAMAGES FOR MAKING NOTE ESTOPS FROM DEFEATING ITS COLLECTION.

One who has recovered damages on the ground that he has been induced by fraud to make himself liable to pay a promissory note is estopped from successfully invoking the maxim, "He who comes into equity must come with clean hands," to defeat the subsequent collection of the note in equity.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 63.*]

5. JUDGMENT (§ 883*)—OFFSETTING JUDGMENTS—EQUITY HAS JURISDICTION—REMEDY AT LAW INADEQUATE—A JUDGMENT DEBTOR NONRESIDENT.

Courts of equity have original jurisdiction to offset judgments between the same parties.

Where one of the judgment debtors is a nonresident without leviable property in the jurisdiction, the remedy at law is not as prompt, efficient, and adequate as a decree of offset in equity.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 883.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. APPEAL AND ERROR (§ 934*)—RECITAL IN DECREE OF AGREEMENT OF PARTIES PRESUMABLY TRUE.

A chancellor's recital in a decree that by agreement of parties in open court a certain relief was adjudged is presumptively correct, and, in the absence of any evidence to the contrary, it must prevail.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934.*]

7. EXECUTION (§ 156*)—COSTS OF LAWFUL LEVY DURING STAY PAYABLE BY JUDGMENT DEBTOR.

Where the enforcement of a levy upon property is stayed until the final hearing of a suit in equity while the security of the levy is preserved, and at the final hearing it is found that the judgment debtor must pay some part of the amount unpaid on the judgment, that debtor is liable for the costs of guarding and holding the property levied upon during the stay.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 156.*]

8. APPEAL AND ERROR (§ 461*)—RELEASE OF LEVY BEFORE PAYMENT OF JUDGMENT, ERROR.

An order of the court, made after an appeal from such a decree, and before the determination of the case on the appeal, to the effect that the levy be released, is error, because the bond on appeal was not conditioned to pay the judgment in case the appeal failed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2235-2238; Dec. Dig. § 461.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

H. H. Bloss and John T. Harding, for D. B. Loy.

Ralph E. Scofield (John L. McNatt, on the briefs), for W. W. Alston and E. R. Durham, U. S. Marshal.

Before SANBORN and VAN DEVANTER, Circuit Judges, and POLLOCK, District Judge.

SANBORN, Circuit Judge. On June 29, 1906, W. W. Alston recovered a judgment in the court below for \$6,500 and costs against D. B. Loy and L. A. Tooker, on account of fraudulent representations, which induced him to buy three-ninths of a mining lease in January and two-ninths of the same mining lease in April, 1905. He purchased the two-ninths of Loy, who was the cashier of the Miners' & Merchants' Bank of Aurora, and at the time of that purchase he and Tooker gave their note to that bank for \$2,667, the proceeds of which were used either to pay for the interest purchased in the mine or for an interest purchased in a mill and mining plant, or for both. Tooker et al. v. Alston, 86 C. C. A. 425, 428, 159 Fed. 599, 602, 16 L. R. A. (N. S.) 818.

On December 8, 1906, the bank recovered a judgment against Alston in the circuit court of Jasper county in the state of Missouri, for \$1,595.85, on account of the balance due on this note. In March, 1907, this judgment was assigned to Loy, and on April 28, 1908, there remained \$817.75 and some interest owing upon this judgment. On that day Loy exhibited his bill in this court, in which he alleged that Alston owed him \$3,034.45 on account of a partnership transaction between them and \$835.35 on account of the bank judgment, that he had tendered and offered to pay to Alston the difference

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

between the aggregate of these amounts and the amount of Alston's judgment against him, that Alston was not a resident of the state of Missouri and was insolvent, and he prayed that the amount which Alston owed him might be credited upon Alston's judgment against him in the court below, and that Alston might be enjoined from enforcing that judgment. Upon the payment by Loy of \$3,300, the difference between the aggregate amount of Alston's alleged indebtedness to him and the amount due on the judgment against Loy, the court below issued a temporary injunction against the collection of the remainder of Alston's judgment, and the suit then proceeded to final hearing, whereupon the court rendered a decree to the effect that Alston owed Loy nothing on account of the alleged partnership, that the \$817.75 unpaid on the bank judgment be credited upon the judgment against Loy, that by agreement of the parties in open court Alston should make no further claim against the bank or its sureties on account of a certain attachment, and that Alston should pay the costs and expenses which had accrued upon a levy of an execution which he had caused to be made under his judgment against Loy. From this decree both parties have appealed, Loy because the court failed to allow him the amount which he claimed on account of the alleged partnership, and Alston because the court compelled him to credit Loy with the amount owing upon the bank judgment, deprived him of the costs accrued on his execution, and by an order made after the decree released his levy thereunder.

The claim of Loy is that he, Alston, and L. A. Tooker were partners operating the mining lease, five-ninths of which he and Tooker had induced Alston by fraud to buy, from January, 1905, until March, 1907, that this operation resulted in a loss of \$4,184.06, which he paid, and that Alston owes him five-ninths of this amount, or \$2,324.

A mining partnership differs in some respects from the ordinary commercial partnership. It may be formed, continued, and dissolved in either of two methods, (1) by the usual partnership agreement, or (2) by the joint ownership of undivided parts in a mine or lease, and by the operation of a mine or lease by some of the joint owners with the consent or acquiescence of the other joint owners. A commercial partnership is dissolved when one of the partners disposes of his interest, but a mining partnership, which results from the operation of a mine by some of the joint owners with the consent of the others, is not dissolved by the conveyance by one of these owners of his interest in the mine or the lease to a stranger; but the grantor then ceases to be a member of the copartnership, and the stranger becomes a partner in his place. The *delectus personæ* which is an essential element of an ordinary partnership is not an indispensable attribute of a mining partnership. *Bissel v. Foss*, 114 U. S. 252, 261, 5 Sup. Ct. 851, 29 L. Ed. 126; *Snyder on Mines*, §§ 1575, 1581; *Taylor v. Castle*, 42 Cal. 367, 370; *Nisbet v. Nash*, 52 Cal. 540; *Charles v. Eshleman*, 5 Colo. 107, 111.

The entire loss in the conduct of the partnership here in question occurred between January, 1906, and March 11, 1907, and Loy insists that he and Alston were then partners, both by virtue of his ownership of two-ninths of the mine during that time and also by virtue of an

agreement of partnership between them. Was Loy a partner of Alston by virtue of his ownership of two-ninths of the mine during this time? Loy, Tooker, and Reed each owned three-ninths of the mining lease in January, 1905. They sold and Reed conveyed his three-ninths of this lease to Alston during that month. On April 13, 1905, Loy conveyed two-ninths of the lease to Alston and one-ninth of it to Tooker by the same writing, so that he parted with his entire interest by a single conveyance. On May 4, 1905, Tooker conveyed his four-ninths to his son Harry Tooker, and on December 11, 1905, Loy conveyed two-ninths of this lease to one Olney. These conveyances were all in writing and properly executed, and there are no other conveyances of any interest in the mine in evidence. The necessary result is that Loy parted with his entire interest in the lease in April, 1905. He then ceased to be a partner by virtue of any ownership in the lease, and Tooker and Alston became the sole owners and partners, and he never thereafter acquired any title whatever to any interest in the lease or in the mine. It is true, as counsel declare, that Loy and Tooker testified that there was an understanding that Loy should have Tooker's interest until the latter paid for it, and that he never did so. It is also true that Loy and the Tookers testified that Harry Tooker turned back to L. A. Tooker, and the latter turned back to Loy, two-ninths, or some other indefinite interest, in the lease after the conveyances to them had been made; but this testimony was the only evidence that Loy ever had any right or title to an interest in the lease after April 13, 1905, and it is clearly insufficient to overcome these indisputable facts: The recorded title was in others ever after April 13, 1905. Loy and Tooker induced Alston to purchase of Loy the two-ninths which he bought on that day by the representation that Tooker was buying Loy's other one-ninth and that the conveyance which Loy then gave to them eliminated him from the partnership and gave Alston the ownership of a majority interest in and the control of the lease, and Loy is estopped by that representation from denying that these were the facts. The understandings and parol agreements of Loy and the Tookers relating to reconveyances of interests in the lease were ineffective and are negligible because no interest therein could "be assigned, granted or surrendered unless it be by deed or note in writing." Rev. St. Mo. 1899, § 3415 (Ann. St. 1906, p. 1949). And if Loy ever had obtained two-ninths from the Tookers after he conveyed away all his interest in April, 1905, he conveyed that two-ninths to Olney in December of that year, and the loss in the operation of the mine did not occur until after January, 1906. Loy was not therefore a partner of Alston by virtue of any joint ownership with him in the lease during the time when the loss occurred.

Was Loy a partner of Alston by virtue of any agreement of partnership? In April or May, 1905, at or soon after the time when Loy conveyed all his interest in the mine to Alston and Tooker, the latter agreed, and Loy knew of this agreement at the time, that Alston, who thereby acquired a major interest in the lease, should control, and his brother, N. F. Alston, should superintend all the mining operations under it. Pursuant to this agreement, N. F. Alston did superintend the working of the mine from that time until about the 1st of January,

1906. He deposited the moneys which he derived from the mine in the bank of which Loy was the cashier. By January, 1906, he had derived a profit of \$2,388.50 from the operation of the mine, and he had a larger amount on deposit to his credit in the bank out of which he had been in the habit of drawing money by his checks to pay his laborers and the other expenses of operation. Thereupon, about the 1st of January, 1906, Loy refused to let the bank pay Alston's checks, ordered the lessor company not to pay the lessee's share of the income derived from the operation to Alston, and put one Wheat, Loy's brother-in-law, in control of the operation of the mine in the place of N. F. Alston, the superintendent. There was some evidence that prior to this time N. F. Alston had consulted and agreed with Loy and Tooker about the operation of the mine; but neither he nor W. W. Alston ever consented or agreed to his removal as superintendent, or to the management or control of the mining operation under the lease by Loy or Wheat. W. W. Alston testified that Loy never was his partner, and that he never made any agreement of partnership with him, and the evidence upon the issue of an agreement of partnership between Alston and Loy is not so clear and persuasive as to overcome the presumption that the finding of the chancellor below upon this issue was right. Moreover, if there ever was a partnership between them by agreement, the most important term of that contract was that W. W. Alston should have the control and N. F. Alston should be the superintendent of the operation of the mine. Loy defiantly violated that stipulation in January, 1906, and he was in no position thereafter to enforce the contract of partnership. After he had removed N. F. Alston and placed his brother-in-law in control, he incurred and paid debts in the operation of the mine to the amount of \$4,184.06 above the income which he derived from it; but these debts were incurred without the knowledge or consent of W. W. Alston and in violation of his partnership agreement. "A court of equity acts only upon the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." No rule of law, or of equity, or of morals, required Alston to pay any part of these debts, and the court below rightly refused to allow Loy any credit upon the judgment against him on account of them. The appeal of Loy cannot be sustained.

We turn to the appeal of Alston. His counsel assail the decree on many grounds. They contend that the court below had no jurisdiction of this suit because L. A. Tooker, who was named as a defendant herein, but was never served with a subpoena, was a citizen of the same state as the complainant Loy and was a necessary party to the accounting of the affairs of the alleged copartnership. But this suit is based upon a dependent bill exhibited to restrain the enforcement of a judgment of the court below to which Loy, Alston and Tooker were parties, until the complainant's equitable right to a credit of the amount of the claims in his favor could be determined, and neither diversity of citizenship nor a federal question is indispensable to jurisdiction of such a suit. A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in a national court in the absence of both these attributes: (1) To aid, en-

join, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) or to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit. *Campbell v. Golden Cycle Min. Co.*, 73 C. C. A. 260, 262, 263, 141 Fed. 610, 612, 613; *Brun v. Mann*, 80 C. C. A. 513, 518, 151 Fed. 145, 150, 12 L. R. A. (N. S.) 154.

Again, Tooker was not an indispensable party to this suit because he was not a necessary party to Loy's claim for a credit of the bank judgment, even if he was such to the claim for an accounting of the affairs of the alleged partnership, and as there was no such partnership the suit was properly maintained in his absence.

Counsel for Alston invoke the maxim, "He who comes into equity must come with clean hands," and contend that Loy is entitled to no relief in this suit because he fraudulently induced Alston to give the note on which the bank judgment was founded to enable him to borrow money to pay Loy for his interest in the mining lease. For what purpose Alston borrowed the money he obtained upon this note, and how he actually used it, is not definitely shown by the evidence. Probably a portion of it was applied to the payment of the purchase price for Loy's interest in a mining lease, and a portion of it was used to pay for an interest in a mill which Alston bought of Loy. There is no substantial evidence in this case that the portion of the note which was given for money to pay for the mill was obtained by fraud, and there is therefore no defense in this suit to that part of the note. When Alston discovered that he had been fraudulently induced to give the other part of the note which he made to borrow money to pay for an interest in the lease which he bought of Loy, he had a choice of remedies. He might have rescinded the purchase and have recovered back the consideration which he had paid, including a release of that part of the note applicable thereto if the bank held it with notice of the fraud as is claimed, or he could have affirmed the sale and the note and have recovered the difference between the value of the interest in the lease as it was and its value as Loy represented it to be. He made his election. He chose the latter alternative, and he has recovered his judgment for \$6,500, on the ground that his entire note was valid, and that he would be obliged to pay it. In this state of the case, he cannot be permitted to recover of Loy upon this judgment on the ground that his note is valid, and that he is liable to pay it and to defeat Loy's collection of this note in this suit in the same court on the ground that this note, or a part of it, is void, and he is not liable to pay it. A court of equity will not tolerate and sustain positions so inconsistent. In this suit Loy is estopped, by his affirmation of and recovery on account of his note in the former action, from here invoking the rule, "He who does iniquity cannot have equity," to defeat its collection.

Another objection to this suit is that Alston is solvent, and Loy has an adequate remedy at law; but these judgments are in the state of Missouri. Alston is a resident and citizen of North Carolina, and Loy of Missouri. There is no evidence that Alston has any property subject to execution in the latter state, and the marshal failed to find sufficient to pay the judgment against him when he had an execution

in his hands for that purpose. Courts of equity have long possessed and exercised the power to order judgments between the same parties to be set off each against the other where a multiplicity of suits will be avoided or justice will be promoted by the pursuit of such a course. Black on Judgments, §§ 1000, 1001. If the court below should decline to grant relief in this suit, the complainant must pay the amount due upon the judgment against him, and then bring another action at law in North Carolina upon his Missouri judgment and collect the judgment he may recover in that action in North Carolina by a subsequent execution or other process issued in that state. This remedy is not as prompt, efficient, and adequate as the simple decree of this court that Alston shall credit on the judgment it has rendered in his favor the amount due to Loy on the judgment against Alston in the state court. *Sowles v. Witters* (C. C.) 40 Fed. 413.

Authorities are cited in support of the proposition that a court of equity may not compel the credit of one judgment upon another unless the former is final, and it is said that the decree below is erroneous because there was an appeal pending on the judgment in the Jasper county court; but the pleadings and the records have been searched in vain for any averment or evidence introduced at the hearing upon this issue of an appeal. It is true that, in an affidavit of N. F. Alston made and used on an application for a preliminary injunction, a statement may be found that such an appeal was pending on April 27, 1908; but that affidavit was never introduced in evidence at the hearing of this case, and the statement which it contained was not proved in any way, nor was it in issue. Upon the evidence no appeal had been taken from the judgment of the Jasper county court, and it was final. There was therefore no error in that part of the decree which adjudged that Alston should allow a credit of \$875.75 upon his judgment as of December 8, 1906.

There is a paragraph in the decree here in issue which reads in this way:

"And by agreement of parties in open court, it is hereby decreed that said W. W. Alston shall make no further claim against the Miners' & Merchants' Bank of Aurora, Mo., or against any surety for said bank on or by reason of an attachment in a state court, and said claim or claims are fully canceled."

This paragraph is assailed on the ground that there was no such agreement, and that under section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), the federal courts may not stay proceedings in a court of a state except in bankruptcy cases; but as the recital of the chancellor that the agreement he specifies was made by the parties in open court is presumptively true, and there is no proof or evidence to the contrary in the record, it must prevail. There is no provision in the decree which in any way enjoins or stays any proceedings in any state court. The entire effect of this paragraph is to cancel and release, pursuant to the agreement of the parties, certain claims of Alston which, so far as this record discloses, were not in suit in any court.

Finally, counsel for Alston specify as errors a paragraph of the decree to the effect that he shall pay all the costs and expenses for guarding, protecting, and caring for the property levied upon under his judgment and an order made on July 25, 1908, about a month

after the decree was rendered, to the effect that the mill property involved in this litigation be released from the levy under that judgment because, as the court recited in the order, Loy's appeal bond protected Alston in case the decree below should be affirmed. These specifications are well made. Under his judgment Alston had the legal right to levy his execution on the property of Loy and to hold that levy and the property seized thereunder as security for his judgment until it was fully paid. The temporary injunction stayed proceedings under this levy, but it expressly provided that any levy of an execution was not discharged thereby, but should continue in force and effect if the temporary injunction should be dissolved. Inasmuch as it appeared at the hearing that the complainant tendered and paid into court several thousand dollars less than Alston was entitled to receive, the temporary injunction should have ceased at the final hearing when this fact was found, and Alston should have recovered the necessary costs and expenses of holding the property under his levy until the amount justly due him was paid.

Again, Loy's bond on appeal was conditioned to pay all damages and costs if he failed to make good his plea; but damages resulting from the release of Alston's levy and the loss of the security thereof were not the effect of the appeal, because Loy had the right to maintain the levy notwithstanding the appeal until his judgment was fully paid. The appeal bond was not conditioned that Loy would pay the judgment if his plea was not sustained. Therefore the order of July 25, 1908, which released Alston's levy, was erroneous, it must be reversed, and the levy and its liens must be restored and maintained until the amount owing on Alston's judgment is paid.

As against the appeal of Loy, the decree below must be affirmed.

As against the appeal of Alston, the decree below and the order of July 25, 1908, must be reversed, and the case must be remanded to the court below, with instructions to enter a decree to the same effect as that heretofore rendered, except that it shall not require Alston to pay, but shall adjudge Loy liable to pay, the necessary costs and expenses of holding, guarding, and protecting the property levied upon under the execution upon his judgment against Loy, and shall adjudge that the temporary injunction cease and no longer have effect, that Loy satisfy and release the bank judgment against Alston, that the levy canceled and released by the order of July 25, 1908, be reinstated and restored to the same effect as though it had not been released, and that, unless within 30 days after the rendition of the decree the complainant Loy pays the amount found due Alston by the decree, the marshal may proceed, if so directed by Alston, to sell all the interest which the defendants named in Alston's judgment against Loy and Tooker had at the date of the levy in the property levied upon under that judgment to satisfy and pay the amount adjudged due Alston by said decree, and that Alston recover the costs of this suit to be taxed by the clerk; and it is so ordered.

In re BEMENT.

SMITH v. MISHAWAKA WOOLEN MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,516.

1. SALES (§ 474*)—CONDITIONAL SALES—VALIDITY UNDER WISCONSIN STATUTE—UNRECORDED CONTRACTS.

Under St. Wis. 1898, § 2317, which provides that no contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid, shall be valid against any other person than the parties thereto, or those having notice thereof, unless the contract shall be in writing, and filed for record, etc., such a sale of goods, which go into the possession of a retailer for resale, is fraudulent as against the general creditors of the purchaser, unless the contract is filed for record, and the reservation of title in the vendor is void.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

2. BANKRUPTCY (§ 185*)—RIGHTS VESTING IN TRUSTEE—RIGHTS OF CREDITOR.

A trustee in bankruptcy has power to represent general creditors of the bankrupt in resisting claims that, were the creditors permitted to resist them, would be invalid under the statutes of the state.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 185.*]

Appeal from the District Court of the United States for the Western District of Wisconsin.

The appeal is by the trustee in bankruptcy, from an order of the Court below (158 Fed. 885), directing the trustee to turn over to appellee, the Mishawaka Woolen Manufacturing Company, certain goods described in its petition.

February 14th, 1907, upon petition, filed Dec. 8th, 1906, George B. Bement was declared a bankrupt, and Frank L. Smith duly appointed trustee of the estate. The petition of appellee, a corporation organized under the laws of the state of Indiana, alleges that on the 3d of February, 1906, it and Bement entered into two contracts in writing, by the terms of which petitioner agreed to sell and deliver to Bement, certain personal property therein described, a portion of it described as lot No. 1, and a portion of it as lot No. 2, all of which was subsequently delivered; that by the terms of the contracts "the title and property in all the goods herein mentioned shall remain in the vendor until fully paid for in cash, if payment for the same shall not be properly made when due or if at any time before the same shall be fully paid for the purchaser shall become insolvent, or shall, in the opinion of the vendor, be in danger of insolvency, or the vendor, in its judgment, shall, for any reason, whatever, deem itself in danger of losing the price of the said goods, then the vendor may, at its option, reclaim and take possession of so much of the said goods as shall then remain in the hands of the purchaser unsold"; that no part of the purchase price of said goods has been paid, whereby the title remains in the petitioner; that upon a replevin suit in the Circuit Court of Green County, Wisconsin, the possession of said goods known as lot No. 1, were recovered; that the possession of said goods known as lot No. 2 were not recovered, although at the time Bement was adjudged a bankrupt, they were still in his possession, and are now in the possession of the trustee; and praying for an order upon the trustee to deliver over to petitioner the goods known as lot No. 2, and to ratify and confirm the taking of the goods embraced in lot No. 1; to which the trustee answers that by section 2317 of the Wis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

consin Statutes of 1898, every contract of the nature set forth, in order to be valid, must be filed in the office of the clerk of the town, village or city in which the vendee resides, or in which the goods are located; and that no such contract has ever been filed in the manner required; to which answer appellee filed a general demurrer; which demurrer, though overruled by the referee, was sustained by the Court and the order appealed from was entered.

E. D. McGowan and Emerson Ela, for appellant.

Charles E. Buell, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

In some states, by general law, conditional sales of goods that go into stock to be sold by retail are, as against creditors, held to be invalid; there being in this respect a clear distinction between machinery that becomes a permanent part of some factory building, and goods that go into the possession of the retailer for resale. (*Troy Wagon Co. v. Hancock, Trustee*, 152 Fed. 605, 81 C. C. A. 595 (Circuit Court of Appeals, Seventh Circuit)). The ground for this distinction is that to allow such secret title to attach to goods in the vendees' possession for resale is a constructive fraud upon creditors.

No conditional sale holding of this character, by the courts of Wisconsin, has been brought to our attention; nor any holding of the Wisconsin courts contrary thereto. But those courts have held, upon precisely the same grounds, that chattel mortgages on goods going into stock for resale—no provision being made that the money thus received should be turned over to the mortgagee—is a constructive fraud upon creditors; and though, technically, in the case of a chattel mortgage, title passes, while in conditional sales title is reserved, the considerations of public policy that make the transaction a constructive fraud upon creditors is the same in the one as in the other.

In the absence of decision by the Wisconsin courts we would hold this to be the law in Wisconsin; all the more so when we take into consideration section 2317 of the Wisconsin Statutes of 1898, as follows:

"No contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city or village where the vendee resides, or if he shall not be a resident of the state then in the office of the clerk of the town, city or village where the property may be at the time of making such contract, and such clerk shall file, keep and index the same in like manner as mortgages of personal property and receive a like compensation therefor; but the effect of such filing shall not extend for more than one year after the time fixed for payment of the contract price or for the performance of the other conditions of such sale."

But it is contended the trustee in bankruptcy cannot question the validity of appellee's title, for the reason that he takes only the title and right of the bankrupt, and therefore cannot assert a right belonging to the creditors. That the defense the trustee makes to appellee's

petition is a defense that only the creditors could assert, had there been no proceedings in bankruptcy, is perhaps beyond dispute. Does this fact, under the decisions of the Supreme Court, make that defense unavailing in the hands of the trustee?

The question was raised, but not expressly decided in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, where the preceding authorities were reviewed. One of those authorities was the *Hewit Case*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986—the sale of machinery to the bankrupt on condition that title should not pass until the property was paid for; but the incapacity of the trustee to resist the application of the vendor for the return of his goods, in that case, was placed upon the fact that under the statutes of New York conditional sales were only void against “subsequent purchasers, pledgees, or mortgagees in good faith,” and that the trustee was not a subsequent purchaser, pledgee or mortgagee.

Local statutes of the same kind determined the judgment of the court in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, and *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

In *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782 (the goods involved were machinery for an ice plant), it was found that the policy of Ohio, expressed through her statutes, as construed by her Supreme Court, made conditional sales of such property valid except as against creditors “who had taken actual steps to fasten upon the property for the payment of their debts”; and it was upon this predicate, and this predicate alone, that the Supreme Court based its decision that the vendor might assert his lien upon the machinery, no creditor having taken steps prior to the adjudication in bankruptcy, to “fasten upon” the property. “There were no such creditors” said the court in the opinion. “And hence there was no one who could question the validity of the instrument at the time the trustee’s title would have accrued. * * * We hold that as the conditional sale was valid by the law of Ohio, except as to a certain class of creditors, if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so, because in that case, the adjudication did not operate as the equivalent of a judgment or attachment, or other specific lien upon the property.” *Security Warehousing Co. v. Hand*, supra. In none of these cases, therefore, and in no case that has been called to our attention, has the right of the trustee to represent creditors, in a case where creditors may assert the invalidity of a conditional sale, been either raised or questioned. That the trustee in bankruptcy may thus represent creditors, we think clear. As stated by the Circuit Court of Appeals for the Second Circuit, in *Re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133 (quoted with approval by the Supreme Court in the *Hewit Case*, supra), if the lien “is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee.” True, an adjudication in bankruptcy vests the trustee, as representative of the

bankrupt, with no better right or title to the property than the bankrupt had when the adjudication took place. But the trustee is, by the adjudication in bankruptcy, vested also with exemptions and immunities respecting such property that the bankrupt did not possess; among them, immunity against the right of the creditor to proceed, either by attachment or execution, to fasten upon the property. In other words, while the title of the bankrupt is not, by the adjudication in bankruptcy, enlarged through the fact that it has gone into the hands of the trustee, the adjudication none the less suspends the rights of the creditors to proceed. To some extent at least the trustee has taken the place of the creditors, in bankruptcy. He has possession of the property that otherwise would be open to them to make good their claims; but they may not seize it. He has under the law, the power to sell the property, and distribute the proceeds; and this is the only access the creditors have, either to the property or its proceeds. He stands, from the moment of the adjudication, possessed of the whole sum of power that all the creditors might have exercised had not the adjudication taken place—all things considered, a substitution of trustee for creditors that carries with it, we think, the power to represent the creditors against the assertion of claims, that were the creditors permitted to resist them, would, under the express language of the local laws of Wisconsin, render the claim invalid.

The order of the District Court appealed from is reversed with instructions to enter an order overruling the demurrer to the answer, and to proceed further in accordance with this opinion.

GREY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909. Rehearing denied May 13, 1909.)

No. 1,488.

1. INDICTMENT AND INFORMATION (§ 202*)—REQUISITES AND SUFFICIENCY—LANGUAGE OF STATUTE.

An indictment, under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to defraud, which substantially follows the language of the statute, is sufficient after verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-645; Dec. Dig. § 202.*]

2. POST OFFICE (§ 48*)—USE OF MAILS TO DEFRAUD—INDICTMENT.

In an indictment for using the mails in and for executing a scheme to defraud, it need not be alleged that the contents of a letter or circular charged to have been mailed pursuant to such scheme were false.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. § 48.*]

3. CRIMINAL LAW (§ 878*)—FORMER JEOPARDY—PROSECUTION FOR USING MAILS TO DEFRAUD—VERDICT.

Where an indictment, under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to defraud, contained three counts, each charging the same scheme, but the sending of letters pursuant thereto to dif-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ferent persons, an acquittal on two of the counts does not invalidate a conviction on the remaining count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

4. POST OFFICE (§ 49*)—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.

On the trial of a defendant, charged with having conducted a scheme to defraud by the use of the mails, evidence that defendant's predecessor in the business had been indicted for the same offense was competent on the question of intent, if defendant was shown to have had knowledge of the fact and thereafter continued the business.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 49.*]

5. POST OFFICE (§ 35*)—PROSECUTION FOR USING MAILS TO DEFRAUD—DEFENSES.

Where the evidence established the charge that defendant advertised as a matrimonial agency, and obtained money from a person by means of correspondence through the mails by false representations made in the advertisement, the offense of using the mails to defraud was complete; and it was no defense that defendant afterwards put the person defrauded in correspondence with a woman whom he married.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 35.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

E. N. Zoline, for plaintiff in error.

Edwin W. Sims, U. S. Atty., F. G. Hanchett, and Seward S. Shirer, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was convicted of using the mails in aid of a scheme to defraud. Section 5480, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3696). Briefly the scheme charged was that plaintiff in error obtained matrimonial agency fees from men by the false pretense that she had been commissioned by a rich and beautiful widow to find her a husband, and from women by the lure of a fictitious "retired business man, wealthy, but lonesome."

The indictment was not challenged by demurrer or motion to quash; but a motion in arrest of judgment was overruled. No question is made but that the scheme to defraud was fully stated. The second element, namely, the intention to effect the scheme by "correspondence * * * by means of the post office establishment of the United States," was alleged as follows:

"Which said scheme and artifice was a scheme and artifice which the said Marion Grey, when devising the same and committing the several offenses hereinafter in this indictment mentioned, intended to effect, and which said scheme and artifice then and there was a scheme and artifice to be effected, by inciting, by means of said advertisements, the said persons so intended to be defrauded as aforesaid to open communication with her under the respective styles, 'Box 104, Elgin, Ill.,' and 'Box 94, Elgin, Ill.,' by means of the post office establishment of the said United States, and by thereupon opening correspondence with those persons respectively under the name of the Searchlight Club, per Marion Grey, Mgr., by means of the post office establishment of the said United States."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As the remaining element the statute says the accused—

“shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, a letter, packet, writing, circular, pamphlet or advertisement in a post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment.”

The indictment averred that plaintiff in error—

“in and for executing said scheme and artifice, and in and for attempting so to do, and in and for defrauding by and through that scheme and artifice one William Grable, then resident at Dearborn, in the state of Missouri, unlawfully, willfully and fraudulently did place and cause to be placed in the post office of the said United States, at Elgin aforesaid, to be sent and delivered to the said William Grable, at Dearborn aforesaid, by the said post office establishment of the said United States, a certain circular, to wit.”

The criticism of the averment of the second element is that the intent to use the mails was not declared to be a part of the scheme devised by plaintiff in error; and of the statement of the third element the complaint is made that there is no allegation that the circular was inclosed in an envelope or wrapper, and stamped and addressed, or that the contents of the circular were false. It will be observed that the averments substantially follow the language of the statute. Ordinarily this is sufficient, even against a demurrer or motion to quash. *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; *Pounds v. U. S.*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62; *Konda v. U. S. (C. C. A.)* 166 Fed. 91. Here there is no complete omission of some material element. If it were conceded that the criticisms are just, they are of the kinds that are cured by verdict. Section 1025, Rev. St. U. S. (U. S. Comp. St. 1901, p. 720); *Connors v. U. S.*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; *Rosen v. U. S.*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. Whether the contents of the circular were true or false was immaterial. The letters or circulars that are mailed need only be “in and for executing” the scheme to defraud. *U. S. v. Hoeflinger (D. C.)* 33 Fed. 469; *Durland v. U. S.*, 161 U. S. 307, 16 Sup. Ct. 508, 40 L. Ed. 709.

The indictment contained three counts. In each the same scheme to defraud was set forth. In the first it is charged that a letter was mailed to John Peckett, in the second to William Grable, and in the third to Minnie Coleman. Plaintiff in error was acquitted on the first and third counts. Her counsel now contends that this cancels the conviction on the second count. The argument is that since the jury, in passing on the first and third counts, found that the scheme was not fraudulent, a finding on the second count that the scheme was fraudulent should not be permitted to stand. But the verdicts of guilty and not guilty are reconcilable on the theory that the jury found that the scheme was fraudulent, and that in execution thereof plaintiff in error mailed a letter to Grable, but did not to Peckett or Coleman. And if counsel should convince us that the jury ought not to have found his client guiltless of sending letters to Peckett and Coleman as charged, that would be no reason for setting aside the conviction on the Grable count.

Plaintiff in error was the successor in business of one Blackney. The prosecution asked a witness whether an indictment against Blackney had been presented by the grand jury. Plaintiff in error objected on the ground that "that is not the proper method of proof." The objection was overruled, but no exception was taken, and the witness answered, "Yes." Thereupon the prosecution, without objection, introduced in evidence a certified copy of the Blackney indictment, the court saying, "Do I understand that counsel for the United States undertakes to connect this defendant with the transaction?" and counsel replying, "Yes, directly." The fact of such an indictment, if knowledge of that fact were brought home to plaintiff in error when she took over the business, would have a bearing on her intent in continuing the business. No motion was ever made asking the court to strike out the evidence concerning the Blackney indictment on the ground that knowledge thereof by plaintiff in error had not been sufficiently proven. So, in view of the ground of the objection above recited and of the failure to question the government attorney's full performance of his promise to connect plaintiff in error with the matter, if any error was committed in admitting the copy of the indictment, it was invited error.

It developed at the trial that Grable had married a woman with whom plaintiff in error had put him in correspondence, and was satisfied. In view of this evidence counsel claims that the conviction must be vacated. The scheme was to get Grable's money by exciting his curiosity about the wealthy and handsome widow; and, like in Aldrich's story, there was no Marjorie Daw. The other elements—intent to use the mails, and the mailing of the circular in furtherance of the scheme and intent—being also proven, the offense was complete. *Weeber v. U. S. (C. C.)* 62 Fed. 740; *Stokes v. U. S.*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667. What happened to Grable subsequently, and what he might say about his experiences, were not controlling.

Additional assignments of error are aimed at the charge of the court to the jury and at certain remarks of the court during the introduction of the evidence. No objections were made, and no exceptions taken, on which formally to predicate assignments. Counsel invokes our rule that:

"The court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below."

We have examined the evidence, and find it sufficient to sustain the verdict. We have examined the instructions, and find that they fully and correctly state and apply the law. Counsel falls into a sheer mistake in saying that the court omitted to state the presumption of innocence. Counsel likewise is at fault in contending that the court, in calling attention to plaintiff in error's failure to materialize the wealthy widow and the retired business man, cast the burden of proof upon plaintiff in error. She was a witness in her own behalf, and her testimony was subject to examination as fully as that of any other witness; and her testimony, with that of other witnesses bearing on the ques-

tion of intent, was reviewed in the charge, as is permissible and customary in the federal courts. The challenged remarks do not come within the rule, because they do not "involve the merits of the case," and it is not "apparent of record that the [subject-matter thereof] was contested and not waived in the court below."

The judgment is affirmed.

ROBINSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1909.)

No. 2,877.

1. CONSPIRACY (§ 43*)—FEDERAL STATUTE—INDICTMENT.

An indictment for conspiracy to use the mails to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), considered, and *held* sufficient.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 96; Dec. Dig. § 43.*]

2. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS.

The charge of the court in a criminal case as to the character of circumstantial evidence necessary to warrant a conviction *held* sufficient, in the absence of a specific request to charge in particular language.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. § 824.*]

3. CONSPIRACY (§ 37*)—FEDERAL STATUTE—CONSTRUCTION.

Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), makes a conspiracy to commit an offense against the United States a distinct offense, and a defendant may be convicted thereunder, although the proof shows that the substantive offense to which the conspiracy related was in fact committed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 68; Dec. Dig. § 37.*]

4. CRIMINAL LAW (§ 113*)—FEDERAL STATUTE—VENUE.

A charge of conspiracy to commit an offense against the United States, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), may be prosecuted in any district where an overt act was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 232; Dec. Dig. § 113.*]

In Error to the District Court of the United States for the District of Minnesota.

C. D. O'Brien and R. D. O'Brien, for plaintiffs in error.

Charles C. Haupt, U. S. Atty., and E. S. Oakley, Asst. U. S. Atty.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Robinson, Layne, and Holliday were convicted in the trial court of a conspiracy under section 5440, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3676), to commit the offense denounced by section 5480, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3696). To reverse the judgment rendered against them they sued out a writ of error from this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is assigned as error that the trial court erred in denying a motion in arrest of judgment. The ground of the motion in arrest was that the indictment did not charge a public offense against the laws of the United States. The only reason urged here in support of the motion in arrest is that the indictment does not by proper averment allege that the representations which defendants were to make in carrying out their scheme to defraud were to be false. Assuming, but not deciding, that such representations must be false, the language of the indictment does not bear out this claim. It is alleged therein that:

"All of which pretensions and representations so made and set forth were to be made for the purpose of persuading and inducing the persons unknown as aforesaid to send and intrust their money and funds to the said Edward A. Vaughan for investment in grains and stocks upon the representations so made and set forth in said circulars and letters, and that all moneys so sent by the persons unknown as aforesaid, and so received by said persons under the name of the said Edward A. Vaughan, be fraudulently converted to the personal use of them, the said Edward A. Vaughan, Henry F. Raymond, John Hogan, J. L. Layne, M. A. Gill, B. R. Hyman, and John Doe, and in no wise invested as promised and set forth in said circulars and representations."

In view of these allegations, how can it be urged that the representations and pretenses were not to be false? This point is without merit.

It is further assigned as error that the trial court refused to instruct the jury in regard to circumstantial evidence. Conceding, but not deciding, that it would have been error for the court to refuse to give to the jury a properly framed charge as to the degree of certainty which must exist in a juror's mind in order to convict upon circumstantial evidence, we do not think the record discloses any such refusal. At the close of the court's charge to the jury the following conversation occurred between the court and counsel for defendants:

"Mr. O'Brien: I ask your honor to instruct the jury, on the question of the principle of law applicable to circumstantial evidence, it must point solely to the hypothesis of guilt; that if it can be reconciled in any way with the innocence, that that is the difference between direct and circumstantial evidence.

"The Court: I think that my charge is sufficient.

"Mr. O'Brien: Your honor didn't say a word about circumstantial evidence.

"The Court: I indicated that a conspiracy could be proved by circumstantial evidence.

"Mr. O'Brien: But your honor didn't give the request which I asked this morning as to the circumstantial evidence—that it must point solely to the hypothesis of guilt.

"The Court: I think that is included in what I said with reference to the establishment of these facts beyond a reasonable doubt.

"The Court: I say here it is not necessary that the evidence should repel every fanciful theory, but it should be inconsistent with the idea of innocence.

"Mr. O'Brien: If that applies to circumstantial evidence, why, of course, the rule is that it must point solely to the hypothesis of guilt. I want to call your honor's attention—

"The Court: I think it must point solely to the hypothesis of guilt. I think that is correct; but I think I have carried the same idea here (referring to written portion of the charge)."

The court did say in its charge to the jury, in speaking of the degree of proof necessary to convict:

"But it should be inconsistent with the idea of innocence, and strong enough, as I have said, to satisfy the reason and conscience of the jury, so that they

will be fully satisfied and convinced to a moral certainty of the conclusion that they reach."

The court also, of course, instructed upon the question of reasonable doubt. It thus appears that there was no specific request to charge; hence nothing upon which an exception could be based. It appears by the conversation above quoted that the trial court was not put upon record as refusing any particular language requested by counsel. Moreover, we are satisfied that defendants suffered no prejudice from what occurred at the trial in relation to this matter.

It is again assigned as error that the court refused to instruct the jury to acquit the defendants, for the reason that the proof showed a completed offense under section 5480, and, therefore, the offense of conspiracy had become merged into that of using the mail to defraud. The crimes denounced by sections 5440 and 5480 are both misdemeanors as the law now stands, and the doctrine of merger does not apply. *Berkowits v. United States*, 93 Fed. 452, 35 C. C. A. 379.

In answer to the criticism of counsel as to this mode of proceeding it is only necessary to quote the language of Justice Brewer in delivering the opinion of the Supreme Court in *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269, as follows:

"It is contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself, and also that, when the principal offense is in fact committed, the mere conspiracy is merged in it. The language of the sections is plain and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan v. Wilson*, 127 U. S. 540, 555, 8 Sup. Ct. 1301, 32 L. Ed. 223. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each."

Again, this court has decided the question presented in this assignment in accordance with the case last cited. *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

It is assigned as error that the trial court refused to instruct the jury at the request of counsel for the defendants as follows:

"That if the jury should find from the evidence in this case that there was a corrupt agreement between these defendants, or any of them, with anybody else, constituting a conspiracy under your honor's instruction in the charge, and if they further find that that agreement was made or entered into in the city of Cincinnati, state of Ohio, or the city of Chicago, state of Illinois, or both of those places, and that that agreement and understanding was complete and existed between the defendants and the parties at the time they came within the district of Minnesota, that then and in that case their verdict must be for the defendants."

There was testimony tending to show that the agreement constituting the conspiracy alleged in the indictment was entered into in Cincinnati and Chicago; but all the overt acts set out in the indictment were proven to have been committed in Minneapolis, Minn., and the evidence also showed that it was the intention of the conspirators to carry out their conspiracy at Minneapolis. The request of counsel was made, we suppose, in reliance on those provisions of the Consti-

tution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the state and district wherein the crime shall have been committed. Article 3, § 2; Amend., art. 6.

At common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design. 1 Archbold's Criminal Practice and Pleading (8th Ed.) p. 226. Where a conspiracy was formed at sea, and an overt act done in Middlesex county, it was held that the venue was properly laid in that county. *The King v. Bresac and Scott*, 4 East, 164. In the case of *King v. Bowes and Others*, referred to in the above case, the conspirators were tried in Middlesex, though there was no proof of an actual conspiracy in that county, and the acts and doings of some of them were wholly in other counties. In *People v. Mather*, 4 Wend. (N. Y.) 261, 21 Am. Dec. 122, Marcy, J., in delivering the opinion of the court, said:

"I admit that it is the illegal agreement that constitutes the crime. When that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown or ever performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act there they renew, or perhaps, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. In this respect, conspiracy resembles treason in England, when directed against the life of the king. The crime consists in imagining the death of the king. In contemplation of law, the crime is committed wherever the traitor is and furnishes proof of his wicked intention by the exhibition of any overt act."

To the same effect are *Commonwealth v. Gillespie*, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; *Noyes v. State*, 41 N. J. Law, 418; *Commonwealth v. Corlies*, 3 Brewst. (Pa.) 575.

If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force under section 5440, Rev. St. U. S., as the offense described therein for all practical purposes is not complete until an overt act is committed.

In *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90, it is said:

"Granting that the gravamen of the offense is the conspiracy, and that at common law it was neither necessary to aver nor prove an overt act (*Rex v. Gill*, 2 B. & Ald. 204; *Bannon v. United States*, 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494), an overt act is necessary under Rev. St. § 5440, to complete the offense."

In the case of *In re Palliser*, 136 U. S. 266, 10 Sup. Ct. 1036, 34 L. Ed. 514, it is said:

"When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the Legislature may designate; and Congress has accordingly provided that 'when any offense against the United States is begun in one judicial district and completed in any other, it shall be deemed

to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner and as if it had been actually and wholly committed therein.' Rev. St. § 731 (U. S. Comp. St. 1901, p. 585)."

This language is quoted with approval in *Burton v. United States*, 202 U. S. 388, 26 Sup. Ct. 702, 50 L. Ed. 1057.

It will be noticed that the Supreme Court, in quoting section 731, Rev. St. U. S., uses the word "district," instead of "circuit," as being, no doubt, the real intention of Congress. It seems clear, then, that whether we place reliance on the common law or on section 731, Rev. St., the venue of the offense was correctly laid in the district of Minnesota, and the evidence sustained the allegation of the indictment.

This disposes of the assignments of error argued; and, finding no error in the rulings of the trial court in reference thereto, its judgment is affirmed.

CHENEY v. DICKINSON et al.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,515.

1. FRAUD (§ 31*)—RIGHT OF ACTION FOR FRAUDULENT REPRESENTATIONS.

One who has been induced by fraud to purchase property has his election of either one of two remedies at law: He may repudiate the purchase, return the property, and recover from the seller the consideration paid; or he may affirm the purchase, retain the property, and recover the difference between what he paid and the value of what he received from any one who intentionally deceived him into making the purchase, whether the seller or a third party.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. § 31.*]

2. FRAUD (§ 29*)—FRAUDULENT REPRESENTATIONS—RIGHT OF ACTION FOR DAMAGES.

Officers or promoters of a corporation, who made false representations in respect to its property and affairs in a prospectus and otherwise, to induce persons to buy its treasury stock from the corporation at par, did not thereby become liable in damages to one who bought stock from another stockholder at less than par, although he did so in reliance on such representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 25; Dec. Dig. § 29.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Plaintiff in error, who was plaintiff below, seeks the reversal of a judgment based on a directed verdict for the defendants. One Flagler was also named as a defendant in the declaration; but he was not served with process and did not appear, so the case was tried without him.

The declaration (in outline) charged that the defendants, including Flagler, organized a corporation with charter powers to manufacture and sell steel tubes and other steel and iron products; that they constituted themselves officers and directors; that they confederated and conspired to defraud the plaintiff and all others they could induce to purchase shares in said corporation, by making deceitful and fraudulent statements in prospectuses and otherwise; that to carry out their conspiracy they made certain statements and representations to the plaintiff which were material with respect to the value of the stock; that such statements were false and fraudulent, and were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known at the time by the defendants to be false and fraudulent, and were made by the defendants for the express purpose of deceiving and defrauding the plaintiff; that the plaintiff believed said representations to be true; that, relying thereon, "he purchased from the defendants 100 shares of the supposed treasury stock of the Flagler Iron & Steel Company, of the par value of \$10,000, and paid therefor the sum of \$10,000; that he now has in his possession certificates for said stock ready to be produced in court and surrendered to the defendants as the court may direct." The declaration also alleged that the entire issue of 30,000 shares of preferred stock and all of the 20,000 shares of common stock, except 10 shares subscribed and paid for in money so as to qualify the subscribers to serve as directors, were issued by the present defendants, acting as a board of directors, to the aforesaid Flagler as full-paid and nonassessable shares in payment for a worthless iron mine, and "that said stock was issued to Flagler and divided between him and the other defendants; that the treasury of the company never did own the stock, and never received the money that was obtained from the sale of the stock, and none of the money paid by the plaintiff for his stock went into the treasury of the company"; and "that the stock was at the time of the sale of the same to the plaintiff absolutely worthless and of no value whatever."

The prospectus, after setting forth descriptions of the character and value of mineral lands and manufacturing plants (which the evidence tends to prove were false), proceeds: "The company has now in its treasury for sale stock (not taken) to the amount of 30,000 shares—25,000 shares preferred, 5,000 shares common—to be sold from time to time as needed for construction purposes. For further information regarding terms of our securities and any other data, please address or call at the company's offices. Flagler Iron & Steel Company, Rooms 1322-23 First National Bank Building, Chicago, Illinois."

A letter from the plaintiff to the company reads as follows: "My attention has been called to your Co. as a good investment for funds, and I shall be glad if you will send me full particulars regarding terms of purchase of preferred stock and bonus of common stock, as well as price of common. I should like to know what would be the earliest date you expect to begin to pay dividends on the preferred. Please give me any other information I may require for proper consideration of purchase."

A long letter to the plaintiff, signed by the company, "by W. P. Dickinson, V. P. & T.," contained the following: "Replying to your favor of Dec. 19th, we regard the common and preferred stock a good investment. * * * Our mills Nos. 1 and 2 are built and we are now installing machinery. We shall sell about \$500,000 more stock for equipment purposes and working capital. * * * The price of the stock is par, common or preferred. We have not sold a share of stock to anybody for less than its face, and we have authorized no one to sell any stock for less than its face, and we have given no bonus to anybody. We aim to make this a manufacturing proposition worth the money. We want you to pay for what you get, and we expect to keep it good. * * * We shall be glad to have you come out (from your home in Connecticut) and look the proposition over, and make any investigation that you feel like, and take some of our stock if you are satisfied that we are all right. We are sending you under separate cover a prospectus of our company, which we would like to have you take the time to read." The omitted parts of the letter relate to representations of the character and value of the company's assets.

Other matters of evidence, as well as of lack of evidence, so far as they are deemed pertinent to the decision, are stated in the opinion.

Almon W. Buckley, for plaintiff in error.

Horace Kent Tenney, E. W. Froelich, Warren B. Wilson, and Samuel M. Sutloff, for defendants in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). A person who finds that he has parted with his money through being fraud-

ulently led into a purchase may pursue either one of two remedies at law. He may repudiate the purchase, surrender the property to the vendor, and recover the consideration. Such an action manifestly can be maintained only against the party from whom he purchased the property and to whom (or to whose order) he paid the consideration. Or he may affirm and abide by the purchase, retain the property, and recover the difference between what he paid and the value of what he received and is retaining. Such an action can be maintained against any one (vendor or third party, indifferently) who intentionally deceived the plaintiff into making the purchase. In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction. The difference between the two actions is not merely technical; in substance they are as far apart as affirmation and repudiation. *Wilson v. New U. S. Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 241; *Kingman v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Simon v. Goodyear Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; *Westerfeld v. N. Y. Life Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

The declaration in this case bears some evidence that it is an attempted mixture of the two irreconcilable theories. The allegations that the defendants' fraud led the plaintiff to purchase the shares from the defendants, and that the plaintiff brings the certificate of shares into court for surrender to the defendants, point to an action to recover from the defendants the consideration paid to them on a sale which plaintiff repudiates on account of fraud. If these allegations are ignored, as being surplusage, there may remain enough in the declaration to state a good cause of action for deceit. And inasmuch as the declaration was not questioned by motion or otherwise, and the motions for directed verdict were based solely on the contention that the evidence failed to establish a cause of action (without regard to the theory of the declaration), we have examined the evidence to determine its sufficiency to make a *prima facie* case on either theory.

The undisputed evidence shows that the plaintiff received the stock from and paid his money to one Costelo, a Boston broker of stocks and bonds; that Costelo was not the agent or representative of the company, or of any of the present defendants; that the stock sold through Costelo was the property of Flagler, and that Flagler received the consideration; that the defendants knew nothing of the sale from Flagler to the plaintiff, were not interested directly or indirectly in the shares that were so sold, and received no part of the consideration. In short, there was an utter failure of proof to sustain the first above stated theory of liability.

Evidence was introduced which tended to prove that a charter was legally obtained; that the defendants as directors carried through a bargain with Flagler by which all the stock (except 10 qualifying shares) was issued to Flagler as full paid and nonassessable, in consideration whereof Flagler turned into the company's treasury at least 15,000 of said shares and agreed to convey to the company a certain so-

called mine; that the company held options on certain grounds and buildings which the defendants hoped would be useful in creating the business for which the company was chartered; that, of the stock which Flagler retained, certain amounts were distributed among the defendants gratuitously; that the defendants intended that the stock in the treasury should be sold by the treasurer to the public for the purpose of raising money with which to try the experiment of making their otherwise worthless stock valuable; that the treasurer, in endeavoring to sell treasury stock, issued a prospectus which consisted mainly of false and misleading statements; that some of the defendants actually knew the statements were false, and others were conscious that they had no knowledge that the statements were true (*Lehigh Zinc Co. v. Bamford*, 150 U. S. 665, 673, 14 Sup. Ct. 219, 37 L. Ed. 1215); that the plaintiff in buying relied on the truthfulness of the statements in the prospectus and in the treasurer's letter; and that plaintiff was damaged to the extent of the purchase money because the stock was valueless.

As already stated, the plaintiff bought of a broker who was selling stock owned solely by Flagler. Not only was no purchase made by the plaintiff of treasury stock, or of stock in which the defendants were otherwise interested; but the record fails to show any legal ground for the plaintiff even to claim that he was buying treasury stock. On the contrary, the letter of the treasurer was explicit notice that the broker, in offering stock to the plaintiff at 50 cents on the dollar, must be dealing in stock that had already left the treasury.

Only one inference can be drawn from the prospectus. The defendants were inviting every one into whose hands the prospectus should come to buy treasury stock. That was in aid of the conspiracy, and the only conspiracy, which the evidence tended to sustain. And to all persons who bought treasury stock—who paid their money into the fund over which the defendants had a control and interest in common—relying on the truth of the statements of fact in the prospectus, all of the defendants who were parties to the false statements might well be held answerable in damages. But the plaintiff, so far as the defendants were concerned, was a purchaser on the market. And while the sponsors for false prospectuses that are issued to bring in money to the common treasury are justly made to respond to all persons who take the invited action, yet the law recognizes no right of action in one who relies without invitation on a statement addressed to a particular class which he stays out of. *Peek v. Gurney*, L. R. 6 H. L. 337; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Hunnell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. "It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff had relied upon it and sustained injury. The moral obligation to speak the truth is not ground for a civil action unless the misrepresentation was intended to induce the very action by the plaintiff which has resulted in his damage." By the prospectus the defendants intended merely to induce the plaintiff or any other reader of it to pay his money into the treasury and receive stock from the company as seller. And the letters between the

plaintiff and the company do not change the situation in the slightest. The plaintiff did not frankly disclose what he was thinking of doing. On the contrary, he asked the company to name the price at which it would sell him stock—just what the company would expect from any one who had been attracted by seeing or being told of the prospectus. The company's letter in reply incloses another copy of the prospectus, repeats the representations thereof largely, and invites the plaintiff to buy some of the stock which the company is selling "for equipment purposes and working capital." Plaintiff's purchase of Flagler stock at 50 cents was not only outside of the action invited by the prospectus and letter, but was destructive of the defendants' endeavor to place treasury stock at 100 cents. So the case, on the evidence touching this branch of it, comes to this: While the defendants' deceit may afford a ground of action in favor of those who were misled into paying their money (or property) into the treasury for stock sold by the company, the deceit does not run with the stock into the hands of subsequent transferees.

The judgment is affirmed.

HOFFMAN v. GOSLINE et al.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1909.)

No. 1,904.

1. SALES (§ 340*)—REMEDIES OF SELLER—ASSUMPSIT—REQUISITES—TITLE.

A seller cannot recover in assumpsit for goods sold and delivered unless title has passed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 927; Dec. Dig. § 340.*]

2. SALES (§ 218½*)—CONTRACT—PASSING TITLE—"SHIPPED TO."

Defendant ordered plaintiffs to "ship to" defendant at a specified place and over a specific route 50 cars of coal of a certain grade and price f. o. b. mines, to be shipped during the first week in April, 1906. *Held*, that the words "shipped to" did not indicate an intention that defendant should control the coal in transit; and hence the fact that plaintiffs shipped the coal in their own name did not necessarily as a matter of law disclose an intent to retain title after delivery of the coal to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

3. SALES (§ 199*)—PASSING TITLE—INTENT.

The time of passing title to chattels sold depends on the intention of the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 517; Dec. Dig. § 199.*]

4. SALES (§ 201*)—PASSING TITLE—"F. O. B." SHIPMENTS.

The ordinary effect of a purchase of coal at a specified price "f. o. b. mines" is that title shall pass on delivery of the coal to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 535, 536; Dec. Dig. § 201.*]

5. SALES (§ 200*)—PASSING TITLE—CONDITIONS PRECEDENT—WEIGHING.

Where defendant requested plaintiffs to ship to defendant at a specified place 50 cars of coal of a specified kind at \$2.25 f. o. b. mines during the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

first week in April, 1906, shipping date guaranteed, and defendant accepted regardless of conditions, weighing the coal was not a condition precedent to the passing of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 525, 526; Dec. Dig. § 200.*]

6. SALES (§ 199*)—PASSING TITLE—INTENT.

Where no rights of creditors had intervened, and there was no question of the buyer's ability to pay for coal purchased and refused, it was the seller's right to rebut the presumption of intent to retain title by consigning the coal to the place of delivery in the name of the seller, instead of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 517; Dec. Dig. § 199.*]

7. SALES (§ 218½*)—PASSING TITLE—QUESTION FOR JURY.

In an action for goods sold and delivered, but shipped by the seller in its own name, and not to the buyer as consignee, whether title passed was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

8. SALES (§ 218½*)—PASSING TITLE—QUESTIONS FOR JURY.

Where an action for goods sold depended on whether the title passed, the court's failure to submit to the jury the precise lines of inquiry into the facts from which they were to determine such issue was prejudicial error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action in assumpsit upon the common counts. It was commenced in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, by plaintiffs below, partners under the firm name of Gosline & Co., of Toledo, Ohio, against Hoffman, defendant below, of Detroit, Mich. The action grew out of a contract, notice of which was given under the plea of the general issue. The cause was tried to the court and a jury, and resulted in a verdict in favor of the firm for \$4,574.78. Judgment with interest thereon was entered, and in due course the cause was brought here upon proceedings in error.

The bill of particulars of the demand made and of the recovery sought was the "purchase price of fifty cars, containing 1,858.45 tons Kanawha gas run of mine coal, at \$2.25 per ton, f. o. b. mine, \$4,181.51." The contract before alluded to was made through correspondence. On March 30, 1906, Hoffman telegraphed an order to Gosline & Co. in substance:

"Please ship to Jules G. Hoffman, at Junction Yards, Mich. Route, M. C. R. R. * * * 50 cars * * * Kanawha gas run-of-mine; * * * price \$2.25, f. o. b. mines * * * to be shipped first week in April, 1906. Shipment at above date guaranteed." On March 31st Gosline & Co. accepted this order by letter, stating among other things: "Shipment next week. Mines have agreed to ship this regardless of conditions, and in selling it to you we understand you are to take the coal on the same basis." On April 2d Hoffman acknowledged receipt of this letter, and, after allusion to his order, closed with the words, "for shipment this week, regardless of conditions." It seems that at the time there was some prospect of a coal strike in the soft coal regions, though no strike occurred and the prices of coal declined. Gosline & Co. had on March 28th purchased 50 cars of the same grade of coal at \$1.50 per ton f. o. b. mines from a company of Charleston, W. Va., which was operating coal mines at Paint Creek on the Chesapeake & Ohio Railroad, in that state. Gosline & Co. undertook to fill the Hoffman order from that source. As the coal was loaded on the cars at the mines, card bills, as they

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were called, were made out by representatives of the coal operating company, showing the numbers of the cars, consignor, consignee, route, and destination. The cards were then deposited by the operating company at an agreed place, from which they were taken by the railroad conductors when the loaded cars were removed by the railroad company. The loaded cars were automatically weighed as they passed over the scales at Paint Creek Junction, and were thence transported to their destination. These card bills were taken up at the weighing station and waybills were made and substituted, with the addition, however, of the weights of the coal. No bills of lading were issued, and the waybills were, as was usual, given only to the conductors who were in charge of the trains, as means of identifying and directing the cars to their destination. Gosline & Co. kept trace of the cars through their numbers, which were furnished them both by an agent they had at the mines, and by the railroad agents. The card bills and waybills representing the coal in question contained the name of Gosline & Co., by their direction, both as consignors and consignees, destination and route in each instance being Junction Yards, Mich., via Michigan Central Railroad.

Evidence was offered tending to show that 50 cars were loaded at the mines with coal of the required grade and quality, billed in the manner mentioned, and turned over to the railroad company within the first seven days of April, 1906; that Gosline & Co. notified Hoffman of the shipments of the coal as often as made, giving numbers of cars and destination, Junction Yards, and at the same time notified the proper railroad agents that the coal belonged to Hoffman and to deliver same to him; that the railroad agent at Junction Yards, upon arrival of cars, seasonably notified Hoffman, who declined to receive the coal. The evidence tended to show that 23 of the cars were loaded and delivered to the railroad on or before April 6th, and the remainder on April 7th; also, that seven of the cars were weighed and their transportation commenced prior to the 7th, and the remainder upon the 7th, and at various dates thereafter until the 15th. In the forenoon of April 7th Hoffman sent a telegram to Gosline & Co. stating: "I hereby cancel my order. * * * You will have to divert." Gosline & Co. communicated with Hoffman both by telephone and telegraph, the telegram reading: "Every car in your order * * * is either en route or will go forward to-day. This is per agreement. We cannot cancel." Hoffman wired in return at 11:57 a. m.: "Your telegram order is absolutely canceled; will not accept coal." At 3:14 p. m., Hoffman wired again: "My order was canceled and you ship coal at your own risk." Gosline & Co. confirmed their course by letter of April 7th, which Hoffman answered on the 9th, alluding to telephone conversation and confirming his telegrams. The 50 car loads of coal were subsequently sold by the railroad company for demurrage. Each of the parties to the action disclaimed any interest in the coal, and refused to have anything to do with it.

J. B. Murfin, for plaintiff in error.

H. C. Bulkley, for defendants in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The assignments of error are numerous, but need not be noticed in detail. Each side presented charges, requesting among other things a directed verdict. The leading issue presented by the record and by counsel is whether title to the coal passed to Hoffman. It is conceded by both sides, as under settled law it must be, that in an action like this—declaration on the common counts—recovery was not permissible unless title had passed.

It is claimed on behalf of plaintiff in error that title did not pass for several reasons: In the first place, that the contract in terms re-

quired the coal to be consigned to Hoffman by name. In the next place, that consignment of the coal to Gosline & Co. disclosed a purpose in them to retain title, and so be able, as was customary under conditions like those threatened, to divert the coal to others at higher prices. And, finally, that Hoffman's refusal to receive the coal prevented transmission of title, and consequently recovery in an action like this. It is maintained on behalf of defendants in error that consignment to Gosline & Co., with intent to transfer title to Hoffman, giving notice to that effect to him and the carrier, was consistent with the contract, and that they anticipated and met the other claims by evidence (1) explaining that the sole object of so consigning the coal was to avoid revealing the name of their customer to the mine operators, and that it was customary so to do, as Hoffman well knew; and (2), if we understand it, showing that the coal had been delivered to the railroad company at the mines when notice of Hoffman's effort to cancel the contract was received.

We are not persuaded that the contract required consignments to be made only in the name of Hoffman. Of course, consignments made in his name would have been in harmony with the contract. But did the language so restrict consignments? As it seems to us, the words "ship to Jules G. Hoffman, at Junction Yards, Mich. Route M. C. R. R.," meant that the coal should be placed in Hoffman's actual possession at Junction Yards, rather than that it should be placed at his disposal in transit. Expressly naming destination necessarily meant dominion of the coal in Hoffman at that place; but mentioning only a portion of the route, and omitting any point of origin or any route leading thence to the Michigan Central Railroad excluded demand for control in transit, and left the consignment open to any explanation which was consistent with transfer of title at the mines. If control in transit and possession at destination were intended to be made alike material, surely that intent should have been distinctly expressed. The words "ship to" a person named, "at" a specified place, are hardly calculated to reveal a purpose to control in transit, so much as an order for delivery of the thing at the place named. Indeed, it is hard to see why it would not have been a compliance with the language we are considering, if Gosline & Co. at the time of receiving and accepting the order of Hoffman had been in control at Junction Yards of 50 cars of coal of the kind required, and had tendered the same to Hoffman.

We therefore think any construction of the contract which would restrict consignment exclusively in the name of Hoffman would attach unusual rigor to the meaning of the words "ship to," and would also bring them into conflict with the usual effect accorded to the intention of the parties where passing of title is in question. In *Harrison v. Fortlage*, 161 U. S. 57, 63, 16 Sup. Ct. 488, 490, 40 L. Ed. 616, it was held that a contract "to ship by a certain vessel for a particular voyage" did not necessarily mean that the goods must be carried in that vessel throughout the voyage. See, also, *Fisher and Another v. Minot*, 10 Gray (Mass.) 260, 262; *Mora y Ledon v. Havemeyer*, 121 N. Y. 179, 186, 24 N. E. 297, 8 L. R. A. 245; *Clark v. Lindsay*, 19 Mont. 1, 4, 47 Pac. 102, 61 Am. St. Rep. 479.

The foregoing views are strengthened, we think, by the law applicable to consignments made by consignors to themselves instead of their vendees. Nothing perhaps is better settled than that the intention of the parties must be given controlling effect in issues concerning the passing of title to chattel property. It is not open to serious dispute that the contract under review discloses a common intent in the parties to transfer title to the coal, when placed upon the cars and delivered into the custody of the carrier. This is but the ordinary effect to be given to "f. o. b. mines." If the consignments had been made in the name of the vendee, there could have been no question so far as this contract is concerned as to passing title to all coal loaded on cars and seasonably delivered into the custody of the carrier at the mines. In that event the appropriation of the coal to the buyer would have been complete; for in our view the contract did not make weighing a condition precedent to the passing of title. Now, since no rights of creditors had intervened, and no question of vendee's ability to pay had been made, it was open to the vendor, by pertinent facts and circumstances, to rebut the presumption of intent to retain title by consigning the coal in the firm name. *Dows v. National Exchange Bank*, 91 U. S. 618, 633, 634, 23 L. Ed. 214; *Joyce v. Swann*, 17 C. B. (N. S.) 83; *Browne v. Hare*, 4 H. & N. 821, 828; *Gibbons v. Robinson*, 63 Mich. 146, 150, 154, 29 N. W. 533; *Emery's Sons v. Irving National Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Straus v. Wessel*, 30 Ohio St. 211; *Merchants' National Bank v. Bangs*, 102 Mass. 291; *Hobart v. Littlefield*, 13 R. I. 341; *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *McKay & Co. v. McKenna*, 173 Pa. 581, 34 Atl. 236.

This reduces the case to an issue of fact. Under our view of the evidence, this issue was one for the jury. It follows that the requests made on behalf of the parties respectively for charges directing a verdict were properly overruled. But we are constrained to think, with deference, that the general charge failed to submit to the jury the precise lines of inquiry into the facts which they were to determine. We think that this amounted to prejudicial error, and that the case should be retried under appropriate instructions concerning the passing of title. The judgment is accordingly reversed, and a new trial awarded.

LOUISVILLE & N. R. CO. v. F. W. COOK BREWING CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,505.

1. CARRIERS (§ 45*)—SUIT TO COMPEL INTERSTATE CARRIER TO RECEIVE AND TRANSPORT GOODS—JURISDICTION.

A suit to compel an interstate carrier to receive and transport property tendered for shipment is one to enforce performance of a duty imposed by general law, and within the jurisdiction of the courts, and the complainant is not required to resort in the first instance to the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 45.*]

2. COURTS (§ 6*)—SUIT TO COMPEL INTERSTATE CARRIER TO RECEIVE AND TRANSPORT GOODS—JURISDICTION.

A suit to compel an interstate carrier to receive and transport property tendered for shipment is one in personam, and may be maintained in a court, state or federal, in the state where the shipments were tendered, where such court has jurisdiction of the parties, regardless of the fact that the shipments were refused because of a statute of the state where they were consigned for delivery.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 6.*]

Jurisdiction over corporations, see note to St. Louis, I. M. & S. Ry. Co.

v. Newcom, 6 C. C. A. 174.]

3. COMMERCE (§ 33*)—INTERSTATE COMMERCE—REGULATION BY STATES—INTOXICATING LIQUORS.

A state statute prohibiting carriers from carrying intoxicating liquors into any county or district therein where the sale of such liquors is prohibited by law, as applied to shipments from other states, is void as an attempted regulation of interstate commerce, and affords no justification for the refusal of a railroad company, although a corporation of such state, to receive and carry such shipments.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

Appeal from the Circuit Court of the United States for the District of Indiana.

Philip W. Frey, for appellant.

George A. Cunningham, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. On bill and answer a decree was entered restraining appellant from refusing to accept interstate shipments tendered by appellee. The facts from which arise the questions necessary to be answered are these: Appellee is an Indiana corporation operating a brewery at Evansville. Appellant is a Kentucky corporation doing business as an interstate carrier on an interstate railroad extending through Indiana and Kentucky. In 1906 Kentucky passed an act declaring it to be unlawful for carriers to bring intoxicating liquors into any county or district where the sale of such liquors had been legally prohibited. In 1907, shortly before appellee filed its bill, appellant published a circular, posted it in stations, and filed it with the Interstate Commerce Commission, directing appellant's agents to refuse to accept shipments of intoxicating liquors, whether intrastate or interstate, destined to points within Kentucky prohibition territory. Before this, appellant shipped beer for appellee to all Kentucky points on its line (from which fact we deduce that appellant had duly made and published proper classifications and rates for such shipments). After the issuance of the circular aforesaid, appellant refused to accept appellee's beer shipments to prohibition points, though the full freight charges were tendered in advance, but continued to accept such shipments to nonprohibition points. Appellee filed its bill in the state court at Evansville.

The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission, we deem untenable. No complaint was made that the beer rates were unreasonable.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ble, either in themselves or on comparison with rates for other commodities, or that appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But the suit here was based on appellant's refusal to carry under any circumstances goods of a class for which appellant had made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). And the act itself provided that nothing therein should in any way abridge the remedies at common law. See *Danciger v. Wells, Fargo & Co.* (C. C.) 154 Fed. 379.

Jurisdiction (resting upon the original jurisdiction of the state court) is further assailed on the ground that the decree affects property and rights of appellant beyond the territorial reach of the court. The state court, and the federal court on removal, had full jurisdiction of appellant's person. The suit was in personam. The act complained of was appellant's refusal in Indiana to accept in Indiana goods for shipment into Kentucky. That part of the decree which directs the performance of acts in Indiana is beyond the scope of the attack. Therefore the decree should not be vacated (nor modified, since no motion to modify was made), even if there were any merit in the contention that the command to make deliveries in Kentucky was erroneously included in the decree.

We find nothing in the case to justify appellant's refusal. Beer is recognized by the law of the land as a commodity in which persons may deal as freely as in other commodities, except to the extent that such traffic is restrained or prohibited by express legislation. The Kentucky legislation was effective only as an exercise of local police power. As a regulation of interstate commerce it was utterly void. *Cincinnati, etc., R. Co. v. Commonwealth*, 126 Ky. 563, 104 S. W. 394, 31 Ky. Law Rep. 954; *Heymann v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178. And under the Wilson act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) the local police power could not attach until after delivery of the beer to the Kentucky consignee. *Foppiano v. Speed*, 199 U. S. 501, 517, 26 Sup. Ct. 138, 50 L. Ed. 288; *Heymann v. Southern R. Co.*, *supra*.

In support of its reliance upon the Kentucky statute appellant in its answer alleged that as a Kentucky corporation it had covenanted with Kentucky to obey the Kentucky laws. If as between Kentucky and appellant the promise was meant to include void statutes, the right of Indiana citizens to require appellant to perform fully its duty as an interstate carrier under the laws applicable to interstate commerce could not be thereby altered or diminished. For otherwise appellant would be endowing the Kentucky Legislature with a power forbidden it by the federal Constitution.

The answer attempted a further justification on the ground that the promulgation and enforcement of appellant's aforesaid circular was "in the exercise of its power as a common carrier to make reasonable rules

and regulations as to the kind of goods and commodities which it would transport and carry as such common carrier." Conceding the power to the full extent stated in the numerous authorities cited by appellant (see 5 A. & E. Ency. of Law [2d Ed.] 162, as illustrative), we find no facts either in the answer or the bill on which to base the reasonableness of the promulgated rule. As a mere transportation problem there was no difference between carrying a case of beer to a "wet" Kentucky county and carrying one to the adjoining "dry" county. Appellant did not claim that it was not equipped or did not choose to carry that class of property. On the contrary appellant's general practice was to accept such traffic. In argument it was suggested that a good reason for making the difference between beer shipments to "wet" and to "dry" counties might be found in the damage to its business which appellant might suffer from fines, costs, withdrawal of patronage, punitive regulations, etc., if it should fail to obey the void Kentucky statute. That is speculation for which we find no warrant in the record. The bill averred that the statute, so far as it affected interstate commerce, was held void in the first case that arose, and that all the railroads in Kentucky except appellant had been carrying beer to "dry" counties without any prosecutions being instituted. The answer merely stated that appellant "would render itself liable to prosecution." Appellant did not even allege a belief that prosecutions would be undertaken, much less that they would end in fines, or that other evil consequences would follow. And such an apprehension, if speculation is to be indulged, would probably be groundless unless appellant should voluntarily go beyond its province of carrier and make itself a party to illegal sales after the transportation was ended—a thing conceivable in "wet" as well as in "dry" counties. So the reasonableness of the rule really comes back to rest on appellant's mere desire to carry out the policy exhibited in the void, as well as in the valid, part of the Kentucky statute. While this may be not uncommendable in appellant as a Kentucky corporation, at the same time appellant as an interstate carrier should not overlook the fact that the paramount congressional policy stands expressed in the Wilson act.

The decree is affirmed.

UNION CARBIDE CO. v. AMERICAN CARBIDE CO.

(Circuit Court, N. D. New York. August 2, 1909.)

1. PATENTS (§ 75*)—PRIOR PUBLIC USE—WHAT CONSTITUTES—EXPERIMENTAL USE.

An experimental use of a new invention or discovery, which will not defeat the right of the inventor to a patent unless application is made within two years, must have been in perfecting the invention, and where the discoverer of a new form of calcium carbide, who made a considerable quantity, used the same in experiments in making acetylene gas, etc., not for the purpose of perfecting it, but to demonstrate its commercial value, and also sent a quantity abroad without injunctions of secrecy or restrictions upon its use, where it was used for like pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

poses, such use constituted a public use or disclosure within the meaning of the law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 95; Dec. Dig. § 75.*]

Priority and continuance of public use of invention as affecting patentability, see note to *Eastman v. Mayor*, etc., of City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 110*)—PRIOR PUBLIC USE—TIME OF APPLICATION—SUCCESSIVE APPLICATIONS.

The discoverer of a new form of a chemical product made an application for a broad patent thereon, which was rejected, and he afterward, but more than two years after his product had been in public use, made a new application for a more limited patent, which after various amendments was granted. *Held*, that the second application was a continuation of the first in such sense as to take the case out of the limitation of the statute; the product which was the subject of both applications being the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 153; Dec. Dig. § 110.*]

3. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—CRYSTALLINE CALCIUM CARBIDE.

The Willson patent, No. 541,138, covering "as a new product crystalline calcium carbide existing as masses of aggregated crystals," is valid, but is limited to the one form of crystalline carbide "existing in masses of aggregated crystals," and does not include other forms which had been previously produced. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for alleged infringement of United States letters patent No. 541,138, to Thomas L. Willson, dated June 18, 1895, for an alleged new product existing in the form of crystalline calcium carbide, and for an accounting.

Louis C. Raegener, for complainant.

Kernan & Kernan (Charles Neave and Willis Fowler, of counsel), for defendant.

RAY, District Judge. The claim of the patent in suit, No. 541,138, dated June 18, 1895, application filed March 4, 1895, and granted to Thomas L. Willson, for "product existing in form of crystalline calcium carbide," reads as follows:

"As a new product crystalline calcium carbide existing as masses of aggregated crystals, substantially as described."

The patent says:

"This invention relates to the production of a new form of crystalline calcium carbide. Before my invention, calcium carbide has existed in an amorphous condition, due either to the method of its preparation, or to the impurities contained in it. By my invention herein described, calcium carbide is produced in a new form, namely, in crystalline condition, having a bluish or purplish iridescence. The carbide so existing is in a condition particularly applicable, on account of its purity, for conversion into other compounds."

The patentee then describes his process, and then says:

"The liquid calcium carbide thus produced, when allowed to cool, crystallizes into the form above described, and when broken exhibits the iridescent surfaces above named."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

He then states that by his process the yield of calcium carbide per electric horse power is almost doubled over a process of using direct current, etc. He then describes the mode of preparing the material, etc. He also says in the very beginning of his specifications:

"I have invented a new and useful product existing in the form of crystalline calcium carbide."

One is impressed with the idea that the patentee claims to have invented a new product which in the claim he says is "crystalline calcium carbide existing as masses of aggregated crystals." He, as seen, expressly states that his invention relates to the production of a "new form of crystalline calcium carbide." That form is emphasized in the claim as "existing as masses of aggregated crystals," and to repeat:

"By my invention herein described, calcium carbide is produced in a new form, namely, in crystalline condition having a bluish or purplish iridescence."

The quality contended for is greater purity, and therefore greater adaptability for conversion into other compounds.

If "crystalline calcium carbide existing as masses of aggregated crystals" of the form and quality substantially as described, viz., a "crystalline condition," was old, then we have no new product. The patent on its face admits that calcium carbide had existed in an "amorphous" condition—that is, having no determinate form, no regular structure, not crystallized, having no particular form or shape—but claims that the patentee has produced a calcium carbide "existing in masses of aggregated crystals," therefore crystallized, and that, existing in the new form, it possesses greater purity and is therefore better adapted for conversion into other compounds. If this product did not exist before, and Willson did produce it, utility must be conceded. This is the patent, and this the claim, and no matter what Willson invented or produced, if he has not described and claimed it, his patent cannot be upheld. This has become elementary in patent law, and the subject will be referred to later.

The defendant urges three grounds of invalidity, viz.:

"First, because, even assuming that the prior calcium carbides were amorphous, there is no patentable novelty in the crystalline form whether or not existing as masses of aggregated crystals.

"Second, because, if the claim is for crystalline calcium carbide (and is not modified by the words 'existing as masses of aggregated crystals'), it is directly anticipated by the Woehler calcium carbide which, we contend, was crystalline.

"And, further, the patent is invalid because, as we point out at pages 57-66, *infra*, if Willson's story is to be believed, the claimed product was in public use or on sale for more than two years prior to filing the application for the patent in suit."

The defendant also insists that it does not produce "calcium carbide existing as masses of aggregated crystals," and therefore does not infringe; but suppose it true that calcium carbide before Willson existed only in an "amorphous condition"—that is, "not crystallized"—and defendant produces it in a crystallized condition, and of the necessary purity, even if it does not always exist "as masses of aggregated crystals," does it not infringe? Is the existence of defendant's product

in masses of aggregated crystals essential to constitute infringement if it produces it in the crystallized form as distinguished from the amorphous form and it only existed in the amorphous form before? What is the essence of the Willson invention if there be invention? Is it calcium carbide crystallized, or is it calcium carbide existing as masses of aggregated crystals? The defendant insists that the claim must be narrowly construed to embrace only that specific form of crystalline calcium carbide which exists as masses of aggregated crystals, and that it is not a claim for crystalline calcium carbide or for calcium carbide. The defendant insists that the claim as originally made was rejected, and rejected again after amendment, and only allowed when the words, or limitation, "existing as masses of aggregated crystals," were inserted.

It is conceded that after Willson made his invention, whatever it was, that he applied for a patent for calcium carbide broadly and was rejected. He then filed the claim in suit. The first application was filed March 16, 1893, and the claim read:

"The new product hereinbefore described; the same being a carbide of calcium with or without metallic calcium."

The file wrapper of this patent shows that the original claim filed March 4, 1895, read as follows:

"As a new product, crystalline calcium carbide having a bluish iridescence, substantially as described."

That this claim was rejected March 19, 1895, on:

"U. S. 492,377, Feb. 21, 1893, Willson (Fused Bath Aluminum); Comptes rendus, vol. 119, p. 16, July 2, 1894; Roscoe & Schorlemmer's Treatise on Chemistry, vol. 3, part 2, Manchester 1884, p. 445 (455). Comptes rendus, vol. 119, refers to calcium carbide as crystalline."

Thereupon, May 8, 1895, Willson, by E. N. Dickerson, his attorney, filed the following communication and affidavits:

"To the Hon. Commissioner of Patents—

"Sir: I amend this case as follows:

"Amend claim 1 by adding after the words 'calcium carbide' the words 'existing as masses of aggregated crystals.'

"Add the following claim:

"2. As a new product, crystalline calcium carbide existing as masses of aggregated crystals, substantially as described.

"A sample is furnished herewith.

"It is respectfully insisted that the references do not meet the claims. There is no description of crystalline calcium carbide in Willson's 1893 patent, or in Roscoe and Schorlemmer. An affidavit filed herewith antedates the publication in the Comptes Rendus of July 2, 1894.

"So far as the present first claim is concerned, there is the additional distinction of the peculiar bluish iridescence obtained by Mr. Willson's process, and not to be found in any of the anticipating references.

"Respectfully,

E. N. Dickerson, Atty. for T. L. Willson.

"May 8, 1895.

"City of Washington, District of Columbia—ss.:

"Thomas L. Willson, being duly sworn, deposes and says: I am the applicant in the above-entitled application. Previous to July, 1894, I had practically produced crystalline calcium carbide on a large scale in the United States. I had previously produced several tons of such material, and I had more than

a ton of such material in New York at that time. This fact, if desired, can be verified by affidavits of numerous witnesses.

"Thomas L. Willson.

"Sworn to and subscribed before me this eighth day of May, A. D. 1895.

"[Notarial Seal]

W. Clarence Duvall, Notary Public."

"City of Washington, District of Columbia—ss.:

"Thomas L. Willson, being duly sworn, deposes and says: That he is the applicant in the above-entitled application, and that he executed an affidavit in said application dated the 8th day of May, 1895, in which he stated that he had practically produced crystalline calcium carbide on a large scale in the United States prior to a certain date. He now reiterates that statement and supplements it with the statement that prior to September, 1892, he had produced crystalline calcium carbide in practical quantities, and in September, 1892, he sent a quantity of it to Lord Kelvin, at Glasgow, Scotland. This crystalline calcium carbide was produced, broadly stated, by subjecting calcium oxide with carbon to the action of an electric arc, using an electric current of about thirty-five volts and two thousand amperes. The crystalline calcium carbide produced thereby has the formula CaC_2 . Since that time deponent has been constantly engaged in practically producing this crystalline calcium carbide, and has produced it in large quantities and on a commercial scale. And further deponent saith not.

"Thomas L. Willson.

"Sworn to and subscribed before me this ninth day of May, A. D. 1895.

"[Notarial Seal]

W. Clarence Duvall, Notary Public."

Thereupon the commissioner held that there was no patentable difference between the old claim as amended and the new claim, as the only difference in the wording was that the old claim as amended retained the words "having a bluish iridescence," which were omitted from the new and added claim. Thereupon Willson, by his attorney, struck out claim 1 as amended, leaving the new claim, and this was allowed. The old claim, claim 1, as amended, read as follows:

"1. As a new product, crystalline calcium carbide existing as masses of aggregated crystals having a bluish iridescence, substantially as described."

And the added claim read:

"2. As a new product, crystalline calcium carbide existing as masses of aggregated crystals, substantially as described."

Claim 1 being struck out, 2 remained and was allowed. This was a change which followed the rejection based on the statement that prior publications showed that calcium carbide existed as crystalline. The change was the insertion of the words in the new claim, as in the old, "existing as masses of aggregated crystals." Is this a self-imposed limitation, in view of the action of the Patent Office? Is it a limitation imposed by the Patent Office and acquiesced in by the applicant in order to obtain his patent. The change and modification or limitation of the claim certainly followed the action of the Patent Office. The words "existing as masses of aggregated crystals" cannot be held to be meaningless. It may be a disputed and disputable question whether the claim was allowed because of the affidavits presented to the Patent Office, or because of the limitation put in the claim. Clearly the limitation was put in the claim to avoid the objection of the commissioner of patents. It is equally clear that this patent is not for "crystalline calcium carbide in all its forms." The patent on its face recognizes the prior existence of crystalline calcium carbide, and expressly says:

"This invention relates to the production of a new form of crystalline calcium carbide. * * * By my invention herein described, calcium carbide is produced in a new form, namely, in crystalline condition having a bluish or purplish iridescence."

The patent expressly names crystalline calcium carbide as pre-existing, and states that the invention has to do with "a new form" thereof, and that this new form of the product has "a bluish or purplish iridescence," and in the claim the patent says it exists "as masses of aggregated crystals." This has to do with form. What impresses me is: If Willson supposed he had found or made crystalline calcium carbide as a new product, why did he not say so and adhere to his claim? Why did he say that his invention relates to "a new form of crystalline calcium carbide?" How can there be a "new form" of a thing in the absence of the thing itself? "Crystalline" is thus defined by the Century Dictionary:

"Consisting of crystal, relating or pertaining to crystals or crystallization, formed by crystallization; of the nature of a crystal, especially as regards its internal structure, cleavage, etc.—opposed to amorphous."

It seems to me plain on the face of the patent, in connection with the file wrappers of his previous applications, that during the prior proceedings in the Patent Office, resulting in the final rejection of the claim for calcium carbide broadly, Willson had become informed that crystalline calcium carbide existed and was known prior to the date of his invention, and that after the rejection of his claims he made up his mind that he had discovered, produced, and invented "a new form" of crystalline calcium carbide, one having a peculiar iridescence and existing as masses of aggregated crystals, and therefore first claimed the new form of crystalline calcium carbide having a bluish or purplish iridescence, and later made his description of this new form of crystalline calcium carbide more specific by inserting in the claim the particular form in which it existed as claimed by him to be a new product. I can account for the presence of these descriptive and limiting words in no other way.

About August 5, 1892, Willson filed an application for a process patent, "electric reduction of refractory compounds," in which he described his use of the electric arc, his present process, and said therein, referring to the electric arc:

"I have already employed it for reducing calcium oxide and producing calcium carbide."

Did he then know he had produced crystalline calcium carbide? If so, why did he not so state, and why, in his application filed March 16, 1893, did he not claim crystalline carbide?

In November, 1899, Moissan published an article, "Researches on Calcium and Its Compounds," in which he says:

"At the temperature of the electric furnace, the lime is thus reduced by the carbon under the formation of calcium vapors. If there is, in the presence of this vapor, solid or gaseous carbon, there is at once produced calcium carbide. In the presence of oxide of carbon, or of carbonic acid, there will be formed a mixture of oxide and of calcium carbide. These different reactions have an importance for the study of the industrial preparation of calcium carbide."

It is apparent from this and other publications and evidence that calcium carbide had been produced by the electric current in a suitable furnace as early as 1899, by others.

It is evident that Willson used the words "crystalline calcium carbide" in opposition to the words "amorphous calcium carbide." In fact he so states in substance. In 1891, D. H. Williams published in New York "Elements of Crystallography." He describes and illustrates "crystal aggregate" and "crystalline aggregate." He says:

"That portion of a homogeneous crystallized substance whose molecular arrangement is throughout the same along all parallel lines, and which is bounded by its own characteristic plane surface, is called a crystal individual. Such an individual is not of necessity completely bounded by crystal planes, since there is generally a larger or smaller point of attachment to other crystals. There must, however, be enough planes to allow of the restoration of the complete form. Anything less than this is a crystal fragment or grain.

"The union of two or more crystal individuals produces a crystal aggregate; while a mass of crystal grains, devoid of their characteristic forms and closely packed together, may be termed a crystalline aggregate."

We may therefore have at least two forms of crystalline calcium carbide—that existing in the form of crystal aggregates, or, what is the same thing, that existing as aggregated crystals, and this may be in masses, and that existing in the form of crystalline aggregates. The distinction exists and existed in 1891, long before Willson claims to have made his invention or discovery. He is presumed to have known the distinction. The same idea of the formation of crystals and crystalline bodies is expressed in volume 5, American Cyclopaedia [Ed. 1881], under "Crystallography." It is there stated:

"(11) While simple and twin crystals form when circumstances are favorable, in other cases the solidifying material becomes an aggregate of crystalline particles. Regular crystals often require for their formation the nicest adjustment of circumstances as to supply of material, temperature, rate of cooling, or evaporation, etc.; and hence imperfect crystallizations are far the most common in nature. A weak solution spread over a surface may produce a deposit of minute crystals, which, if the solution continues to be gradually supplied, will slowly lengthen, and produce a fibrous or columnar structure. In other cases, whether crystallization take place from solution, or fusion, or otherwise, the result is only a confused aggregate of grains, or the granular structure."

On the final hearing the position and claim of the complainant was that the words "existing as masses of aggregated crystals" in the claim of the patent is mere tautology; that they add nothing to the claim and detract nothing. This assumes that all crystalline calcium carbide exists as masses of aggregated crystals, and in no other form, and that the distinction made by Williams in the forms of crystalline bodies has no application to crystalline calcium carbide. If so, why did Willson insert the words in the original claim, and why did he add a new claim after the old one was rejected containing them? Was it to announce the alleged fact that he had invented or discovered a "new form" of "crystalline" calcium carbide, and that his "new form" of "crystalline" calcium carbide always existed as "masses of aggregated crystals?" By implication Willson says in his specifications of the patent in suit that calcium carbide has theretofore existed, so far as

known, in the amorphous condition only; that is, not in a crystalline condition.

I am of the opinion and hold under the weight of evidence that crystalline calcium carbide, as Willson understood it, exists in at least two forms—not referring to the amorphous condition, which is not crystalline in any sense, but the opposite.

In Willson's British patent of 1894, No. 16,342, he said:

"The product of this invention is distinguished from calcium carbide previously produced in minute quantities for laboratory experiments, in that it is crystalline existing in masses of aggregated crystals," etc.

It is evident that this is the form he had in mind as his production.

Whitlock, defendant's witness, says:

"In my opinion the assemblage designated by Williams as a 'crystal aggregate' represents a mass of aggregated crystals and is distinct from a 'crystalline aggregate.' A crystal aggregate, or in other words, a mass of aggregated crystals, is necessarily crystalline, since the latter term includes the former. A mass of aggregated crystals, is then a particular form of a crystalline aggregate."

Doremus, defendant's witness, says:

"Q. 40. You have, I believe, read the patent in suit. Please state what the product is that is there described and claimed.

"A. I have read the patent in suit, namely, No. 541,138, issued to Thomas L. Willson, and I have compared the statements in the specification with the claim. In the opening paragraph the patentee states that he has invented 'a new and useful product existing in the form of crystalline calcium carbide,' and in lines 9 and 10 states: 'This invention relates to the production of a new form of crystalline calcium carbide.' The claim reads: 'As a new product, crystalline calcium carbide existing as masses of aggregated crystals, substantially as described.' I am therefore of the opinion that the inventor desired to claim one form of crystalline calcium carbide; this new form existing as masses of aggregated crystals. Now it is stated in 'Elements of Crystallography, George Huntington Williams, Ph. D., 1891,' pages 16 and 17, defendant's Exhibit K, that: 'The union of two or more crystal individuals produces a crystal aggregate; while a mass of crystal grains, devoid of their characteristic forms and closely packed together, may be termed crystalline aggregate.' Two figures are given on page 17, Nos. 21 and 22, in illustration of this description. We find a similar state of affairs when we compare a large flake of snow, which consists of well-defined snow crystals, a mass of aggregated crystals, and a hailstone, which is a crystalline aggregate."

Mr. Crocker, defendant's witness, says:

"The development and use of the electric furnace which I have outlined, giving only a few of the prominent contributions to the subject, the literature of which is very extensive, proves that the heating effects of the electric current, whether used according to the arc or incandescent principle, was shown to the world by Davy a century ago, and was practically applied to the actual production of crystalline calcium carbide by Dr. Hare, as early as 1839. * * * The Cowles patent, No. 319,995, defendant's 'Exhibit BC,' specifically mentions oxide of calcium as one of the materials to be mixed with granular carbon and subjected to a high temperature in the Cowles electric furnace, which would result, and actually did result, in the production of crystalline calcium carbide. Nothing further was needed by one skilled in the art to enable him to employ this Cowles furnace and the lime and carbon mixture, in order to obtain crystalline calcium carbide. All that is necessary is to construct the Cowles furnace, use the mixture, and carry on the operations as set forth in the Cowles patents referred to, and the product will be crystalline calcium carbide."

In commenting on the patent in suit, he says that the words "existing as masses of aggregated crystals" were inserted by Willson "in view of and in order to differentiate from the prior art," which Crocker had fully described. He adds:

"This product patent and claim in suit therefor in view of the definite language quoted, does not and was not intended to cover all crystalline calcium carbide, and would not therefore cover all crystalline calcium carbide which is not amorphous."

I have read the evidence of the complainant's witnesses on all these points, but it is unnecessary to quote or discuss same here, as I am forced by the language of the claim, of the specifications, and Willson's letters and statements in his other patents, many of which I have not directly referred to, to agree with the defendant's contention that this is a limited claim, and limited to that form of crystalline calcium carbide which exists as masses of aggregated crystals, and which I find to be a form distinct from crystalline aggregates, which in common parlance may be spoken of as a mass of broken, confused crystals, mixed, it may be, with other material.

Does Defendant Infringe?

If there was patentable invention or discovery in what Willson did, assuming that he first produced or discovered crystalline calcium carbide existing as masses of aggregated crystals—that is, if it is a new and useful "manufacture or composition of matter"—and the defendant produces, or produces and uses, or sells same, it infringes and is liable as an infringer unless it be true that this product was in public use or on sale for more than two years prior to the filing of the application for the patent in suit. "Any person who has invented or discovered any new and useful * * * manufacture or composition of matter, or any new and useful improvement thereof," etc., is entitled to a patent therefor. There is much evidence tending to show that defendant does not produce, use, or sell crystalline calcium carbide existing as masses of aggregated crystals, but the other form, even if crystalline.

No weight can be given to the evidence of Prof. Moses, complainant's witness, that he finds defendant's product to be "crystalline calcium carbide existing as masses of aggregated crystals," as he constantly claims all through his evidence that the words "existing as masses of aggregated crystals" add nothing to the words "crystalline calcium carbide." In other words, to him all crystalline calcium carbide exists in this form, whether in regular crystal masses or in broken and crushed and confused masses. He recognizes no distinction between a crystal aggregate and a mass of crystal fragments or grains mixed with other material, or a crystalline aggregate. As he persistently refuses to recognize any difference between the one product and the other, he, of course, pronounces the one to be the same as the other. He makes defendant an infringer if it makes or uses any form of crystalline calcium carbide. In giving his reasons for his answer, I cannot discover that Prof. Moses anywhere shows or attempts to show that defendant's product exists as "masses of aggregated crys-

tals" as defined and described by Williams and by several witnesses in the case, or otherwise.

Thomas L. Willson, complainant's witness, says that he made the invention described in the patent in suit, No. 541,138, May 3, 1892, at Spray, Rockingham county, N. C. As his application was filed March 4, 1895, two years and ten months intervened between the making of his alleged invention and the filing of the application. He says that he had an electrical furnace in operation. On September 14, 1892, he wrote in his note book, describing his product "clean and perfect crystals of calcium carbide," and says he sent specimens abroad. Here was his new discovery, his new form of crystalline calcium carbide. In his notes he says he produced crystalline carbide from time to time before. He says that, on producing this calcium carbide of perfect crystals, he sent some of it to Lord Kelvin, Glasgow University, Kingdom of Great Britain. There was no injunction of secrecy, and Lord Kelvin used it. He also sent it to other places and made no secret of his discovery. His evidence is, however, to the effect that it was sent and used for information and to obtain information. It was, however, a public disclosure of his discovery. As to the quantities made at Spray—and he did make quite large quantities there—the evidence tends to show that it was used up by himself and his assistants in experiments in making acetylene gas, etc., not in improving his product; that is, his newly discovered crystalline calcium carbide of the new form or of any form. In fact, it could not be used in experimenting on that product or its production, but was used in experimenting in various compounds that could be made or produced from it, or which he supposed could be produced from it. He was making and using it, with others, to demonstrate, if possible, its success as a commercial commodity. It was not put on public sale, but it was publicly used in a sense.

But was it publicly used in any sense that brings it within the statute? It is a defense to show, and a person cannot have a patent for a new discovery if the new discovery had been in public use or on sale in this country for more than two years before the application for a patent, or had been abandoned to the public. In *Elizabeth v. Pavement Co.*, 97 U. S. 126, 135, 136, 24 L. Ed. 1000, Mr. Justice Bradley, in giving the opinion of the court, said:

"So long as he [the inventor] does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent; but if the inventor allows his machine to be used by other persons generally * * * then it will be in public use * * * within the meaning of the law."

One single case is sufficient to establish prior public use. In *Eastman v. Mayor*, 134 Fed. 858, 859, 69 C. C. A. 642, 643, the Circuit Court of Appeals in this circuit thoroughly discussed the question of prior public use and sale and laid down certain rules which it is not necessary to repeat; but it is settled that to be an experimental use the experiments must be made in perfecting the invention as described and shown. I take it that, when the invention claimed consists of a new and useful product or composition, time spent in demonstrating its commercial value, while it may be devoted also to determining its

actual qualities, is not time spent in perfecting the invention or discovery. Once made, the discovery is made; and, once discovered, using it, not to perfect or improve it, but to test its efficiency, its value for various purposes, its availability for commercial purposes, must be a public use, if done by others.

In *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755, it was said:

"If an inventor having made his device gives or sells it to another to be used by the donee without limitation, or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use and the knowledge of the use may be confided to one person."

There the inventor presented his invention, a steel corset, to a lady friend who wore same, and this was held a public use. Here we are not dealing with the process, but with the product, and Willson not only sent it to Lord Kelvin, but he informed him what it was, and Lord Kelvin used it, experimented with it, produced acetylene gas with it, and there was no injunction of secrecy or limitation on its use. It was not a corset to be worn, a machine for manufacturing, a vehicle for conveying persons or goods, but a new form of an old product but little used, and mainly for chemical or laboratory work. It was as much used by Lord Kelvin as it was capable of being used in the then state of the art and progress of science, viz., for generating acetylene gas.

In the case of *Egbert v. Lippmann*, the court said further:

"We say, thirdly, that some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye," etc.

This discovery was of that nature. True it could have been taken out into some public place and experimented with there, or used there; but that would have been out of the ordinary and unnatural. Suppose that the use by Willson and others was confined to a use in making and perfecting generators, burners, etc., in which or with which to use this new form of crystalline calcium carbide, or its product, was this an experimental use for perfecting the invention, the new discovery? This court thinks not. *Universal Adding Machine Co. v. Comptograph Co.*, 146 Fed. 981, 77 C. C. A. 227; *Young v. Clipper Mfg. Co.* (C. C.) 121 Fed. 560, affirmed 130 Fed. 150, 64 C. C. A. 502.

When the discovery of the product is complete, is made, then the application for the patent must be made within the two years thereafter, or the inventor runs the risk of losing the benefit of the discovery, if some other person to whom he has disclosed or delivered his invention has used it more than two years prior to the application for a patent. The main use of calcium carbide of any kind was to produce acetylene gas, or gas, and, when Lord Kelvin and others put it to this use, it was a user by them and a public use; there being no restrictions or limitations. But March 16, 1893, Willson filed an application for this discovery, in which he claimed calcium carbide broadly. He did not claim crystalline calcium carbide, or crystalline calcium carbide existing as masses of aggregated crystals. That application was rejected. He filed another claim for the process and product, and finally this claim. Was this sufficient to avoid the statute, or, putting it an-

other way, was this the filing of an application for a patent for his discovery, or invention, sufficient to comply with the statute? In view of *Victor Talking Machine Co. et al. v. American Graphophone Co.* (2d Cir.) 145 Fed. 350, 76 C. C. A. 180, I must hold, I think, that this was a continuation of the original application sufficient to take the case from the operation of the statute.

Returning then to the original proposition, Does defendant infringe? we must ascertain whether or not defendant's product is crystalline calcium carbide existing as masses of aggregated crystals. If so, infringement is made out if I am to hold the patent valid. I think the patent valid for what it claims, viz., crystalline calcium carbide existing as masses of aggregated crystals. I think this is a new form of calcium carbide produced by the use of lime in the presence of carbon heated, etc., in a so-called "electrical arc furnace," and that it is a form of calcium carbide which discloses such progress in the art as to make the patent valid. I think that by the process used by Willson he discovered a new and better form of crystalline calcium carbide, a new subdivision thereof. The *Encyclopedia Americana* says:

"Calcium carbide, CaC_2 has long been known and was prepared by Woehler, in 1862, by melting an alloy of zinc and calcium in the presence of carbon. Its commercial importance, however, dates from the discovery made by Mr. T. L. Willson, in 1892, that it can be formed by the direct combination of lime and carbon at the temperature of the electric furnace. * * * Its value in the arts depends upon the remarkable fact that when it is thrown into water a double decomposition occurs, by which acetylene gas is formed," etc.

Here no mention is made of the use of the electric arc by Willson. The same work (volume 1, "Acetylene") says:

"It [acetylene gas] was discovered in 1836 by Edmund Davy when experimentally trying water on the impure carbide produced by distilling calcined potassium; named by Berthelot, who, in 1862, prepared it by red-heating ethylene by electrically vaporizing carbon, and by incomplete combustion of coal gas; the same year (1862) Woehler produced the carbide by heating carbon with an alloy of calcium and zinc. Acetylene is also produced by the direct union of carbon and hydrogen when an electric arc is caused to pass between carbon terminals in an atmosphere of hydrogen; but both carbide and gas were laboratory curios till after 1892, when a new method of obtaining cheap carbide was accidentally discovered at the works of Thomas L. Willson, a Canadian at Spray, N. C., and perfected by the chemist Dr. G. De Chalmot and the electrician J. M. Morehead. And not long afterward Prof. Henri Moissan of Paris independently discovered the same in essence; the electric arc acting on mixed lime and carbon. This at once made the gas of great industrial importance for lighting and the carbide as an agricultural germicide."

On the evidence in this case, I think it was the process of Willson by which the production of crystalline calcium carbide, a pre-existing product, was cheapened, that gave it its commercial success. There may be other processes that will do the same thing, and those processes may have been known at the time Willson discovered his, and he may not have been the first to devise the process he claims; but that is not the question here. If the defendant uses the same process in producing its crystalline calcium carbide as that used by Willson, we may expect the same product in the same form if the same materials are also used. If the defendant uses a different process, or a different process and different materials, or even different materials

and the same process, it becomes a question, what is produced? That is, what form of crystalline calcium carbide is produced? It is not sufficient to show that the product of defendant produces acetylene gas, or that defendant's product is produced cheaply, or even by an electric furnace. In this case it is not sufficient for the complainant to show that defendant produces the commercial or chemical equivalent of complainant's crystalline calcium carbide existing as masses of aggregated crystals. The patent is for a particular form, a new form, and that form must be produced by defendant to constitute infringement.

Mr. Whitlock says that defendant's calcium carbide does not exist as masses of aggregated crystals. At page 114 of the defendant's record, he says, in answer to a question:

"Q. 67. Did you find that the calcium carbide made by the Woehler process, so called, and do you find that the defendant's calcium carbide, exists as masses of aggregated crystals, as just defined by you? A. I do not."

He also says, in defining "crystalline calcium carbide existing as masses of aggregated crystals," as follows:

"A. On page 6 of Bulletin 58 of the New York State Museum, under the heading 'Crystal Masses,' I have made the following statement: 'When a number of crystals are formed in a limited space, the individual crystals intersect and lap over one another, producing what is known as crystal masses. If this intersecting is carried to such an extent as to entirely fill the bounded space, leaving no interstices between the crystals, the mineral is said to be massive.' When I wrote the above sentence, I had in mind that the term 'crystal masses,' as used by me, was synonymous with the term 'crystal aggregate,' as employed by Williams in the work which I have previously cited, and that the term 'massive' is included in the expression 'crystalline aggregate,' as also used by him as above stated."

Charles A. Doremus defines "crystalline calcium carbide existing as masses of aggregated crystals" and "crystalline aggregates," and then says:

"I have repeatedly examined complainant's exhibit of defendant's carbide, taking different specimens from it, and do not find that it is crystalline calcium carbide existing as masses of aggregated crystals within the definition I have given above."

His definition clearly specifies masses of aggregated crystals, and not masses of partially or incompletely formed crystals never developed as such and mixed with other substances in a confused mass. The complainant's witness Fred E. Wright clearly recognizes a distinction between "crystalline calcium carbide" and "crystalline calcium carbide existing as masses of aggregated crystals." In substance, in his answer to cross-question 99, he admits that "masses of aggregated crystals" of calcium carbide are a subdivision of crystalline calcium carbide. His evidence, in brief, amounts to a statement that "crystalline calcium carbide existing as masses of aggregated crystals" is not necessarily the same as "crystalline calcium carbide." That is what defendant claims. The defendant insists that crystalline calcium carbide existed, had been discovered, and was known prior to the discovery of Willson, whatever it was, and that Willson may have discovered this new form, as he says he did, of crystalline calcium carbide existing as

masses of aggregated crystals. I do not see how any one can dispute that all "crystalline calcium carbide existing as masses of aggregated crystals" is "crystalline calcium carbide" in a broad sense; but not all crystalline calcium carbide exists as masses of aggregated crystals. This is a new form, and, of course, an added subdivision of the crystalline calcium carbides. It was the new form, or this "subdivision," as Wright puts it, that Willson discovered and patented. Wright says, in substance (answer to cross-question 101) that crystalline calcium carbide may exist in the following forms, or subdivisions: (1) A single crystal bounded more or less perfectly by crystal faces, a polyhedral; (2) a single crystal without polyhedral faces; (3) polyhedral crystals more or less perfectly developed with respect to bounding crystal faces existing together in aggregated masses; (4) aggregated masses of crystals without polyhedral development. He does not state what he would call a confused mass of incomplete crystals, imperfectly formed, all or some of them, and mixed more or less with other substances; but he says, "I take it that the term masses of aggregated crystals" refers particularly to the third class mentioned, while the term "crystalline" includes all four.

Assume that the claim in suit does describe just the subdivision referred to, viz., polyhedral crystals more or less perfectly developed with respect to bounding crystal faces and existing in aggregated masses, and assume that, since some one discovered these masses existing in this form, they are included in the term "crystalline calcium carbide," as naturally and logically they must be, does this show or prove that this precise form or subdivision was not Willson's discovery, or that this form was known before he made his discovery, or that, because he discovered this new form or subdivision, he also discovered all forms of crystalline calcium carbide? I think not. On the other hand, his evidence confirms the defendant's contention, and the construction I am compelled to put on the claim of the patent in suit. A number of experts on each side have given testimony in this case, and most or all of them have conducted experiments. Willson was not an expert chemist. In his patent in suit he spoke of things he had not seen and of which he knew little or nothing and confesses he took the word of others. I have no doubt he produced a form of crystalline calcium carbide not generally known before. He thought the particular bluish iridescence was of great importance, and perhaps it was as calling his attention to what he had done. That he discovered crystalline calcium carbide is not shown. Such a claim is opposed to the weight of the evidence and authority. Defendant has not shown that Willson did not discover and produce the particular form or subdivision described and claimed in the patent in suit and to which form the claim is, by words having a plain and definite meaning, limited. Such an express limitation by the terms of a claim cannot be disregarded. They are not descriptive generally of crystalline calcium carbide, for the evidence is overwhelming that the crystalline calcium carbide which exists as masses of aggregated crystals is but one form or subdivision of crystalline calcium carbide. Even complainant's witness Joseph P. Iddings, after stating on direct that the addition of the words "existing as masses of aggregated crystals" were tautologi-

cal, was compelled to change his statement on cross-examination, and say (answer to X-Q. 119):

"In using the term 'tautological' in the direct statement I conveyed by the form of my statement that I used the word 'tautological' to mean a similarity to a certain extent, and not absolute identity of the two expressions, since there is more in one part of the expression than in the other."

It is submitted that, if the words just quoted mean more than "crystalline calcium carbide," they enlarge the claim; if they mean less, they limit the claim. If "there is more in one part of the expression than in the other," the part that has the most in it either enlarges or limits the other.

The language of the courts in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344, and *Westinghouse Air Brake Co. v. New York Air Brake Co.*, 119 Fed. 874, 56 C. C. A. 404, and *Matheson v. Campbell*, 78 Fed. 910, 24 C. C. A. 384, and *Universal Brush Co. v. Sonn* (2d Cir.) 154 Fed. 665, 668, 83 C. C. A. 442, would seem to settle the contention as to the construction of the claim of this patent. In the last case cited this court undertook to save what it regarded as a meritorious patent by giving such a liberal and broad meaning to the claim, which was for a brush frame having a chamber with "a contracted aperture," as to include a brush frame having a flaring chamber and made less extensive by a raised portion within, which lessened the capacity of the chamber and made it the equal of the one described in the claim. The Circuit Court of Appeals held this would not do; that it would revolutionize patent law. The court said:

"We must construe the patent in the light of what it says, not what it might have said. * * * As patents are procured ex parte, the public is not bound by them, but the patentees are; and the latter cannot show that their invention is broader than the terms of their claim, or, if broader, they must be held to have surrendered the surplus to the public."

Apply this language and holding to the claim in suit, which is for "a new form" of calcium carbide, viz., a form thereof in which the "crystalline calcium carbide exists as masses of aggregated crystals." As Willson said that his invention related to "a new form of crystalline calcium carbide," and then claimed a particular form, there being more than two including his, we cannot enlarge his claim.

Perhaps we ought to consider for a moment the meaning of the word "form" as here used. In some cases it might refer to quality alone, but not so here. Complainant's witness Iddings says:

"X-Q. 120. What does the word 'form' mean in connection with crystalline compounds? * * * A. The word 'form,' in connection with crystalline compounds, is used in two different senses commonly. It is commonly employed as a general expression to describe the outward shape of a crystal, and it is also used in a specific or technical sense to express those planes which may be developed on a euhedral crystal, which may be described technically by one mathematical expression."

The Century Dictionary says:

"Form; the external shape or configuration of a body; the figure as defined by lines and surfaces; external appearances, considered independently of color or material. * * * (2) Specifically in crystal, the complex of planes included under the same general symbol. * * * A specific forma-

tion or arrangement; characteristic structure, constitution or appearance; disposition of parts or conditions."

However, here the patentee has described his "new form" claiming greater purity or freedom from other things and specific formation or shape or combination of crystalline formation.

In *Matheson v. Campbell*, 78 Fed. 910, 24 C. C. A. 384, the Circuit Court of Appeals, per Lacombe, Circuit Judge, held:

"When an alleged infringing compound fails to respond to the various specific tests of identity which the patentee himself has selected and set forth in his patent, he cannot fairly insist that it is identical with his product."

I think this good law and good sense. At least I am bound by it. I might add a score of cases holding the same rule.

As it is not shown that defendant makes, uses, or sells crystalline calcium carbide answering substantially to the claim of the patent in suit, defendant does not infringe. If all crystalline calcium carbide exists as masses of aggregated crystals, then, of course, defendant infringes; but it does not. Crystals are crystals; and masses of crystals, in this science, are not agglomerations of incomplete or broken atoms of crystals, which are confused with mixtures of other materials, even if it contains some perfect or complete crystals.

While Willson used, and complainant uses, the electrical arc furnace, and defendant uses the incandescent electric furnace, it is claimed this bears but little on the real question now under consideration. Willson describes his process, and says:

"It is essential in order to produce the new material here described to," etc.

I find nothing in the claim itself that would read into the product the described instrumentality, material, and mode of making it. The words "substantially as described" do not limit the claim to a product made in the particular mode or by the particular means and instrumentalities described. However, it is clear that the product of defendant's process and instrumentalities is not crystalline calcium carbide "existing as masses of aggregated crystals." It is crystalline, and I am satisfied, from reading the entire record and chemical works, that all calcium carbide is more or less crystalline. Peters, "Modern Chemistry," says:

"Calcium carbide is a dark gray solid more or less crystalline in appearance, always giving off the odor of acetylene owing to its decomposition by the moisture in the air."

I think it inheres in the very nature of the product. However, it is unnecessary to so decide. It is, of course, true that in construing the claim of the patent in suit we are to be guided by the meaning of words as understood when the patent was granted and the then state of the art, and not by the enlarged or narrowed meanings that may have been necessarily or properly given them since as the science progressed. I may remark that neither Whitlock nor Williams make the existence or nonexistence of a free space between the crystals the only essential difference between crystal aggregate and crystalline aggregate. The illustrations show each and speak largely for themselves. Complainant's counsel says that, as defendant's counsel conceded com-

plainant's exhibit, "defendant's carbide Nos. 1 and 2, to be calcium carbide yielding acetylene gas when treated with water, it only remained therefore for complainant to show that this carbide is crystalline within the meaning of the claim."

It was necessary for complainant to show, by admission or otherwise, that defendant's product is calcium carbide, that it is crystalline, and that its crystallinity consists in the fact that it (the carbide) exists as masses of aggregated crystals. To determine whether or not it so exists, we must turn to the dictionaries and scientific works and writings of the time when this discovery was made and ascertain what the words used in the claim then meant, if they meant anything. This is what defendant's experts have done, and this is what this court has endeavored to do. Infringement must be proved by the complainant by a fair preponderance of evidence.

Satisfied that infringement of this narrow claim is not made out, there will be a decree dismissing the bill, with costs.

UNION CARBIDE CO. v. AMERICAN CARBIDE CO.

(Circuit Court, N. D. New York. August 2, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF PRODUCING CALCIUM CARBIDE.

The Willson patent, No. 563,527, for a process of producing calcium carbide by subjecting lime and a carbonaceous deoxidizing agent to the heat of an electric arc in an electric furnace, construed, and held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit originally to restrain alleged infringement and for an accounting; but, the patent having expired soon after suit brought, there can be an accounting only in case the patent is held valid and infringed.

Dickerson, Brown, Raegener & Matty (S. L. Moody, of counsel), for complainant.

Kernan & Kernan (Charles Neave and Willis Fowler, of counsel), for defendant.

RAY, District Judge. The patent having expired since suit brought, there can be no injunction, but an accounting only. As a cause of action for alleged infringement was stated in the bill filed, and the patent had not then expired, this court denied a motion to dismiss the suit and retained jurisdiction.

The patent in suit was granted to Thomas L. Willson July 7, 1896, on application filed March 16, 1893. The patent is numbered 563,527, and is for new and useful improvement in the production of calcium carbide, to wit, "the process of producing said calcium compound, generally known as calcium carbide." The application was filed shortly after Willson discovered or invented the process claimed, and, as seen,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was pending in the Patent Office about three years. The patent has two claims, claim 1 being in issue here, and that reads as follows:

"1. The herein-described process of producing a calcium compound, which consists in subjecting mingled lime and a carbonaceous deoxidizing agent to the heat of an electric arc in an electric furnace, the carbonaceous matter being in excess of that required to combine with the free oxygen, whereby the liberated calcium combines with the excess of carbon to form a calcium carbide, substantially as described."

As claimed, the process consists in: (1) Subjecting mingled lime and a carbonaceous deoxidizing agent to the heat of an electric arc in an electric furnace; (2) the carbonaceous matter being in excess of that required to combine with the freed oxygen; and (3) whereby the liberated calcium combines with the excess of carbon to form a calcium carbide substantially as described.

In the specifications Willson is more definite and specific as to his process, and says:

"I take finely divided calcium oxid or lime, which may be anhydrous, and finely divided carbon in about the proportions of thirty-five per cent. of carbon and sixty-five per cent. of lime, and, having mingled them thoroughly together, subject them to the action of an electric arc in a furnace. This electric arc must be of sufficiently definite character to be distinguished from the mere heat of incandescence, which is no part of this invention. The reducing agents which I employ are preferably carbon in the form of coke, but hydrocarbons may be employed in admixture with the lime and coke, or the lime may be saturated with a liquid hydrocarbon. The electric furnace is preferably of the kind having a carbon or graphite crucible or hearth connected to one terminal of a suitable dynamo, and a carbon pencil connected to the opposite terminal thereof, and the carbon and calcium oxid are fed into the polar interspace.

"To start the operation, the carbon pencil should be in contact with the crucible or hearth, or so close to the same that a current of electricity may pass. After establishing the current the carbon pencil is lifted so as to strike an arc, and during the process this arc is maintained by keeping the pencil sufficiently lifted to maintain a space between it and the conductor beneath. The intense heat of the arc decomposes the lime, the oxygen combining with the carbon, forming a carbon monoxid or dioxid, which escapes in gaseous form, while the calcium, or the greater part of it, combines with the carbon, forming a calcium carbide."

The patentee states:

"I am aware of the patent to Cowles of June 9, 1885, for electric furnace; but this furnace does not operate by an arc passing in contact or close proximity to a mass of finely divided carbon and lime, and therefore does not carry out the process of this invention. It is furthermore important to have an excess of carbonaceous matter over that necessary to unite with the oxygen, so as to enable the calcium to unite with such excess of carbon. I do not in this application claim the making of metallic alloys by alloying the metal of an electrode with the metal of a bath in an electric furnace."

It is self-evident, I think, that this process is limited to the use of the electric arc in an electric furnace and includes the electric arc as then understood and existing with all improvements thereon. The patentee and his assigns could not be deprived of the benefit of the invention by improving either the electric arc or changing the form thereof. At the time of the invention two types of electric furnace were known and recognized, viz., the arc furnace and the incandescent furnace. In the arc furnace we have a gap or space between the

terminals or electrodes. This space or gap is, so to speak, bridged by a vapor or gas which interferes with the current and causes a very high heat at that point.

In the incandescent furnace we do not have this space or gap between terminals or electrodes, but in place of it some solid or fused body interposed between the electrodes and of a character to offer much greater resistance to the passage of the current than does the rest of the circuit or conductor. At this point therefore great heat is generated, or the interposed body becomes heated to incandescence or glowing heat. We have therefore the solid electrodes, the current of electricity, primarily the gap or space, and lastly the body interposed between the electrodes interfering with the current, offering resistance, and thereby causing the intense heat at that point. Which interposed body, assuming other conditions to be equal, offers the greater resistance? If it be the arc type of furnace where the space is bridged by a gas or vapor, then the heat at that point will be greater in the arc furnace than in the incandescent furnace. There are other minor differences between the two types of furnace. It is claimed that in the arc furnace the energy is liberated in an arc gap of a few inches in length, while in the incandescent furnace the same amount of energy is liberated from a comparatively large area; that this is made necessary for the reason that in the incandescent furnace the incandescent resistance body must be of comparatively great length.

The defendant insists that it uses neither the arc furnace nor the incandescent furnace as they existed at the date of the patent in suit nor an improved type or improvement thereof, but a new type of furnace, the result of discovery and progress in the electric art. It is well known in the art that the character of resistance to the passage of the current may be comminuted or pulverized material. In other words, it is not necessary that the space between the electrodes be "bridged" (using that expression) for the passage of the electric current by a solid or fused body which is heated to incandescence and then radiates or communicates the heat to the surrounding material, provided the principle of the arc is absent, and such space is not bridged by the vapor or gas which does not become heated to incandescence. In either type of furnace the material to be treated is brought in contact with the heat, or the heat with the material. The intense heat decomposes the lime, and the oxygen combines with the carbon, forming a carbon monoxide or dioxide, which escapes in a gaseous form, while, if the heat and proportions of material be proper and sufficient, the calcium, or most of it, combines with the carbon forming a calcium carbide.

The claim of the patent in suit is plainly and distinctly limited to the use of "an electric arc in an electric furnace." The process "consists," says the claim, in subjecting mingled lime and a (any) carbonaceous deoxidizing agent to the heat of an electric arc in an electric furnace. This is emphasized by the specifications, which say:

"I take * * * and, having mingled them thoroughly together, subject them to the action of an electric arc in a furnace. This electric arc must be

of sufficiently definite character to be distinguished from the mere heat of incandescence, which is no part of this invention."

In short, Willson expressly excludes the heat of incandescence and the incandescent electric furnace as he had to do in view of the prior art. He also says:

"The intense heat of the arc decomposes the lime."

Also:

"I am aware of the patent to Cowles of June 9, 1885, for electric furnace; but this furnace does not operate by an arc passing in contact or close proximity to a mass of finely divided carbon and lime, and therefore does not carry out the process of this invention."

It is observed that Willson does not say or intimate that the Cowles furnace does not operate by or use the arc, but that it does not operate by "an arc passing in close proximity to a mass of finely divided carbon and lime, and therefore does not carry out the process of this (Willson's) invention."

One cannot read the Cowles patent of June 9, 1885, No. 319,795, without being impressed with the fact that the process is neither arc nor incandescent strictly, especially as heretofore described. However, there is an interposed substance which is mixed in a way with the material to be treated, and which interposed substance acts as a conductor of the current while also offering resistance to its passage and consequently becoming heated to incandescence. This substance is not a gas or vapor, but "a body of granulated material of high resistance or low conductivity interposed within the circuit in such a manner as to form a continuous and unbroken part of same, which granular body by means of its resistance is made incandescent and generates all the heat required." This body of granulated material may consist of, or as described and the preferred agent consists, of "electric-light carbon as it possesses the necessary amount of electrical resistance and is capable of enduring any known degree of heat when protected from oxygen without disintegrating or fusing." Crystalline silicon or other equivalent of carbon can be employed for the same purpose, says Cowles. This is pulverized or granulated; the degree of granulation depending upon the size of the furnace. Cowles also says that in a large furnace and a powerful current this interposed substance of high resistance or, what answers the same purpose, of low conductivity, "may pass beyond what is ordinarily understood by the term granular and be, in fact, pieces of carbon of considerable size." By the Cowles process, as he understood it, these granular pieces or atoms of carbon became incandescent, and the heat was thus generated and communicated to the surrounding material. This interposed material was usually mixed with the material to be reduced or treated. The patent says:

"The ore or light material to be reduced—as for example— * * * is usually mixed with the body of granular resistance material and is thus brought directly in contact with the heat at the points of generation at the same time the heat is distributed through the masses of granular material, being generated by the resistance of all the granules and is not localized at one point or along a single line."

In short, we would have a suitable receptacle for the materials to be reduced and the granular substance, all mixed together, with an electrical current one pole or terminal above and the other below, the lower one being in the floor of the receptacle and the upper one coming near to but not reaching it, and the interposed mixture will fill the space and make the circuit continuous, but offer the necessary resistance and generate the necessary heat by heating the granulated particles to incandescence and so, of course, communicating the heat to the material mixed with and surrounding them.

Now, how does the Willson furnace operate? As shown by the quotation given from the patent in suit, he has a suitable receptacle for the material to be reduced or operated on, the two poles or terminals one above and one below; the one reaching the base of the receptacle, and the other, affixed to a carbon pencil, coming near to it. The material to be reduced "is fed into the polar interspace." At first the carbon pencil is in contact with the base of the receptacle, but so soon as the current is established the pencil is lifted so as to strike an arc, and this arc is maintained during the operation. As matter of course, the passing current, passing the bridge, goes into the material filling the "polar interspace"; but it is this obstruction that generates the heat in or from the circuit, and it would seem to be done in the immediate presence of and to act directly on the material to be reduced, and not by radiation from some other substance heated to incandescence. This differs from the operation of the Cowles patent or process. The one would seem to belong to the arc type, and the other to the incandescent type, of furnace and mode of operation. When the arc is formed or set in operation, the electrodes are substantially brought in contact in the arc process, whether it be for heating or for lighting. This is done to establish the continuity of the current; but, once established, the electrodes may be gradually separated, within a limit, and maintained in that position. The arc is formed or established when this separation takes place. As the current passes, or jumps the space, or crosses the bridge, being obstructed, the great heat is generated, and as the light therefrom took the form of an arc it was given that name. If Willson bridges the space with some gas or vapor, as Mr. Tone, complainant's witness, says it is done, and such gaseous vapor fills the space and carries the current, and the material to be operated on, carbon and calcium oxide (named in the patent), are fed into the polar interspace, it must be that they intermingle, and it must be that the gas or vapor is intensely heated, and there is little difference in the processes, save intensity of heat and the character of the material forming the bridge, a gas in the one case, and granulated carbon in the other.

Turning to the file wrapper of the patent in suit, we find that Willson at first claimed all electric furnaces, and expressly stated that, while he preferred the arc and arc heat, that of the incandescent type was sufficient. Being rejected on Cowles and the prior art, he finally limited himself to the arc type, as described, and was then rejected; but a new or amended claim was finally allowed, as found in the patent. It follows that the claim is to be strictly construed and is confined to the arc furnace as described.

Claim 2 of the original application read:

"2. The described process of producing a calcium compound consisting in subjecting quick lime and a deoxidizing agent to intense heat in an electric furnace."

Claims 3 and 4 referred only to "an intense heat in an electric furnace." In the specifications he said:

"The furnace, preferably an electric arc furnace, although an incandescent furnace might be employed. The intense degree of heat that is only to be attained by connecting electrical energy with heat energy seems to be necessary to insure the necessary reaction."

In a communication to the Patent Office of February 23, 1894, in amending the claims, etc., the attorneys for Willson said:

"Mr. Willson's present invention resides not so much in the mode of operation as in the material upon which that operation is performed, whereby a hitherto unknown product is produced."

Coming to the defendant's process, we find, according to the witnesses Tone and Morehead, that defendant uses an electric furnace; but there is a contention and sharp dispute as to whether it is the arc furnace or of the incandescent type. It is described by Tone as having a base plate with the lower electrode consisting of a short round carbon block set therein, an upper electrode, so arranged as to be raised or lowered, consisting of 2 lengths of graphitized carbon, each $5\frac{1}{2}$ inches in diameter and 36 inches long and spliced together by a threaded joint and giving a total length of about 6 feet. This is inclosed in a water jacket, but leaving the lower end of the electrode bare for about 20 inches. There is a suitable casing, a gas outlet, and an opening for charging. Morehead thus describes them:

"There were eight furnaces in all. There was a structure made of concrete, probably reinforced, that had an opening in front. I am describing one furnace now. They were all similar. This opening extended from the floor to the top of the concrete structure. The top of the opening was closed by a sheet-iron door. There were two rails leading into the compartment on which a truck could run in and out of the furnace. There was a truck for conveying the crucibles into and out of the furnaces. The crucibles consisted of a cast-iron sole plate some 30 inches in diameter by about $2\frac{1}{2}$ inches thick. This rested on the truck and had lugs for the purpose of making electrical contact. There was a rim on the top of this sole plate for holding the side of the crucible. In the middle of the sole plate there was a hole into which was fitted a carbon plug. This plug was about 8 inches in diameter and stood up about 3 inches above the surface of the sole plate. There was a sheet-iron side to the crucible which was detachable. This was made of about quarter-inch iron or steel, was circular in cross-section, was provided with lugs at the bottom for attaching it to the sole plate, and hooks at the top for moving it. It was perforated to allow of the escape of gas. This circular side, the sole plate, and the truck were designed to move into and out of the furnace compartment made of concrete and mentioned above. Copper conductors were connected to the sole plate to make electrical contact. On the top of the structure, which was some 8 feet high, there was a stationary hopper for holding the mixture and a movable bin which was removed from time to time by a crane, filled with mixture, and replaced. This bin connected with the stationary hopper, which was connected by a chute to the crucible. There was a take-off pipe for gas in the top of the compartment, and coming through the top of the compartment over the center of the crucible below was a movable electrode which consisted of carbon pencils about 6 inches in diameter by about 4 feet long. These were held by a clamp and ran through a water jack-

eted pipe into the furnace. The lower end of the pencil projected below the end of the water jacket and conducted the current into the crucible. The ends of the carbon electrodes or pencils were threaded so as to have new pencils connected as an old one would burn off. The upper electrode was suspended and designed to permit of movement in a vertical direction. It was connected by cables to a device designed for raising and lowering the pencil."

Assume, as I now do, a proper connection with a suitable dynamo and transformer, the use of lime and coke, or lime and a suitable carbonaceous deoxidizing agent, there being the proper excess of the carbonaceous matter, is this lime, mixed or mingled with the carbonaceous deoxidizing agent, mixed with any other substance which bridges the interpolar space, the space between the electrodes when separated after the current is established so as to act as a conductor, at the same time offering the necessary resistance to generate the heat, and does this conducting material, having low conductivity, become incandescent and radiate or communicate the heat to the surrounding material to be reduced? If so, defendant is within the prior art and protected thereby. To infringe the defendant must use not only the material, lime, and carbon, in a mixture, that of the patent in suit, but defendant's furnace must heat it, reduce it, produce the necessary reaction, by the heat of an electric arc furnace as distinguished from an electric incandescent furnace. The heat must come from the arc itself, a space between the positive and negative poles, or the two electrodes, filled with a gaseous vapor which, while having low conductivity, is, of course, heated if not incandescent. When some substance, even if broken into particles, which acts as a conductor, fills the space between the electrodes and becomes incandescent, and the heat is thence conveyed to the substances, or charge to be treated, or reduced, even if it be the material to be reduced or operated on itself, we no longer have the arc or its principle, although we may have a multitude of very small arcs struck or created by the passage, or jumping, of the divided current from particle to particle of the interposed substance or substances. This, undoubtedly, was the action of the Cowles patent. There may be slight or imperfect union between the particles or materials acting as the conductor, the generation of gas, and a passing of current in this way, as well as directly from particle to particle of the material.

The arc furnace, within the meaning of the claim in question of the patent in suit, must be one where the current is carried from electrode to electrode through an open space by some gaseous vapor, and not one where the current is carried by some other substance offering resistance, being of low conductivity and to some extent by means of the very small but multitudinous arcs formed in the manner indicated at many points in the material fed into the furnace. If the materials used by defendant to form the charge carry the current, or the main part of it, and offer the resistance, and fill the space between the electrodes while being transformed, or while the main part is being transformed or reduced, then we have no arc within the meaning of the claim of the patent in suit. In that case we do not have the principle of the arc or derive the heat from an arc; but the furnace acts on the incandescent principle, although, perhaps, not as generally practiced

and understood in 1893 or 1896. The incandescent electric furnace is thus described in the *Encyclopedia Americana* (vol. 6, "Electric Furnaces"):

"The Incandescent Furnace.—This term is commonly applied to those furnaces wherein the heat is developed by the passage of the current through a body which initially at least is solid. Such body may comprise a rod or core of carbon or carbonaceous mixture; a granular bed or core consisting of fragments of coke, retort carbon or graphite; the charge itself, often admixed with a quantity of carbon sufficient for its reduction; the furnace product when this is conductive and possesses a volatilizing point sufficiently high to permit the necessary temperature to be attained; or a pyroelectrolyte, that is to say, an oxide or mixture of oxides which is normally nonconductive or substantially so, but which while remaining unfused becomes capable at temperatures considerably above the normal of carrying the current. Each of these resistance materials possesses its advantages for particular lines of work, but all have in common the advantage of permitting accurate and ready adjustment of the temperature by varying the amount of current passing. These incandescent furnaces have therefore the widest applicability, and in case the resistance material used is carbon the maximum temperature attainable is probably not inferior to that of the terminals of the electric arc. The above defined types are not always sharply distinct, but under certain conditions the operation proceeds under two or perhaps all three of the methods. Thus if the resistance consists of fragments of carbon, the current may traverse the interspaces in the form of minute arcs; and if this fragmentary carbon be commingled with a suitable ore or compound, there may be present also an electrolytic effect; the primary fusion of an electrolyte is often accomplished by means of a resistance rod connecting the electrodes, or this fusion may be accomplished by the arc. Furthermore a given furnace structure is often capable of either mode of operation according to the character of the charge and the adjustment of the electrodes with reference thereto."

The extent of Willson's limitation and his understanding of the arc furnace are shown by a quotation from his amendment of November 3, 1892, found in the file wrapper of patent No. 492,377, where he says, referring to the Cowles patent and to the effect, that there heat is radiated from "innumerable thermal foci" (and, in order to distinguish his process and his type of furnace), "applicant's process is an electric arc process wherein the heat is radiated from only one thermal focus, which is the arc itself." This shows clearly what Willson understood by the arc, what he understood the arc in a furnace to be, and it cannot be reasonably contended that the arc in one Willson patent is different from the arc in another. Here he has defined an electric arc furnace in this particular and made it one where there is but a single arc—a space between the electrodes bridged by gaseous vapor, and not by any solids, whether in one piece or in scores of pieces.

Defendant's witness Crocker visited defendant's plant and carefully examined its furnaces and their mode of operation. He says:

"On these occasions, I observed the starting, running, and stopping of a number of defendant's furnaces, as the work was being carried on in the regular way. In one instance, I observed the entire operation of a furnace from the first starting of it until the operation was completed and the current interrupted. I also saw the carbide and unconverted mixture dumped from the furnace and saw the ingot cleaned and weighed. I am confident that the work was carried on in the usual commercial manner, because the plant was running at full capacity, the furnaces being continually operated—that is, charged up as soon as a previous operation had been completed—and a number of men were busily engaged in tending the various furnaces. Most of the

men were common workmen, who were incapable of doing what I saw them do, unless they were accustomed to their work by considerable routine. Furthermore, the output of the furnaces, including the one which I observed particularly, was normal in amount and quality. My observations therefore covered the regular operation of defendant's furnaces and plant generally.

"The furnace consists of a practically flat horizontal hearth or bottom, mounted on a four-wheeled truck. The lower electrode composed of carbon is fixed in the center of this furnace bottom. Flexible copper cables are connected to the cast-iron bottom, in order to supply electric current to the lower electrode. The upper electrode is a vertical carbon rod, about $5\frac{1}{2}$ inches in diameter, carried by a cast-iron water jacket which acts as a holder, from which the electrode projects downward nearly 2 feet. This electrode is adjustable vertically, that is, raised or lowered, as desired, in order to control the current within proper limits and to carry on the operation in an efficient manner. The mixture of lime and coke treated in the furnace is contained in a cylindrical sheet-iron shell, which stands vertically upon the furnace bottom or hearth, to which I have referred. This shell is often called technically the 'crucible,' because it, together with the hearth, may be regarded as constituting a crucible, which takes the place on a larger scale of the actual crucible employed, in the earlier electric furnaces, as, for example, in the Siemens furnace, which I described in my answer to Q. 5. In fact, defendant's furnace is substantially the same in its construction as the Siemens furnace, including the crucible, fixed lower electrode, and vertically movable upper electrode. The operation of defendant's furnace, however, is on the incandescent principle; the formation of an arc being carefully avoided.

"In order that I might observe more fully and more clearly the exact conditions of operation in defendant's furnaces, I had one of them started and run for some time with the shell or crucible removed, so that the upper electrode and the material were entirely open. In order to study carefully and compare the arc condition of operation with the incandescent condition of operation of the electric furnace, I purposely caused the arc to be formed and maintained, by raising the upper electrode sufficiently to establish the arc and continue it. In observing the action of the furnace, I put on darkened glass goggles to protect the eyes from the light, which was intense in some experiments, and was thus able to see clearly what was going on. I also made a number of definite quantitative tests with electrical measuring instruments, in order to obtain further information regarding the phenomena and electrical conditions involved in the operation of electric furnaces. All the results and conclusions derived from my tests and observations demonstrate conclusively that the conditions and phenomena are radically different when the arc is purposely formed and maintained, compared with the conditions and phenomena that exist when defendant's furnace is run normally, according to the incandescent principle. I have found at least eight positive differences between the 'arc' and 'incandescent' conditions of operation, and I will now point out these differences. * * *

"The very conditions of operation of defendant's furnaces absolutely preclude the forming or maintaining of an arc in normal operation. The mixture of lime and coke is fed into the furnace until the upper electrode is covered to a depth of about 10 or 12 inches. This material is fed in from a hopper above the furnace and fills in all around and in contact with the upper as well as lower electrode. Under these circumstances, the arc is and must necessarily be completely smothered and extinguished. The coke of the mixture is a conductor at all temperatures, and the lime becomes a conductor as soon as it is heated, which occurs very quickly in the high temperature of the electric furnace. This conducting mixture therefore, in contact all around the upper electrode, which is about $5\frac{1}{2}$ or 6 inches in diameter and covered by the mixture to a depth of about 10 or 12 inches, must necessarily make electrical connection and carry the current which instantly avails itself of a solid conducting path in preference to the arc space or gap, which is a poor conductor. Not only is the material fed around and in contact with the electrode to a considerable depth, as I have stated, but it is also a fact that the workmen tending the furnaces continually poke the material up to, and in close contact with, the upper electrode, thus insuring electrical connection through which

the current flows; this being a path of much less resistance than that afforded by the arc.

"It is practically self-evident to any one having even moderate knowledge of electricity that the presence of conducting material in contact with both electrodes will cause the current to pass through that material in preference to jumping across the arc space. It is hardly necessary to corroborate such a self-evident matter; but I cite the statement of Willson himself, the patentee of the patent in suit, in his patent No. 491,394, defendant's Exhibit AQ, as follows: 'In case the material to be reduced is either itself a sufficiently good conductor, or is so intermixed with a good conductor as to afford a sufficient conducting path around the arc (as in case granulated carbon of sufficient conductivity is commingled with it in sufficient proportion), the material must not be permitted to remain in contact with the pencil to such an extent as to afford so good a conducting path around the arc as to extinguish the arc.'"

It is quite clear that the filling in of the material between the electrodes to the depth defendant does would extinguish the single arc when used to start the operation of reducing the material to be filled in, and that defendant relies on the low conductivity of the material itself, the coke, carbon, and lime, all of which defendant uses if complainant's evidence is to be relied on, and the multitude of small arcs formed in the manner before pointed out, and which was and is characteristic of the Cowles process. It must be kept in mind that there has been a vast addition to electrical knowledge since the patent in suit was applied for and granted, and that, in view of Cowles, the patent in suit was granted only after the express limitation placed thereon, and the extent of which, so far as references and quotations are concerned, is herein only outlined. One, at least, of complainant's witnesses, says that the movable electrode is characteristic of the arc furnace. I think, on the evidence, it is characteristic of both the arc and the incandescent furnaces, of the one no more than the other. It was used by Cowles and described by him in his patent of January 26, 1886, for "electric furnace and method of operating same," No. 335,058. He says:

"This invention relates to electrical smelting furnaces operating on the incandescent principle, in which metallurgical operations requiring an intense heat are carried on, with electricity as the heat-producing agent. This invention consists in the improved method of operating incandescent electric furnaces herein described, and in the combination, with a furnace containing a charge of electrical resistance material, of two movable electrodes situated at opposite ends of the furnace, and projecting into the body of the charge contained within it, so that the said electrodes may, when the resistance runs down, be drawn apart, thereby increasing the amount of the charge between the electrodes, and consequently increasing the resistance, and thus preserving a uniform resistance within the furnace. The invention also consists in the arrangement of suitable mechanism actuated by the current or a portion of the same for automatically moving the electrodes, so as to govern the amount of energy utilized in the furnace."

The Cowles furnace, to my mind, was as much of an "embedded arc" as is defendant's. If that was and is an "embedded arc," then it was disclaimed by Willson in order to get his patent in suit. He clearly and definitely and positively disclaimed the furnace of that type; one carrying the current from electrode to electrode through or by means of broken masses of material having (some of it) low conductivity and producing or striking a multitude of small arcs as the current leaps from particle to particle because of the imperfect union,

or otherwise. In such case the current does not pass around one single arc, but passes by many bridges from electrode to electrode.

It is obvious that the operation of the arc has some distinguishing characteristics; but the one that controls is the existence of the one arc through which the current passes and where the intense heat is generated, as distinguished from a composition acting as a resistance and as a conductor wherein or whereby, in addition to the direct current, a multitude of small arcs are struck, as must have been the case with Cowles, although perchance he did not understand it. When a quantity of material to be operated on is filled into the so-called "crucible" above and covering the lower electrode, and the upper electrode is above such material, this upper electrode can be made to move from point to point above the charge, and the intense heat of the arc formed between the upper electrode and such material applied at different points or the electrode can be stationary, and the material or charge made to pass beneath it. When this is done, we, of course, have the arc pure and simple, and I think this was the process Willson had in mind. It is, of course, true that if in defendant's furnace the arc formed, when it is first started, remains, and all the material coming within its direct range or influence is immediately dissolved and melts away, as complainant claims, so that the current is carried by the gaseous vapor between the electrodes, such arc having, of course, quite a little diameter, the furnace acts on the arc principle, and not on the incandescent principle.

But, if so, of what use is the conducting material that does not enter into the product to any material extent? If the arc is formed and does the work of reducing the material, if it all melts, etc., and the surrounding material, as it is reduced, simply falls into the arc and at once drops to the bottom of the crucible, then we have no conductor except the gaseous vapor, and, in place of a solid material acting as a conductor or conductors, and a multitude of small arcs incidental to the use of the material, we have one large arc in the midst of the charge. If this be defendant's operation, then it uses an electrical arc furnace. The mere fact that it is an embedded arc does not change the fact, if it be a fact, that the furnace operates on the arc principle and is within the claim of the patent in suit. As I have said, I do not think or hold that the patent does not cover the arc furnace operating on that principle and in that way, if it be changed in form from the one in use when the patent was granted. I do not understand that the embedded arc has been patented.

I think the evidence establishes: (1) That the material used by defendant in his mixture, or some of it, acts as a conductor and is not a gaseous vapor; (2) that some of this material offering resistance and being of low conductivity becomes intensely heated to iridescence; (3) that, in addition, because of the imperfect union of this conducting material, innumerable small arcs are formed which aid in giving the heat; (4) that there is no single arc in the defendant's process, except at the very beginning and when the current is being established, and that this is very soon extinguished when the material is fed in filling the space between the electrodes and extending up around the carbon pencils forming the upper electrode; (5) that the

reducing of the material fed in and intended to be reduced is done mainly, but not wholly, by incandescence for the reason stated. Finally, I think it shown by the preponderance of evidence that defendant's furnace, on the whole, acts on the incandescent principle, and not on the arc principle, and must be termed an incandescent furnace, and therefore not within or covered by the limited claim in issue of the patent in suit.

It follows that the defendant does not infringe, and that the bill of complaint must be dismissed, with costs.

PAINE METALLIC PACKING CO. v. BRIDGEPORT METALLIC
PACKING CO.

(Circuit Court, D. Connecticut. July 6, 1909.)

No. 1,269.

PATENTS (§ 328*)—INVENTION—METALLIC RING PACKING.

The Paine patent, No. 774,490, for a metallic ring packing, is void for lack of novelty or invention in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for infringement of letters patent No. 774,490, for metallic ring packing, granted to Jedediah C. Paine November 8, 1904. On final hearing.

E. K. Nicholson, for complainant.

F. W. Smith, Jr., for defendant.

PLATT, District Judge. This court dealt with substantially the same matter which is now at issue when it decided the Blake & Johnson Case (C. C.) 161 Fed. 134. The only defense then urged was non-infringement, and the validity of the patent was practically conceded. The prior art was touched upon very lightly, and for no other purpose than to obtain light as to what the patentee meant when he used in his claims the words "cut solely on tangential lines," which was the turning point of the former issue. Now the patent is vigorously attacked, and the situation demands an exhaustive examination of the prior art. The court has done its utmost in this respect, and has tried to place itself as best it could in Mr. Paine's shoes when he filed his application. The result is disastrous to the patent, but the time at my disposal forbids anything more than a cursory glance at the art.

Katzenstein, 228,200, June 1, 1880, and Thurston, 318,400, May 19, 1885, were common property when Paine filed his application. The former patent shows a metallic packing divided on tangential lines, in contradistinction to radial; the rings of each pair being placed face to face so as to break joints. There was no encircling spring, and no inner casing, in the strict sense of the words. The latter patent, however, has an inner casing having grooves to contain rings, and also has a coil spring to keep the sections of the packing always against the piston rod, thus taking up wear. This inner casing of Thurston was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adopted by both parties here at issue as soon as the patent had expired, and cannot be tortured into adding any vitality to the patent in suit. Foss, 368,916, had a plain ring packing, with rings divided solely on tangential lines, as compared to a division partly radial and partly tangential in the same ring, and surrounded by a spring which holds the sections constantly against the piston rod; and Foss said that his rings were arranged tangentially, but that the cuts on each of the pair which went together were made in opposite directions, so as to break joints.

If Paine read these patents before he went to the Patent Office, it is difficult to understand what he thought he had found which was new and not public property. When he reached the office there were France, 636,512, November 7, 1899, and Holmes, 654,542, July 24, 1900, staring him in the face. France shows a metallic packing which contains in combination a grooved casing, a pair of sectional rings arranged within each groove, said rings being divided on tangential lines (as distinguished from radial), and so mutually arranged as to break joints, and an encircling spring around the sections of each ring, which serves as the sole means of maintaining contact of the ring with the piston rod. France thought it better to leave shoulders at the inner end of the cuts, but he says enough to show that he had tangential cuts without shoulders in mind. He preferred his way, and it would not call for an inventive genius to take up the method which he suggests but discards. Taking into account all which had appeared before, it strikes me that claims 1 and 2 of the patent in suit ought to have been refused after a glance at the France patent.

And Holmes, 654,542, remained to be reckoned with. In that patent can be found every idea which Paine was suggesting, except that one of the pair of rings placed together in the groove was divided tangentially and the other radially. These were arranged to break joints, and all that Paine had to do was to cut another like tangential ring and substitute it for the radially cut one, still providing for the breaking of joints. Any respectable mechanic could have done that. If the ring of the Holmes patent is not cut "solely on tangential lines," there was certainly enough information at hand in the art to negative novelty or invention in making that departure from Holmes.

If the court could find a spark of life in the claimed invention, it would be a hard task to pick out which claims to uphold. Claims 1 and 3 have no encircling spring, which is a necessary element to a working mechanism. Claims 2 and 4 have an encircling spring, and the only difference between them is that claim 2 is for a pair of rings, and claim 4 for plurality of pairs. Fortunately it is not necessary to analyze, because the reason of the case counts against the whole claim of invention.

It being clear to the court that the patent is invalid, it is not necessary to examine the question of prior use.

Let the bill be dismissed, with costs.

SCHWAB et al. v. APSTEIN.

(Circuit Court, D. Connecticut. January 8, 1909.)

No. 1,240.

PATENTS (§ 328*)—INVENTION—PUNCTURE-CLOSERS FOR PNEUMATIC TIRES.

The Glidden patent, No. 602,743, and the Sampson patent, No. 632,540, each for a device for closing punctures in pneumatic tires, disclose invention, are valid, and entitled to a fairly liberal construction. As so construed, both *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Andrew Wilson and Archibald Cox, for complainants.

Charles H. Wilson, for defendant.

PLATT, District Judge. This is a suit based upon two patents, viz., Glidden, No. 602,743, for "device for closing punctures in pneumatic tires," and Sampson, No. 632,540 for "puncture-closer for pneumatic tires."

The inventions of these patents are capable of conjoint use, and were in fact so used. The claims at issue are 1, 2, 4, 5, and 10 of Glidden, and 1 and 2 of Sampson:

"Glidden:

"1. A puncture-closer for tubing, comprising a shank, a head hinged thereon, and a co-operating retaining-cap, substantially as described.

"2. A puncture-closer for tubing, comprising a threaded shank, a head hinged thereon, and having a concave back, and a retaining-cap threaded to engage the shank, substantially as described."

"4. A puncture-closer for tubing, comprising a shank, a head hinged thereon, and a co-operating retaining-cap constructed and arranged to be engaged and held by the material of the tube, substantially as described.

"5. A puncture-closer for tubing, comprising a threaded shank to extend through the material of the tube, a thin, substantially concave-convex head hinged to the inner end of the shank, and a retaining-cap adapted to be screwed onto the shank, to clamp the tube between the head and cap, substantially as described."

"10. A puncture-closer for tubing, comprising a metallic head, a threaded metal shank with which it is pivotally connected, whereby the head can be turned up against the shank, and a cap adapted to be screwed onto the shank and bear against the exterior of the tube, substantially as described."

"Sampson:

"1. A puncture-closer for tubing comprising a shank; a head; a universal joint for connecting said head to said shank, said head having a slot extending from said universal joint and of sufficient width to accommodate said shank; and a co-operating retaining-cap, substantially as described.

"2. A puncture-closer for tubing, consisting of the threaded shank, b, with its upper end offset to form a temporary handle and having a ball, e, formed upon its lower end; the head, a, formed with a socket to receive and loosely retain said ball; and the slot, j, narrower than the ball, e, and of sufficient width to accommodate the shank b; and the co-operating retaining-cap with serrated undersurface substantially as described."

In advance of the few words which will bear directly upon the case, let me say that the whole matter has received unusual attention, because of the position in which I found the parties at the hearing.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Two attorneys held in high esteem by the court have in turn abandoned the defendant. After many delays I felt that my duty to the complainant made it necessary to fix a not too distant date for the arguments, and when the appointed day came I found a new attorney in charge of defendant's interests. He proved himself to be thoroughly competent, but was naturally somewhat handicapped by his late introduction into the merits of the controversy. For these reasons I have considered it my duty to move with exceeding care, and the defendant must not think, because my comments are brief, that my final conclusion is not based upon an exhaustive examination.

Much ground is covered by the proofs; but, as I view the matter, the case must turn in the end upon the construction which shall be placed upon the claims of the patents in suit.

Complainant insists that the closing of punctures in pneumatic tires, and the like, is a new art which of necessity has sprung up within a few years, because the pneumatic tire itself is a fairly new device which, by reason of its peculiar construction and the uses to which it is put, presented a new problem to those who were thinking about a way to repair the punctures to which it is so incessantly subject. The defendant, on the other hand, scoffs at such ideas and claims that the patents in suit and the limited few bearing upon the same subject, of which the defendant owns one of later issue, all relate to a general art, which he calls the "art of closing holes," and strenuously insists that any device which is intended to be used to close a hole and stop a leak is an obvious reference when one puts his mind upon the question of caring for the punctures and leaks in pneumatic tires.

The latter line of argument is not persuasive, and, in truth, the more it is examined, the less it satisfies. Assuming, then, as I am compelled to do, that the appearance of the pneumatic tires offered a new problem to inventors, it is plain that the meager efforts to care for punctures which preceded Glidden left him a wide field to work in, and that Sampson put the finishing touch to Glidden's disclosures, so that the combined efforts of those two inventors gave to the world an invention of merit. They are entitled to such a measure of liberality as will protect them from palpable invasion. These premises having been granted, our troubles are over.

All talk about reading the patents on prior devices in the art of stopping holes, and about the patents in suit and the defendant's re-issued patent being for minor and subsidiary improvements in that art, leading out in different directions, the one from a metal plug pure and simple, and the other from a rubber plug pure and simple, becomes idle and visionary. Defendant's attempt to show that he was the prior inventor resulted in a most lamentable fiasco which needs no comment.

The claims in suit are valid, entitled to a reasonably liberal construction, and are infringed.

Let the usual decree be entered.

STILLWELL v. McPHERSON, Highway Com'r.

(Circuit Court, N. D. New York. July 15, 1909.)

PATENTS (§ 328*)—INVENTION—SHEET METAL CULVERT.

The Watson patent, No. 559,642, for a culvert constructed of corrugated sheet metal pipe in sections, bolted or otherwise fastened together, is void on its face for lack of patentable invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Demurrer to bill of complaint for alleged infringement of United States letters patent.

Orwig & Lane, for complainant.

Risley & Love and Bond & Miller, for defendant.

RAY, District Judge. Two grounds of demurrer are urged: First, that title is not shown in the complainant; and, second, that on the face of the bill, the letters patent being a part thereof, it appears that the same are void for want of patentable invention.

When the court has any doubt, a demurrer should not be sustained on the latter ground. Where the court has no doubt, the demurrer ought to be sustained, if want of patentable invention is plain. The courts have said this many times. If there is doubt, the complainant should be allowed to show "a long-felt want," that he has supplied it, and that his device has met with commercial success, etc. This fact, if proved, has been held to turn the scale in some cases. Here the patentee says:

"My invention has for its object to provide a corrugated sheet metal pipe adapted particularly for use as a culvert and as well curbing, to take the place of vitrified tile now in common use for those purposes."

He then says that the disadvantages incident to the use of tile, particularly for culverts, reside in the weight of the material, and hence the necessity of making it in short lengths, which must be joined when the culvert is laid by cement or its equivalent, and its frangibility, which necessitates the transportation thereof by wagon in small loads; a length not exceeding 16 to 20 feet being the capacity of an ordinary two-horse team. He then says that the cement is liable to be washed out of the joints, and that the washing or the undermining of the culvert then results by reason of the weight of the tile, which sinks, and the sections separate and sometimes break. He also says that on account of the weight of tile the bed must be carefully prepared, evenly prepared, so as to relieve the joints of strain. He also says that such preparation of the bed is expensive without considering the repairs made necessary by a small leakage at the joints, and—

"hence it is my object to provide a substitute for tile culverts which may be laid upon an uneven bed without injurious results; the improved culvert being strengthened against transverse as well as against crushing and other destructive strains, the joints being formed without the use of cement, and a greater length of material being transportable at one time by the means ordinarily employed for the purpose."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I take it there is no patentable novelty or invention in conceiving the idea that a sheet metal pipe is less liable to breakage than a tile pipe, and that it may be transported in greater lengths. This has been common knowledge for a half century at least. Corrugated pipe is stronger than plain pipe. This is and was common knowledge. To substitute the sheet metal pipe for vitrified tile was not a patentable invention. Iron pipe—cast iron and sheet iron—has been used to carry water above ground and under ground, over bridges, on bridges, and under bridges, for 40 years at least, and this is common knowledge with all practical men, all observing men. Hollow logs have been used for the same purpose. It was a mere question of cost and durability. Of course, if the culvert was of such length that it became necessary to join two or more lengths, the question of a joint with a minimum of leakage and nonliability to separate became important. With tile it has been customary to have a flange at one end, into which the other end was inserted, and then cement it. It is not really practicable to bolt vitrified tile together.

Has the patentee disclosed patentable novelty in joining the ends of his sheet metal pipe? One end of a length flares, and the other end does not; and hence it slips into the flared end easily. Now the patentee bolts the one length to the other where they thus join. The writer has been familiar with sheet iron stovepipe, plain and corrugated, for at least 50 years, and from youth until the present day has had occasion to assist or act as principal, in emergencies, in putting up the stovepipe, now only used in the writer's kitchen. On the farms such pipe is in common use all over the country where stoves are used. The lengths of pipe are made with one end a little enlarged and the other a little contracted, and when put together firmly are usually riveted. They might be bolted. So far as I can see, the "corrugated metal culvert" of the patent in suit is but a reproduction on an enlarged scale of the common and well-known stovepipe in common use for half a century; bolts taking the place of rivets. I have no doubt of its utility. In fact, old stovepipe is commonly used as a culvert in places where little weight is to rest upon it. It will rust out in time, as will all sheet metal. To be sure, this culvert pipe is heavier than stovepipe—is placed underground and used to carry water, instead of being placed in a house and used to carry smoke. But to my mind it is not a transposition to a new field of action to meet a new and a novel exigency.

The claim reads:

"A culvert constructed of sheet metal and comprising connected cylindrical sections provided with circumferential corrugations extending to the extremities of the sections, each section terminating at one end in a flared and at the other end in a contracted portion of a corrugation, whereby the contracted extremity of one section is adapted to fit into the flared extremity of the adjoining section to interlock the terminal corrugations, and means, as bolts, engaging the overlapping extremities of the corrugations for securing the sections together, substantially as specified."

This claim is not limited to bolts. He who should use rivets to join the sections would infringe, and the result is, if this patent is held valid, that every farmer who shall use two or more sections of stovepipe

riveted together to carry water from a spring or from the roadside, etc., will be liable to a suit in equity and an injunction. There is nothing new or novel about this "corrugated metal culvert." The idea of a stovepipe to conduct smoke has been carried forward to a corrugated sheet metal culvert to conduct water. To my mind there is an utter absence of "patentable invention." No doubt such pipe, when made, has been extensively sold and used. The joint, possibly, has been improved upon, but only in degree. The old idea is simply carried forward. This is not patentable invention. The joint is formed, say the specifications:

"Preferably each section terminates at one end in a flared portion of a corrugation, as shown at 1, and at the other end in a contracted portion of a corrugation, as shown at 2, whereby the flared end of one section is adapted to receive the contracted end of the adjoining section. These telescoping and interlocking extremities of contiguous sections are permanently joined by means of bolts, 3. The fit of the extremities of the sections is sufficiently close to form a practically water-tight joint, when secured by means of bolts or rivets."

The patentee also speaks of the added strength of the joints arising from the fact that, when the contracted end of one section is inserted in the flared end of the adjoining section and they are bolted together, we have a double thickness of sheet metal. This idea is not new. The pipe, as the patent states, consists of—

"sheet metal rolled to a cylindrical form and being provided with circumferential corrugations, preferably arranged in transverse planes in contradistinction to the corrugations which are formed spirally."

It was common to make such pipe—stovepipe, cold and hot air pipe, and other pipe—long before this patent was applied for. In Century Dictionary, under the verb "corrugate" we find:

"To wrinkle, draw, or contract into folds; * * * to corrugate iron plates for use in building."

Also, "corrugated" is thus defined:

"Wrinkled, bent, or drawn into parallel furrows or ridges; as corrugated iron."

There is no possible patentable invention, save in the mode of joining the sections. An idea is not patentable, but new and novel means to carry out a conception may be. As the pipe used is corrugated—that is, alternately enlarged and contracted in parallel wrinkles—the alleged inventor conceived the idea of cutting the sheet iron at the center of a raised portion, trimming off the other half of the severed portion, leaving the end of the next section, when rolled into a cylinder, depressed, so as to shove into and fit the raised portion. This is plainly shown in the drawings forming a part of the patent in suit. When shoved together, the overlapping sheets are bolted or riveted. This was within the province of a mechanic skilled in the art.

The demurrer is sustained, and there will be a decree dismissing the bill, with costs.

THE BAKER PALMER.

(District Court, D. Massachusetts. January 14, 1908.)

No. 40.

1. ADMIRALTY (§ 64*)—INTERROGATORIES—CONSTRUCTION OF RULE.

The extent to which the process of interrogation may be carried by a respondent under admiralty rule 32, which authorizes interrogatories in an answer "touching any matters alleged in the libel or touching any matter of defense set up in the answer," will necessarily vary according to the circumstances of each case, and must be regulated, when in dispute, by the court in its discretion, keeping in view the purpose of the rule and its limitations.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

2. ADMIRALTY (§ 64*)—COLLISION—SUIT FOR DAMAGES—INTERROGATORIES.

Where a libel for collision was filed by certain persons alleged to be the sole owners of a vessel, and as such the lawful bailees of her cargo, on their own behalf "and for and in behalf of her officers and crew and a passenger thereon," the claimant of the libeled vessel may properly, by interrogatories filed with the answer, require libelants to state who all of the other parties libelant are, the capacity in which each makes his claim, and the particular damage which he claims.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

3. COLLISION (§ 117*)—ADMIRALTY (§ 64*)—SUIT FOR DAMAGES—INTERROGATORIES.

A libel for collision occurring in the night, which alleges that after the light of the libeled vessel was seen on the starboard beam of libelant's vessel the latter held her course, "as she was bound to do," and that the libeled vessel continued her course without apparent change until the collision occurred, should allege as nearly as may be what that course was, and where it does not claimants are entitled to call for such information by interrogatories.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 117;* Admiralty, Dec. Dig. § 64.*]

4. ADMIRALTY (§ 64*)—COLLISION—SUIT FOR DAMAGES—INTERROGATORIES.

In a suit for collision, the claimant is entitled by interrogatories to call for information from libelants as to all that took place on their vessel after his own vessel was sighted, including the persons on board, their duties and positions, and what they did.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

5. ADMIRALTY (§ 64*)—COLLISION—SUIT FOR DAMAGES—INTERROGATORIES.

In a suit for collision in the night, where the libel alleges that the loom of a vessel was seen from libelant's vessel two miles away, which proved to be claimant's vessel, he is entitled by interrogatories to call for information as to whether other vessels were seen, and, if so, what was seen of their movements.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

6. ADMIRALTY (§ 64*)—COLLISION—SUIT FOR DAMAGES—INTERROGATORIES.

Where a libel for collision alleged the time, the course of libelant's vessel when claimant's vessel was first seen, that she held such course on the starboard tack, and the direction of the wind, none of which allegations were disputed, claimant is not entitled to interrogate as to the movements of libelant's vessel several hours previously.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

In Admiralty. Suit for collision. On libelant's exceptions to interrogatories propounded in claimant's answer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Russell & Russell, for libelants.

Benjamin Thompson and Edward S. Dodge, for the Baker Palmer.

DODGE, District Judge. Six of the claimant's 33 interrogatories are not excepted to, and these the libelants say they are ready to answer. Of the 27 others to which they except, some call for distinct allegations regarding matters about which the libel as filed is not sufficiently specific. These, which will be identified below, the libelants are clearly bound to answer, as they would have been bound to amend the libel, had exceptions been filed. But the claimant has the right to go further than this under rule 32. "Touching any matters alleged in the libel or touching any matter of defense set up in the answer" he is entitled to compel his adversary to amplify the allegations of the libel, even though not open to exceptions for insufficiency as filed, for the purpose of dispensing with the taking of proofs regarding them, or for the purpose of bringing distinctly before the court the points relied on in defense, or for the purpose of obtaining evidence in support of the defense from the personal answers of his adversary. *The David Pratt*, 1 Ware, 495, 509, Fed. Cas. No. 3,597; *The Serapis* (D. C.) 37 Fed. 436, 442; *The Mexican Prince* (D. C.) 70 Fed. 246; *Benedict*, Adm. Practice (3d Ed.) § 519.

The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when it is in dispute, by the court in its discretion. The purposes for which it is allowed, as above stated, are to be kept in view; and it is also to be remembered that the matters regarding which interrogatories may be put are, by the language of rule 32, only the matters alleged in the libel or set up in defense by the answer, and that interrogatories are not to be used for such purposes merely as those of finding out in advance what the adversary's evidence will be, or who his witnesses are, or of obtaining the production of letters or documents not in issue, or of cross-examining the adverse party regarding the truth of the allegations made in his pleadings. *The Intrepid* (D. C.) 42 Fed. 185; *Havermeyer's, etc., Company v. Compania Transatlantica* (D. C.) 43 Fed. 90; *Bock v. Navigation Company* (D. C.) 124 Fed. 711. It is, however, not necessarily an objection to an interrogatory, otherwise permissible under rule 32, that some of the purposes above referred to may be incidentally accomplished by it. Interrogatories in admiralty are not to be confined within the limits allowed to interrogatories under the practice of the Massachusetts courts. The system of pleading in admiralty differs radically in character from that of the state courts, and the language of rule 32 makes it clear that the interrogating party is not confined, as in those courts, to matters material to the case he sets up in his own pleadings. *Wilson v. Webber*, 2 Gray (Mass.) 558.

1. This libel is brought by certain persons alleged to be the sole owners of the *Maud Sherwood*, and as such the lawful bailees of her cargo, on their own behalf "and for and in behalf of her officers and crew and a passenger thereon."

No decree could properly be entered in favor of persons named, on behalf of persons not named and not identified further than is here

attempted. Unless there was some reason why it was impracticable at the time, the names of the officers and of the members of the crew and of the passenger should have been stated. If there was any reason why this could not have been done, the reason should have been stated, and an amendment supplying the omission should have been filed as soon as possible. The claimant is entitled to know who all the parties libellant are, the capacity in which each of them makes his claim, and the particular damage for which he claims. If there is any question whether this principle requires the respective capacities which each filled on the vessel during the voyage to be stated in the libel, the claimant has in my opinion a clear right to require it to be stated upon interrogatories. The exception to interrogatory 1, which calls for these particulars regarding the libellants not named, must be overruled.

2. The libel, in stating the manner in which the collision between the Sherwood and the Palmer occurred, alleges that the Sherwood was close-hauled on the starboard tack, headed about S. E. by S., with the wind about S. S. W., and that these conditions continued until the collision; that the loom of a vessel which afterward proved to be the Palmer was reported on the starboard beam, and immediately afterwards her red light was seen, at a distance of about two miles; "that the Sherwood held her course, as she was bound to do," without change after the Palmer was reported; that the Palmer continued to approach on the same course as when first seen; that warning signals were sounded on the Sherwood as the danger of collision became imminent, and were continued until immediately before the collision; but that the Palmer, showing her red light only, and apparently in no way changing her course, ran into and struck the Sherwood between the main and mizzen rigging.

In two respects these allegations are not sufficient to support the claim of the libel that the Palmer was solely in fault: (1) The bearing of the Palmer when first seen is not alleged with sufficient definiteness, even though it be assumed that the "loom" of that vessel was seen, as well as reported, "on the starboard beam." The different directions which might be included under this expression are too many and too various. This insufficiency would seem to be conceded by the libellants; for they do not object to answering interrogatory 16, which calls for a definite statement upon the point. (2) If the libellants allege that the Palmer continued to approach on "the same course as when first seen," and ran into the Sherwood "without apparent change" of that course, they should allege what that course was, or at least how it compared with their own course. It may well be that they could not be expected to give the exact compass course under the circumstances, but they should allege the course as nearly as they are able from the indications they had regarding it. If they had alleged, as they ought, on which side the Sherwood was struck, and at what angle, some material would have been afforded for inferring what they claim the Palmer's course to have been, and how it involved risk of collision. It does not necessarily follow, from what is alleged, that the Sherwood was bound to hold her course without change, or that she had a right to do so. Either to cure these insufficiencies in the libel, or as amplifications to which the claimant is entitled of the allegations which relate

to the Palmer's course as they are or ought to have been, the libelants should answer, not only interrogatory 16, but also interrogatories 18, 20, 24, 25, 31, and 32. The exceptions to these interrogatories are overruled.

3. I cannot doubt that the claimant may interrogate the libelants fully regarding everything that took place on board the *Sherwood*, from the time the Palmer was first sighted until the collision. I think he is entitled to know, as to each person on board, where he was, what duty, if any, he was charged with, what he saw, heard, or did, and under what circumstances, during the approach of the two vessels. I therefore overrule the exceptions to interrogatories 2, 3, 15, 17, 19, 22, 23, 27, 28, and 29, and require these interrogatories to be answered. The same ruling would be made as to interrogatory 26, but for the fact that it is alleged distinctly in the libel that no change in the Palmer's course was observed, and the libelants are bound by that allegation. No contrary statement can therefore be expected at present. To this interrogatory the exception is sustained.

4. Interrogatories 9, 10, and 11 seem to me proper, in view of the allegation in the libel that the vessel whose "loom" is alleged to have been reported two miles away proved to be the Palmer. If there were other vessels in the neighborhood at or about the same time, the claimant has a right to know what was seen of them or their movements by those on the *Sherwood*. The exceptions to these three interrogatories are overruled.

5. The allegations being that the *Sherwood* kept close-hauled on the starboard tack on the course and having the wind as stated above, and there being no dispute, as appears from the answer, that the collision was after 9 p. m., I see no reason why the libelants should be required to state how far toward the northward and westward of the place of collision she had been during the afternoon or early evening, or how near Plymouth, her port of destination, she had at any time been, or how Plymouth then bore, or how the tide or wind then were, or how much further toward Plymouth she could then have gone, or how the nearest land or lights then bore, or what occasion there was for heading away from Plymouth, or at what time this was done, or all the changes in the schooner's course since made, or their occasion. All this was several hours before the collision, taking the libelants' allegations as they stand, and the inquiry regarding it seems to me too remote, as the case now stands, to be material, either in defining the issue between the parties or as tending to obtain evidence in support of the defense. The direction of the wind is not in controversy. There is a question whether it was a light or a fresh breeze; but as to the speed of the *Sherwood* there are no allegations either in the libel or in the answer. Interrogatory 33, which the libelants are ready to answer, inquires only as to her speed just prior to the collision. The exceptions to interrogatories 4, 5, 6, and 7 are sustained; also to interrogatory 8, which seeks to ascertain what vessels were in sight when the *Sherwood* changed the course she was on when nearest Plymouth, and what was subsequently seen of any of them. This, also, I regard as too remote.

6. The place of collision is alleged in the libel to have been six or seven miles N. E. by N. from Race Point light. This is definite enough, and I see no occasion for inquiring in interrogatory 14 what part of Race Point is referred to. It appears from the answer (article 4) that there is no dispute as to the place of collision; and, if there were any, the remainder of interrogatory 14 would be mere cross-examination. The exception to this interrogatory is sustained.

The result is that the libelants are required to answer, not only the interrogatories to which they have not excepted, but also interrogatories 1, 2, 3, 9, 10, 11, 15, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29, 31, and 32.

LIEBIG'S EXTRACT OF MEAT CO., Limited, v. LIEBIG EXTRACT CO.

(Circuit Court, S. D. New York. May 4, 1909.)

1. TRADE-MARKS AND TRADE-NAMES (§ 10*)—NAMES SUBJECT TO APPROPRIATION—"LIEBIG."

The name "Liebig," as applied to extracts of meat, has been in common use by many in this country for many years to designate preparations supposed to have been made by Liebig's process, and is common property, which no longer designates, if it ever did, the product of a particular manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 86*)—UNFAIR COMPETITION—IMITATION OF CORPORATE NAME.

"Liebig's Extract of Meat Company, Limited," an English corporation, held not entitled to an injunction to restrain the "Liebig Extract Company," of New York, from using its own name in a competing business in this country; the defendant having adopted and continuously used the name since a time before complainant opened an office here on the same street.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

Use of corporate or firm names, see notes to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 579; *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. C. A. 357.]

In Equity. Final hearing on the merits.

James L. Steuart and Steuart & Steuart, for complainant.

Herbert S. Murphy, for defendant.

PLATT, District Judge. This is the result of final hearing upon a bill in equity asking for an injunction and accounting. The complainant asked for a preliminary injunction in this matter. The motion was denied on June 6, 1907. Judge Lacombe filed with the denial a brief memorandum.

Evidently the moving papers had been based upon defendant's sales of the "Liberty" brand, as well as the "Red Cross" brand. Charges of specific instances of fraudulent misrepresentation were made in the affidavits with greater vigor than can be found in the final proofs. The judge at the earlier hearing was satisfied, I think,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

just as I am, that the defendant was wrong in putting on the market the so-called "Liberty" brand. The sales, however, had been trivial in amount, and had been abandoned before suit. Complainant was given leave to come back, if further sales of the "Liberty" brand were discovered. All other questions were left for final hearing. No further sales of "Liberty" brand have been discovered, and the general charge of fraud has weakened as time has passed.

The only matter, then, left for me to decide, is the situation which has arisen by reason of the defendant's sales of the "Red Cross" brand. I understood at the hearing that this was what the complainant wished, and I shall take him at his word. If the complainant shall hereafter demand and obtain narrower relief, it must in no sense be considered a reversal of my views on the whole case. If I am deemed to be wrong on the broad contention which complainant now makes, I shall try to accept the rebuke with equanimity.

The complainant is an English corporation, which sells large quantities of Liebig's Extract of Meat in the United States. In its direct attack upon the defendant's sales of the so-called "Red Cross" brand of Liebig's Extract of Meat, it necessarily demands the exclusive right to attach to its product the word "Liebig," or the words "Liebig's Extract," or the words "Extractum Carnis," with or without Liebig, on the broad ground that such or a similar use of those or like expressions indicates to the consumer that the extract of meat so sold is made by the complainant. The defendant insists that such words and expressions simply indicate that the extract of meat contained in the package so labeled is made in accordance with the Liebig formula or process, and that, if Baron Liebig ever did have any personal and proprietary rights therein (which is strenuously denied), he dedicated them to the public ages ago, and that ever since such dedication the general public has had the same right to make goods in accordance with the Liebig process that it has to make Dover's powders, and may say so in any way it pleases, which does not invade the rights of an individual member of the public to do the same thing.

It is probable that from a chemical and scientific standpoint Baron Liebig is entitled to the credit of having invented the process whereby beef carcasses could be so treated as to leave behind a concentrated extract of value. It is certain that the general public has always been of that opinion. He also helped out in the commercializing of that process. He did both of these things, however, before he undertook to convey his personal rights and privileges to the predecessor of the complainant. The rights to his process, both scientific and commercialized, had therefore become public property before the complainant undertook to maintain its broad right to the name as applied to the process. The courts of England refused to confirm that broad right in the complainant. The courts of this country have also, whenever squarely confronted with the issue, taken the same negative attitude. We now meet the broadest of all the broad contentions, and are asked to apply the results of a favorable conclusion thereon to the complainant's product as an article of American commerce; and we are asked to do this in despite of the historical facts with which the record is crowded.

The complainant has adopted a somewhat curious way of proving that the name "Liebig," when found on packages of meat extract, guides the public directly to the complainant. He goes about the country among his own customers, and picks out in each locality some member of the firm of excellent standing and reputation. This can be easily done, because complainant is dealing with the very best class of trade in the country. After putting the witness through the usual preparatory paces, he produces a package of complainant's Extract of Meat, with its peculiar earmarks and indicia, and asks him whether he is familiar with that package, and (to clench the matter before the answer comes) whether it is a package which he knows as the package of Liebig's Extract of Meat. In view of the fact that the witness has been dealing for a long time in packages of which the one presented is a fac simile, and in no other kind of package of Liebig's Extract, it is not unnatural that he should answer that it is a package with which he is thoroughly familiar, that he has known it for many years, and that it has been always the same. He is thus prepared to respond to a series of leading questions, which the court, by adopting Liebig's scientific process, may boil down into an expression by the witness of an opinion that when people ask his house for Liebig's Extract of Meat, and say nothing more, he thinks they mean the extract manufactured by complainant, and sends that along as a compliance with the order. This method of trade would go very well with old, established, regular customers; but it is hard to believe that it could be successfully applied to all purchasers, after reading the evidence at large in the record before me.

It will be noticed, further, that all witnesses of that class think the one ordering Liebig's Extract of Meat, without more, refers to the "genuine brand." The distinction implies the knowledge that there are other brands. The house dealing in imported goods would naturally think, on receiving a blind order, that the customer wanted the imported, rather than the domestic, article. The record is replete with testimony that all kinds and descriptions of brands of Liebig's Extract of Meat have for many years been manufactured and sold by domestic makers to the domestic trade; and in every case where the domestic maker has taken pains to so differentiate his package from the complainant's as to eliminate any possibility of error, his right to make Liebig's Extract of Meat has been sustained by the courts. The right to do so was common property before the complainant existed, and it is common property to-day. It would be a pleasant task to take the matter up in detail, and, after setting forth my findings drawn from a mass of subordinate facts, to lead up by slow stages to my various subordinate conclusions, and from them to my final conclusion; but lack of time compels me to refrain.

Complainant's package, with its earmarks and individualities, has been used for so many years in practically unvarying form that, beyond doubt, it points directly to complainant; but I cannot find any satisfactory proof that any package, of any shape, with any marking, which has thereon "Liebig," or "Liebig's Extract," or "Liebig's Extract of Meat," with or without "Extractum Carnis" added thereto, no matter how distinct the endeavor to differentiate may be, will direct the

average public consumer toward the complainant, or, putting it in another way, tend to raise in his mind a belief that the complainant made the article which it contains.

As to the use by defendant of its corporate name: Defendant was incorporated and settled down to business at 48 Hudson street, New York City, with loud assertion of what its business was, long before the complainant opened an office of its own in the city. It has carried on its business openly, and increased its sales, under the eyes of the complainant and its agents and without protest. Complainant says it waited for the outcome of other suits against other parties before bringing this one; but surely no act of any party could, from complainant's view point, be as wanton and outrageous as that of a competitor who deliberately takes a name which inherently commits a trespass on complainant's rights. It is passing strange that complainant could sit calmly by and see a party on the same street adopting a dress which was in and of itself a trespass, before one even had a chance to examine the goods which he made, without crying to high heaven in protest. If the trespass were a flagrant one, it might be possible to overlook the laches; but complainant's conduct ought certainly to excuse a court of equity from a serious discussion of the "Liberty" brand proposition.

I would like to talk about the complainant's assertion that it makes its extract under a secret process of its own. The general public surely thinks that it makes it under the Liebig process. If it is not so making its product, is it not deceiving the public, and how can it claim rights from Baron Liebig, if it has abandoned the process that Liebig invented? I must stop myself with a firm hand, or I shall go on ad infinitum, if not ad nauseam.

All these things and many others being clearly accentuated in my mind, it follows as a matter of course that the bill should be dismissed, with costs; and it is so ordered.

ALTMAN & CO. V. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,372.

1. CUSTOMS DUTIES (§ 37*)—CONSTRUCTION—RECIPROCAL COMMERCIAL AGREEMENTS—"STATUARY."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), the definition there given the term "statuary" as used in this act, governs the provision for "statuary" in section 3, 30 Stat. 203 (U. S. Comp. St. 1901, p. 1690), and the reciprocal commercial agreements negotiated as provided in said section.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 7, p. 6646.]

2. CUSTOMS DUTIES (§ 37*)—BRONZE STATUARY—"WROUGHT BY HAND."

The provision for "statuary * * * wrought by hand * * * from metal," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), does not include a bronze statue

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cast in a foundry by artisans from a model that was made in plastic material by an artist, but upon which he did little or no retouching.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 8, p. 7549.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, G. A. 6,813 (T. D. 29,279), affirmed the assessment of duty by the collector of customs at the port of New York. The opinion of the Board of General Appraisers reads as follows:

WAITE, General Appraiser. The question here arises over the importation of a bronze bust of Louis XVI, No. 4,221 on the invoice, valued at 800 francs, less 10 per cent. and 2 per cent. It was assessed for duty at 45 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), which reads as follows:

"193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

The importers claim it is dutiable at 15 per cent. ad valorem under the provisions of section 3, 30 Stat. 203 (U. S. Comp. St. 1901, p. 1690), and the reciprocal commercial agreement with France (30 Stat. 1774 [T. D. 19,405]), which agreement is authorized by said section 3 and provides, among other things, for the importation of paintings and statuary at the rate of 15 per cent. ad valorem. In order to have a full understanding of the issue here involved, it becomes necessary to consider said section 3 and the French treaty in connection with paragraph 454 of the act (Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678]), which reads as follows:

"454. Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this act, twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

It is claimed that the collector erred in assuming that the word "statuary," as used in section 3 and said commercial agreement, is subject to the provision in said paragraph 454 as to what shall be considered statuary, to wit: "'Statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from * * * metal, and as is the professional production of a statuary or sculptor only." If such definition is applicable, then it is further contended by the importers that this statue is nevertheless "wrought by hand * * * from metal," and is the professional production of a statuary or sculptor within the meaning of said paragraph 454.

As to the question whether the term "statuary" in section 3 and the French reciprocity agreement is subject to the definition found in paragraph 454, we say this question has been passed upon by the Circuit Court of Appeals in the Second Circuit in the case of *Richard v. U. S.*, 158 Fed. 1019, 86 C. C. A. 671, T. D. 28,601, affirming the decision of the Circuit Court in 151 Fed. 954, T. D. 27,948, and by the Board in *Havemeyer's Case*, G. A. 5,286, T. D. 24,247. These decisions specifically deny the contention of the importers in this case. We therefore overrule the protests on this claim.

There then remains the question as to whether the piece of statuary here involved was "wrought by hand * * * from metal" and was the professional production of a statuary or sculptor only. Considerable testimony has been taken, but none of it shows any unusual method in the production of this bust. The bust itself was not in evidence; neither was any one brought before us who had seen its production. For the purposes of this case it must be considered as a piece of ordinary bronze statuary, sometimes termed "commercial statuary," produced by casting from a model made in some

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plastic material under the hand of the artist. This kind of statuary has been the subject of decisions both by the Board and the courts in various cases. The importers in their contention rely on the case of *United States v. Tiffany*, 160 Fed. 408, 87 C. C. A. 360, T. D. 28,717, as modifying all previous decisions on this subject. Paragraph 454 of the act of 1897 is the same as paragraph 465 of the act of 1890 (Act Oct. 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 602), under which last-named act the Circuit Court of Appeals of the Second Circuit passed upon cast bronze statuary in the case of *Tiffany v. United States*, 71 Fed. 691, 18 C. C. A. 297.

We are of the opinion that this decision should govern in the case at bar, and that the case of *United States v. Tiffany*, supra, is distinguished. In the case of *Tiffany v. United States*, supra, the court used the following language: "The artist's handwork in preparing the clay model is in no sense the work which transforms the metal itself into the statue, and the fact that some 'touching up' or smoothing or chasing is put upon the casting after it comes from the mold is not sufficient to entitle it to classification as statuary wrought by hand from metal, especially in view of the testimony of appellants' witness that there are bronze statues made from metal, not by casting, but by beating. The amendment was inserted to accomplish a purpose, and its language is so plain and unambiguous that a construction which would eliminate it cannot be adopted. It manifestly excludes from the provisions of paragraph 465 of the act of 1890 all metal statuary which is not wrought by hand from the metal, and statuary which is substantially made by castings is not so wrought, although it may be afterwards surface-finished by workman or artist."

The case (*United States v. Tiffany*, 160 Fed. 408, 87 C. C. A. 360, T. D. 28,717, supra) relied upon by protestants, is distinguished from the last above-mentioned case by the court in this language: "After the various parts have been cast, the important work, that which gives it its distinctive personal character, is done by hand; the sculptor carefully going over the figure and making the alterations and changes necessary to embody his ideas. It is this artistic feature, this expression to the sculptor's intention, which gives value to the statue, not the price paid for the bronze and ivory. No one but a sculptor of the highest merit could have cut the ivory face so symbolic of the horrors of war, or fashioned the cloak which is considered one of the most wonderful pieces of bronze in existence. In short, the statue was the work of Gérôme, and to its minutest details he gave the best work of his brain and hand."

Further distinguishing the two cases, the court says: "It appeared in that case (*Tiffany v. U. S.*, 71 Fed. 691, 18 C. C. A. 297) that the government's contention was that the importations were known as 'commercial bronzes'; some of them being reproduced many times, and none of them receiving more than perfunctory attention from the original sculptor. There was also evidence that there were bronze statues made, not by casting, but by hand 'beating.' In the present case there is no such testimony, and, as we have before seen, the entire work, from the original conception until the last touch was placed upon the statue, was under the direct and constant supervision of Gérôme."

In the case at bar there is much testimony which clearly shows, we think, that repoussé work, or work produced by hammering and entirely wrought by hand, has been known from a remote time, specimens of which are cited, showing that they have been produced even down to the present, to wit, the Japanese figure of an ape (Exhibit 6), the statue of St. Sebastian (Exhibit 7), the figure of Charles II (Exhibit 8), the Greek Chariot (Exhibits 10, 11, and 12), and the Statue of Liberty (Exhibits 13 and 14). We do not think it is shown that this method of producing bronze or metal statues by hand has been very extensively used. Still we are of the opinion, in view of the ease with which commercial bronze statuary may be produced by the hand of a skilled artisan, entirely independent of the artist, that it was intended to prohibit the importation under said paragraph 454 of such pieces of casting, thereby protecting the bronze foundries and the domestic industries where great quantities of labor are employed and large capital is invested.

In the absence of testimony to the contrary, we assume that this piece

of statuary was produced in the ordinary way, and that practically all the hand work upon it was done by the artisan at the foundry, which hand work consists of removing seams and protuberances left by the imperfections of the mold, and perhaps chasing or smoothing the surface of the figure, which in no way changes the form after it is taken from the matrix or mold. In fact, the efficiency of the foundry is determined by the degree of resemblance that the metal statue bears to the model, and, should the statue vary to any extent, it would be rejected as an imperfect casting. From the testimony in this case it does not appear to us that an artist whose business it is to work upon plastic material would feel competent to change the figure, facial expression, or dimensions after the metal casting had been made. The testimony of founders and workmen who have been in the business for years satisfies us that in this class of statuary the artist has very little, if anything, to do with the statue after he has produced the model. We therefore hold that the piece of statuary involved herein is not "wrought by hand * * * from metal."

In view of this conclusion, it becomes unnecessary to discuss the only remaining question, to wit, whether this bust is the professional production of a statuary or sculptor.

The protest is overruled, and the decision of the collector will stand.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

JULIUS WILE & CO. v. UNITED STATES (two cases).

(Circuit Court, S. D. New York. May 19, 1909.)

Nos. 3950, 4275, 4296, 4301, 4303, 4635, 4638.

CUSTOMS DUTIES (§ 78*)—LEAKAGE OF VERMUTH—"WINES, LIQUORS, CORDIALS, OR DISTILLED SPIRITS."

Vermuth is not covered by Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1654), prescribing that no allowance of duty should be made for leakage of "wines, liquors, cordials, or distilled spirits," as the context indicates that Congress regarded vermuth as an independent article from those enumerated in said provision.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 194; Dec. Dig. § 78.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

These proceedings are also entitled in the names of Hartman, Goldsmith & Co. (two cases), Weidemann Company, and Batjer & Co. (two cases.)

The decisions below affirmed the assessment of duty by the collector of customs at the port of New York on numerous importations containing vermuth. The case turns on the construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1654), reading as follows:

"296. Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

more than fourteen per centum of absolute alcohol, fifty cents per gallon. In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs: Provided, that any wines, ginger cordial, or vermouth imported containing more than twenty-four per centum of alcohol shall be classed as spirits and pay duty accordingly: And provided further, that there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. Wines, cordials, brandy, and other spirituous liquors, including bitters of all kinds, and bay rum or bay water, imported in bottles or jugs, shall be packed in packages containing not less than one dozen bottles or jugs in each package, or duty shall be paid as if such package contained at least one dozen bottles or jugs, and in addition thereto, duty shall be collected on the bottles or jugs at the rates which would be chargeable thereon if imported empty. The percentage of alcohol in wines and fruit juices shall be determined in such manner as the Secretary of the Treasury shall by regulation prescribe."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. So far as these cases relate to shortage of spirits, wines, etc., under the second proviso to paragraph 296, tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]), that question has been decided by the United States Supreme Court in favor of the Government. *Shaw v. United States*, T. D. 29,412. Counsel for the importers, however, show that certain of the protests involved herein relate to items of vermouth and insists that said decision has no application thereto. The counsel abandons all claims except that concerning vermouth.

I am of the opinion that the said proviso to paragraph 296, which states "that there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," was not intended by Congress to include vermouth. When Congress enacted paragraph 296 it seems to have plainly had in mind vermouth as an independent exceptional article, because at the very beginning it found it necessary to mention it *eo nomine* after referring to still wines, and then in the middle of the paragraph when it made the first proviso it again singled out vermouth as one of the articles which, if containing more than 24 per cent. of alcohol, should be classed as a spirit. It would seem to me that, when it made a further proviso with regard to the articles as to which there should be no constructive or other allowance, etc., it would have continued its specific mention of vermouth, if it intended that provision to apply to that article; and the very fact it eliminated vermouth from that second proviso would seem to me to indicate that Congress intended to remove it from the effects of that proviso.

The decisions of the Board of Appraisers in the above-entitled suits are reversed so far as they cover items of vermouth. In all other respects they are affirmed.

H. C. COOK CO. v. BEECHER et al.

(Circuit Court, D. Connecticut. June 29, 1909.)

No. 731.

COURTS (§§ 264, 290, 307*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

An action, by the owner of a judgment recovered against a corporation for infringement of a patent, to charge directors of such corporation with payment of the judgment on the ground that they were joint trespassers with the corporation, is not within the jurisdiction of the federal court as one arising under the patent laws, nor as ancillary to the former suit; and unless there is diversity of citizenship such court is without jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. §§ 264, 290, 307.*]

Jurisdiction in cases involving federal question, see note to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Mining Co., 35 C. C. A. 7.]

At Law.

Verenice Munger, for plaintiff.

Edward A. Harriman, for defendants.

PLATT, District Judge. The plaintiff had a patent suit in this court against the Little River Manufacturing Company. The defendants were the directors of the company during all the time that case was pending. Upon a proper showing they could have been made codefendants in that suit. A strenuous effort was made to bring them in by amendment at the last moment, which was refused, because it came too late.

In the somewhat elaborate complaint now under discussion the plaintiff rehearses the story about the patent litigation and then goes on to allege that the defendants were joint trespassers with the Little River Manufacturing Company in respect of the infringing acts set forth in the former litigation and for which judgment went against the corporation. For that reason he insists that they ought to pay that judgment. His theory seems to be that, because the directors and the corporation were joint trespassers, they must all be jointly responsible for the damages found to have resulted from the trespass charged against one of them alone.

However that may be, it is very clear that the nature of the trespass is not material to the present litigation. The only questions to be litigated are: (1) Does the plaintiff own the judgment? (2) Were the corporation and the directors joint trespassers as alleged? (3) If they were, what is the situation now in respect of the judgment as to four of them about whom the plaintiff remained silent in the patent litigation?

The details of that litigation add nothing to the strength of the complaint. The plaintiff could as well have started with the fact that it had title to the judgment obtained in that litigation and then followed with the rest of its complaint, which sets up new matter, and may or may not set forth a cause of action. To put the matter in a nutshell:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff has a judgment for something near \$12,000 damages for infringement of a patent. That is over and done with. The corporation is insolvent, and the plaintiff wishes the directors to pay that judgment. This is new matter, and is purely a question of law and fact, growing out of the relationship between the corporation and its directors, and is in no sense of the word a patent case. All the parties interested are citizens of Connecticut. The whole matter is one over which the courts of the state have exclusive jurisdiction, and which it would seem intrusive for this court to attempt to touch.

Plaintiff urges the rule that judgment against one joint trespasser without full satisfaction is no bar to a suit against another for the same trespass. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129. The fault in his logic is that this complaint is not a suit against the directors for the infringement of the patent. It is a suit to recover from these defendants, as joint trespassers, the fruits of the infringing acts of their original joint trespasser the Little River Manufacturing Company. Neither the validity of the patent nor its infringement is put in issue by the complaint.

Plaintiff urges that the title to the patent is at issue. I cannot agree with him. The title to the judgment under the patent is undoubtedly at issue; but it is of no importance whether the plaintiff now owns the patent or not. He may have sold the patent and retained the right to recover the judgment obtained for a trespass upon his rights when he did own it.

The plaintiff's other point is that the suit is in the nature of an ancillary action, and that the court has jurisdiction to enforce payment of the judgment described in the complaint. The trouble with that argument is that this suit is not in the nature of an ancillary action. The plaintiff sought ancillary relief when it asked permission to amend its bill in the original litigation. This court then had jurisdiction, and in the exercise of its best discretion refused the relief. The plaintiff was then told that it had a right to pursue its rights in a new suit. The refusal to permit the amendment was acquiesced in by the plaintiff, and with its eyes open it proceeded to take judgment against the corporation alone. With the entry of that judgment the jurisdiction of the court over these parties as litigants in a patent suit ended. It cannot be revived in the way suggested.

It is fair to say, in conclusion, that the defendants have not raised the question of jurisdiction. The responsibility for the action herein ordered rests entirely upon my shoulders. The jurisdictional defect is obvious upon the face of the papers, and action has been taken at the first opportunity offered.

Let the complaint be dismissed for lack of jurisdiction.

UNITED STATES v. McKESSON, ROBBINS & CO.

SAME v. MERCK & CO.

(Circuit Court, S. D. New York. May 13, 1909.)

Nos. 5,342, 5,370.

CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—POWDERED OPIUM—"DRUG ADVANCED IN VALUE OR CONDITION."

Powdered opium is a "drug advanced in value or condition," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628), rather than opium crude or unmanufactured, under paragraph 43, 30 Stat. 153 (U. S. Comp. St. 1901, p. 1629).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

The Board of Appraisers held that powdered opium imported at the port of New York had been improperly classified by the collector of customs at that port as opium crude or unmanufactured, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 43, 30 Stat. 153 (U. S. Comp. St. 1901, p. 1629), and sustained the importers' contention that the article should have been classified as a drug advanced in value or condition under paragraph 20, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628).

D. Frank Lloyd, Asst. U. S. Atty.

Hatch & Clute (Walter F. Welch, of counsel), for McKesson & Robbins.

Comstock & Washburn (Albert H. Washburn, of counsel), for Merck & Co.

PLATT, District Judge. I agree with the Board of General Appraisers that the evidence in these cases does not differentiate the merchandise involved from that passed upon in Merck v. U. S., 151 Fed. 14, 80 C. C. A. 510.

Decisions affirmed.

STEINHARDT & BRO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,065.

1. CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—"PAINTINGS"—PAINTED LITHOGRAPHS.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), for "paintings" in oil or water colors, does not include articles consisting of lithographic prints pasted on wood, and painted to a slight extent, and varnished.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5158-5159.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CUSTOMS DUTIES (§ 37*)—COMMERCIAL DESIGNATION—PAINTINGS.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), the expression "paintings in oil or water colors" is not a commercial term, but is used descriptively.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (George J. Puckhafer, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge (orally). The articles in controversy are lithographic prints pasted on wood and decorated with oil paints, which the Board held to have been properly classified as manufactures in chief value of wood under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647) overruling the importers' contention that they should have been classified as paintings under paragraph 454 of said act.

I do not think these are paintings within the meaning of paragraph 454. I do not agree with the Board that it is a question whether they are known commercially as paintings. In my opinion, the language employed in said paragraph—"paintings in oil or water colors," etc.—is descriptive. These articles have been produced largely by the lithographic process, and the subsequent application with the brush and paint to a slight extent and washing over with varnish is not sufficient to give to them the character of paintings.

Decision affirmed.

UNITED STATES v. WADLEIGH.

SAME v. WINTER & SMILLIE.

(Circuit Court, S. D. New York. May 21, 1909.)

Nos. 5,345, 5,346.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—SINGAPORE BUFFALO HIDES—"CATTLE"—EJUSDEM GENERIS.

Singapore buffaloes are not "cattle," because they are not domesticated, and their hides are therefore not within the provision for hides of "cattle," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676). Furthermore, the presence in the same paragraph of a drawback provision with respect to leather indicates an intention to include therein only such hides as can be tanned into leather, a use of which these Singapore hides are not susceptible.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1005-1008.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,809 (T. D. 29,266), reversed the assessment of duty by the collector of customs at the port of New York. The question at issue is whether Singapore buffalo

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hides are classifiable under paragraph 437, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), or under paragraph 664, Free List, § 2, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688), the pertinent portions of which read as follows:

"437. Hides of cattle, raw or uncured, whether dry, salted, or pickled, fifteen per centum ad valorem: Provided, that upon all leather exported, made from imported hides, there shall be allowed a drawback equal to the amount of duty paid on such hides, to be paid under such regulations as the Secretary of the Treasury may prescribe."

"664. * * * Hides not specially provided for in this act."

D. Frank Lloyd, Asst. U. S. Atty.

B. A. Levett, for importers.

PLATT, District Judge. These hides are exactly the same as those held free in *United States v. Winter & Smillie*, T. D. 25,184, affirmed by the Circuit Court of Appeals (134 Fed. 841, 67 C. C. A. 437, T. D. 25,901), and acquiesced in by the government December 23, 1904 (T. D. 25,886). They are Singapore hides, coming from the Straits Settlements. Since the above decision another class of hides, known as "Calcutta hides," have been decided to be dutiable as cattle hides at 15 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676). *Schmoll v. United States*, 157 Fed. 1005, 85 C. C. A. 679, T. D. 28,604. It is conceded that these latter hides come from a domesticated buffalo and when tanned can be used for leather.

I do not see how the government can expect to have the hides in suit classified as cattle hides, unless they have shown that, like the Calcutta hides, these hides are also taken from domesticated buffalo and when tanned can be used for leather. I am aware of the general rule that the uses to which an imported article is to be put do not control the classification; but where we find a paragraph like 437 it would seem that an exception to the rule is at hand. It is the first paragraph of the leather schedule, and, after fixing an ad valorem rate of 15 per cent. on "hides of cattle," a proviso is inserted as to a drawback upon exported leather made of imported hides. There being no other provision for a duty on hides, and all other hides being made free by paragraph 664, it would seem that Congress must have had the leather industry in mind when it passed paragraph 437.

Decision affirmed.

MALDONADO & CO. v. UNITED STATES.

HENSEL, BRUCKMANN & LORBACHER v. SAME.

(Circuit Court, S. D. New York. May 21, 1909.)

Nos. 4,448, 4,679.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"STEEL IN ALL FORMS AND SHAPES"—FINISHED ARTICLES.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), does not include such distinctively finish-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed articles as horseshoe calks and ball bearings in the provision for "steel in all forms and shapes."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

The decisions below affirmed the assessment of duty by the collector of customs at the port of New York. Note G. A. 6,412 (T. D. 27,542).

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.
Addison S. Pratt, Asst. U. S. Atty.

PLATT, District Judge. There is no doubt about these importations, steel horseshoe calks in the one case and ball bearings in the other, going into Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), unless paragraph 135 of that act is more specific. The importers insist that "steel in all forms and shapes," found in paragraph 135, describes them. We start in 135 with steel in a very crude form, namely, ingots, blooms, slabs. We then go to gun-barrel molds, then to steel castings, then to sheets and plates, and then immediately to "steel in all forms and shapes." It is true that Congress must have had in mind in this last phrase forms and shapes upon which some labor had been expended in addition to that required to produce sheets and plates. But although, as the Board says, every manufactured article must have form and shape, it is not conceivable that Congress intended to provide in paragraph 135 for such distinctively finished products as those at issue.

Decisions affirmed.

UNITED STATES v. LEHN & FINK.

LEHN & FINK v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1909.)

Nos. 5,429, 5,430.

1. CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—BALSAM IN CAPSULES—"MEDICINAL PREPARATIONS."

Gelatin capsules containing balsam are dutiable as "medicinal preparations," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4465, 4466; vol. 8, p. 7720.]

2. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—"CRUDE DRUGS NOT ADVANCED IN VALUE OR CONDITION."

Where the process of placing crude balsam in gelatin capsules has resulted in an article with a greater value and an improved condition, the combination is not classifiable as "crude drugs not advanced in value or condition," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 548, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—"BALSAMS ADVANCED IN VALUE OR CONDITION."

Balsam in gelatin capsules cannot be considered simply as balsam and classified as "balsams * * * advanced in value or condition," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628), because nothing whatever has been done to the balsam itself.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

4. CUSTOMS DUTIES (§ 47*)—CLASSIFICATION—CAPSULES FILLED—"COVERINGS."

Gelatin capsules containing a medicine are not "coverings," within the meaning of the tariff laws, not being for transportation, but an essential part of the article.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 2, p. 1705.]

On Application for Review of a Decision by the Board of United States General Appraisers.

These are cross-appeals from a decision reported as G. A. 6,837 (T. D. 29,408) and relating to merchandise imported at the port of New York. This merchandise was classified by the collector of customs as a medicinal preparation, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631). The Board held it dutiable under paragraph 20, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628), relating to drugs such as "balsams * * * advanced in value or condition." The government contends in its appeal that the collector's assessment was correct. The importers contend that their further claim for free entry should have been sustained under the provision in section 2, Free List, par. 548, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), for drugs, including "balsams, * * * in a crude state and not advanced in value or condition."

D. Frank Lloyd, Asst. U. S. Atty.

Brown & Gerry (Everit Brown, of counsel), for importers.

PLATT, District Judge. The articles imported are gelatin capsules containing balsam. The capsules by themselves would come under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 450, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678). The contents of each capsule is confessedly balsam, a crude drug, free under paragraph 548. The balsam has not been advanced in condition or value by any process applied to the drug itself. The crude balsam is put in the capsule, and the combination, as imported, has by reason of such treatment a greater value and its condition is improved. The thing imported cannot, therefore, by any twist of logic be tortured into balsam crude and nothing more. It is balsam crude plus the gelatin covering, which is an essential and necessary part of the imported article, and cannot be called a convenient or usual covering for the purposes of transportation. The article imported, therefore, is taken out of paragraph 548. Neither is it balsam advanced in condition or value by refining, grinding, or other process, because nothing whatever has been done to the balsam itself. It cannot, therefore, be classified under paragraph 20. It is agreed, I be-

lieve, by all parties, that it is a medicinal preparation not containing alcohol; and, as Congress does not seem to have provided for it in any other place, it would seem to me to fall properly within paragraph 68, where it is placed.

The decision of the Board of General Appraisers is reversed, and the merchandise held subject to duty as a medicinal preparation not containing alcohol, under paragraph 68 of the tariff act, as assessed by the collector.

SWAN & FINCH CO. v. UNITED STATES.
(Circuit Court, S. D. New York. May 13, 1909.)

No. 5,426.

CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—OLEIN—"WOOL GREASE"—"DISTILLED OIL."

So-called olein, a distillate from wool grease, in the form of an oil, is not "wool grease," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 279, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), but is dutiable as a "distilled oil," under Schedule A, par. 3, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 8, p. 7515.]

On Application for Review of a Decision by the Board of United States General Appraisers.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The article in controversy was invoiced as olein, but is shown by the testimony to be also known as wool olein or "wooleine." It is described by the Board of General Appraisers as consisting of "a dark reddish oil distilled from wool grease." By an admitted error it was classified as an acid. The board, without approving the collector's assessment, held that it should have been classified as a distilled oil under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 3, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627) and overruled the importers' contention for classification under paragraph 279 as "wool grease."

I am of the opinion that the board should be affirmed. For one thing, there being evidence to support their finding that the material in dispute is not wool grease, I am bound by that finding. But, aside from that consideration, I think that if I had been the board I should have decided as they have. In *Movius v. United States* (C. C.) 66 Fed. 734, wool grease was said to be of a "viscous consistency," while the substance at bar is an oil, and, being distilled from wool grease, should be considered as a product of that material, rather than wool grease itself. It is not the "crude raw material" referred to by the Circuit Court of Appeals in the *Zinkeisen Case*, 167 Fed. 312, as being the article intended by Congress to be covered by the expression "wool grease."

Decision affirmed.

In re BLOOMSBURG BREWING CO.

(District Court, M. D. Pennsylvania. August 19, 1909.)

No. 1,319, in Bankruptcy.

1. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ADJUDICATION—BREWERY—NATURE OF CORPORATE BUSINESS—MANUFACTURING—CORPORATION "ENGAGED PRINCIPALLY IN MANUFACTURING."

A brewing company, chartered to manufacture and sell malt liquors, which has done nothing except in preparation for such business, by constructing a brewery plant at large expense, taking out a brewer's license, and hiring a brew master, although it has never made any beer, nor bought materials therefor, is a corporation engaged principally in manufacturing, and subject to proceedings in involuntary bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7650-7651.]

2. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO PROCEEDINGS—WHEN CORPORATION ENGAGED IN BUSINESS FOR WHICH CHARTERED.

A corporation chartered for a certain purpose is to be regarded in bankruptcy as engaged in the purpose of its charter from the time it starts to put itself in shape to pursue the objects for which it is incorporated, and takes character as a manufacturing or other corporation accordingly.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

In Bankruptcy. On exceptions to report of H. A. McKillip, referee.

W. H. Rhawn, for exceptions.

A. W. Duy, for petitioning creditors.

ARCHBALD, District Judge. The Bloomsburg Brewing Company, the alleged bankrupt, was incorporated under the laws of Pennsylvania on August 1, 1906, for the purpose, as expressed in its charter, of "brewing, manufacturing, and selling malt liquors and malt extracts." To properly equip itself for this business it purchased about 100 acres of land in the borough of Bloomsburg, Pa., in this district, and proceeded to erect thereon a brewery building, installing the necessary brewing machinery and appliances, at a cost of about \$100,000. The money was principally raised by an authorized issue of first mortgage bonds of \$150,000, only \$90,000 of which, however, were marketed; the work and material above this which went into the brewery being secured on credit, for which mechanics' liens to the amount of \$8,000 have been entered. There are also a number of tax liens which have been filed against the property, and in addition some \$1,500 is due to general creditors. The company, it is admitted, is hopelessly insolvent, and has also committed an act of bankruptcy in preferring certain of its officers and creditors, provided, always, that it is liable to involuntary proceedings. It is denied, however, that this is the case; the company not being engaged, as it is claimed, in any manufacturing pursuit, within the meaning of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), at the time of the filing of the petition.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The proceedings to have the company declared a bankrupt were instituted December 29, 1908, and there is no question that it had not at that time, nor has it since, engaged in the actual business of brewing; the nearest it has come to it, outside of the construction and equipment of the brewery, being to engage a brew master and to take out a brewer's license. This license was obtained on due application to the quarter sessions of Columbia county April 1, 1908, and was renewed again on April 1, 1909, after these proceedings were pending. And the brew master was retained upon wages until there was no more money to pay him, just how long is not shown by the record. As already stated, however, no manufacturing or selling of ale or beer was entered upon; the company not being in funds to pay for material, and its credit being gone by reason of its financial embarrassment.

By section 4 b of the bankruptcy act as amended, "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars (\$1,000) or over," may be adjudged an involuntary bankrupt; and the brewing of malt liquors, such as the respondent company was chartered to do, would, of course, be a manufacturing within the terms of the statute. It was held, however, in the case of the Toledo Cement Company (D. C.) 19 Am. Bankr. R. 117, 156 Fed. 83, that a corporation organized for the purpose of making cement, but which had never exercised its franchise and never engaged in actual manufacture, was not subject to adjudication. But, on the other hand, it was held in the case of the White Mountain Paper Company (D. C.) 11 Am. Bankr. R. 491, 127 Fed. 180, that a corporation organized for the purpose of manufacturing and selling paper from wood pulp, which had become the owner of large tracts of timber land, and had made extended expenditures in the prosecution of this purpose, was within the statute, even though there had been no actual manufacturing; it being declared that the words "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," as used in the bankruptcy act, were descriptive of the kind of the corporation that could be put into bankruptcy, and was not intended to make the operation of the law depend upon whether it was actually so engaged at the particular time when the petition was filed against it. This decision was affirmed on appeal in *White Mountain Paper Company v. Morse*, 11 Am. Bankr. R. 633, 127 Fed. 643, 62 C. C. A. 369, where it was held that, having acquired lands and constructed mills for the purpose of making paper, it had become engaged in that business. "The corporation is a business corporation," says Judge Putnam. "It undertook to acquire lands and construct mills for a certain purpose, and that purpose must be presumed to be one within the four corners of its organization. It had undertaken a business, and, in view of its charter and of what facts we have stated, that business could be no other than the business of manufacturing. It was not organized for the purpose of constructing mills, so that it could be said that its business was that of constructing mills. It was permitted to construct mills only as incidental to its authorized powers, which, so far as this case is concerned, were those of manufacturing. The question being purely a question of fact, and the case addressing itself on that question so strongly to the ordinary mind, * * * we are

bound to hold that, on any fair construction of the statute, * * * the corporation was not only principally, but wholly, engaged in manufacturing, although in the early stages of it." It is true that in that case some timber had been cut into suitable lengths for use in the contemplated making of paper. But, while alluding to it, the decision, as it will be seen, does not rest on that, but must be taken as standing for the broad view that, where a corporation is organized and makes preparation for carrying out the objects of its charter, acquiring and equipping itself with the necessary plant and appliances, it thereby engages in that which it is incorporated to do—whether manufacturing, or mining, or whatever it may be—within the meaning of the bankruptcy act, and is liable accordingly.

This, in my judgment, is the correct interpretation of the law, and, if so, the proceedings were properly instituted. The respondent company was chartered to manufacture malt liquors, and at large cost it built and fitted up a brewery to do so. It even went so far as to take out a license and hire a brew master, although that is not very material. It may not have got together the necessary ingredients to begin to brew. But all that it did it did under the sanction and to carry out the purposes of its charter, which, while preliminary to the actual business of manufacturing and selling its products, not only stamped it as a manufacturing or brewing company, but as engaged in that pursuit from the moment that it started, under its charter, to put itself in shape to do so; every step taken necessarily having that in view. It is true that what a corporation is actually doing, and not simply what it is authorized to do by its charter, outside of that, is to determine whether it is engaged in any of the pursuits named in the statute. And where, therefore, it possesses a franchise by which it might be liable, it is not to be held if it does not use it. In *re New York Water Company* (D. C.) 3 Am. Bankr. R. 508, 98 Fed. 711; In *re Tontine Surety Company* (D. C.) 8 Am. Bankr. R. 421, 116 Fed. 401; *Columbia Iron Works v. National Lead Company*, 11 Am. Bankr. R. 340, 343, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645. But that is altogether different; the franchise which it does, and not that which it does not, use giving character to its business. And that is all that was meant in *Tiffany v. La Plume Milk Company* (D. C.) 15 Am. Bankr. R. 413, 141 Fed. 444, decided by this court, where it was said that the actual business of a corporation is to be considered, and not that which it might possibly have undertaken by virtue of authorized, but unexercised, powers.

It is, however, said that bankruptcy is designed to protect commercial debts, incurred in trade, where credit is asked and received, and hence the requirement that a business within those enumerated by the statute must have been entered upon before liability attaches. But this, if of any force, is not controlling, and is met by the consideration that, as already stated, a manufacturing or trading corporation to all intents and purposes engages in business when it starts to carry out the objects for which it was incorporated. And if the incurring of debts upon credit is required to satisfy the statute, there certainly was enough of that here.

The exceptions are overruled, and an adjudication directed to be entered in conformity with the report of the master.

FOURTH ST. NAT. BANK v. MILLBOURNE MILLS CO.'S TRUSTEE.

In re MILLBOURNE MILLS CO.

(Circuit Court of Appeals, Third Circuit. August 10, 1909.)

No. 38, October Term, 1908.

1. BANKRUPTCY (§ 185*)—PLEDGE OF PERSONAL PROPERTY—VALIDITY AS AGAINST TRUSTEE.

Unlike an assignee for the benefit of creditors, who has no rights beyond those of his assignor, by whose voluntary act the assignment was made, a trustee in bankruptcy takes title by operation of law entirely independent of the bankrupt, and is expressly invested with the rights of creditors, and with authority to avoid any transfer by the bankrupt of his property which any creditor might have avoided under which he may avoid a pledge invalid for want of delivery.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235; Dec. Dig. § 185.*]

2. FRAUDULENT CONVEYANCES (§ 138*)—DELIVERY OF POSSESSION—ISSUANCE OF WAREHOUSE RECEIPTS BY OWNER OF PROPERTY.

A man cannot make a warehouse of himself as to his own goods, and by issuing and pledging warehouse receipts make a valid transfer as against his creditors of property which remains in his possession and under his control, without anything to distinguish it from his other property or to indicate that he is not the unqualified owner.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 138.*]

3. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—ATTEMPTED PLEDGE OF PROPERTY.

A bankrupt milling company in Pennsylvania prior to bankruptcy had issued wheat and flour certificates each calling for a certain quantity of wheat or flour stored in its grain tanks or mill, to be delivered to the holder on demand, and had indorsed such certificates as collateral security for loans. The wheat called for by such certificates was an undivided part of that contained in its grain tank, which was a shifting quantity; the wheat being run from such tank into the mill as needed for grinding. The flour certificates each called for a certain number of barrels set apart in its storage rooms, which were so set apart, but were in no way marked to indicate a pledge nor to negative the ostensible ownership of the company. *Held*, that there was no such delivery as to constitute a valid pledge under the settled law of the state, and that title to the wheat and flour passed to the trustee in bankruptcy, as property which might have been levied on and sold under process against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

4. BANKRUPTCY (§ 188*)—EQUITABLE LIENS—VALIDITY AS AGAINST TRUSTEE.

A transaction intended as a pledge of property, but which for want of delivery is ineffectual as a pledge, does not create an equitable lien as against a trustee in bankruptcy, who represents the general creditors of the pledgor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

Buffington, Circuit Judge, dissenting.

Petition for Review from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion of court below, see *In re Millbourne Mills Co.*, 162 Fed. 988.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 172 F.—12

Henry S. Drinker, Jr., and H. Gordon McCouch, for petitioner.
John G. Johnson, for trustee.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The question involved in this case is the validity, as against the trustee, of certain pledges or attempted pledges of grain and flour on store at the mills of the bankrupt company. The company issued certificates, after the manner of a warehouse, of the quantity of these commodities on hand, on the strength of which, as collateral, loans were secured from time to time; the property, however, remaining in the possession and under control of the company, and there being nothing outside of the certificates to indicate the rights of the certificate holders to it. By agreement the property was sold by the trustee and the money brought into court for distribution, where the pledges were held to be invalid for want of possession taken; the money being awarded to the trustee for the benefit of the estate. And thereupon this petition was prosecuted.

By the express provisions of the bankruptcy act, § 70 a, the trustee is vested with the title of the bankrupt by operation of law as of the date of the adjudication to all (5) property which prior to the filing of the petition might have been levied upon and sold under judicial process against him; and is authorized (section 70 e) to "avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided." It is also provided (section 67a) that "claims, which for want of record or for other reasons," would not be "valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate"; and (b) "whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes bankrupt, the trustee of the estate of such bankrupt, shall be subrogated to and may enforce such rights of said creditor for the benefit of the estate."

It follows as a necessary consequence from these enactments, unless the plain terms of the statute are to be disregarded, that, if creditors in any given case would have the right to call in question the transaction, the trustee as their representative is entitled to do so also. Indeed, unless the rights of creditors are preserved and protected in some such way, bankruptcy, instead of being in their interest, as supposed, is an actual disadvantage, taking from them that which they otherwise would have. Nor is this representation confined to creditors who have liens on the property of the bankrupt, but applies equally to those by simple contract only, whose rights are no different, except that until judgment and execution they are simply not in a position to assert them. *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. It may be, as said in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, that "the trustee takes the property in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it"; or, as it is put in *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, that he "stands simply in the shoes of the bankrupt." But it is also true, as

declared by the same high authority in *First National Bank v. Staake*, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, that "the rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens, which, although valid as to the bankrupt, are invalid as to creditors"—a qualification which it is of the utmost importance to bear in mind here.

There is no analogy to the position of an assignee for the benefit of creditors under the state law, and the decisions relied on with that idea (*Vandyke v. Christ*, 7 Watts & S. [Pa.] 373; *Wright v. Wigton*, 84 Pa. 163; and *Smith v. Equitable Trust Company*, 215 Pa. 418, 64 Atl. 594) are misleading and do not apply. An assignment is the voluntary act of the debtor, who can confer no authority which he does not himself have, and whose assignee is therefore limited to the same extent that he is; while a trustee in bankruptcy, as we have seen, takes title by operation of law, entirely independent of the bankrupt, and is expressly invested with the rights of creditors, which he is authorized to enforce. The position of a trustee in insolvency, on the other hand, is squarely in point, taking title by operation of law as he also does, and being similarly authorized to avoid the fraudulent acts of the insolvent in the interest of creditors. *Tams v. Bullitt*, 35 Pa. 308; *Ruff v. Ruff*, 85 Pa. 333, 336. "A voluntary assignee for the benefit of creditors," says Chief Justice Mitchell, in *Printing Press Company v. Publishing Company*, 213 Pa. 207, 62 Atl. 841, "is a mere representative of the debtor and is bound where he will be bound. *Wright v. Wigton*, 84 Pa. 163. But *Tams v. Bullitt* establishes the distinction that when the assignee, trustee, or whatever he may be called, derives his authority, not from the mere voluntary act of the assignor, but from the mandate of the law, even when enforced, by the language of that case, through a 'compulsory assignment' from the debtor, in the interest of the creditors, he represents the latter and is vested with their powers."

It was, accordingly, held, in *Bank of Alexandria v. Herbert*, 8 Cranch, 36, 3 L. Ed. 479, that the trustee of an insolvent, representing creditors, was entitled to take advantage of a defect in the recording of a mortgage, although the insolvent himself could not. "In reason," says Chief Justice Marshall, "there can be no difference between this statute, which asserts the right of the creditors, in the mode prescribed by law and an assertion of that right in their own names." And in line with this, in *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460, and *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618, a trustee in insolvency, as the representative of creditors, was allowed to recover personal property which had been inadequately pledged.

The same principle applies also to a receiver, appointed by court, upon a creditor's bill, who derives authority, as it is said, not at all from the debtor, but from the court, acting in the interest of creditors, and for the enforcement of their rights (*Printing Press Company v. Publishing Company*, 213 Pa. 207, 62 Atl. 841), a view to which this court is committed by the decision in *Porter v. Boyd*, 171 Fed. 305, in which it was enforced in favor of the receiver of an insolvent corporation as against chattels held under a conditional sale. And so does it, to the receiver of a national bank, who, in *Casey v. Cav-*

aroc, 96 U. S. 467, 24 L. Ed. 779, was held entitled to maintain a bill to recover securities, which had been agreed to be pledged, but failed of being so, for want of delivery; the authority for this being most significantly drawn by analogy from that of an assignee (now trustee) in bankruptcy, a receiver to wind up a bank being regarded as occupying an equivalent position. "That an assignee in bankruptcy has this power," as is there said, "cannot well be doubted." And in *Security Warehousing Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, a trustee in bankruptcy was allowed to avoid a pledge of personal property, invalid for want of delivery, on the ground that this could have been done by creditors, the very case which we have here.

"By section 70a," says Mr. Justice Peckham, "the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and by subdivision 'e' of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud, or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same."

And again:

"The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been at all times in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company in fact at least shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company."

Distinguishing the case of *York Manufacturing Company v. Cassell* and others of like character, preceding it, it is further said:

"The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called 'warehouse receipts' issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which state they were issued. In such case this court follows the state court."

The present case arises out of an attempt, by the bankrupt, a milling company, to pledge its property for money advanced, while still retaining possession and dominion over it. The form adopted was the issuing of so-called "certificates," for so much grain or flour, in store at the mills; these certificates being issued to different parties, as collateral to loans, somewhat like ordinary warehouse receipts. The grain in question was contained in tanks, adjoining the mills, from which it was run to the mills, to be made into flour, by means of a conveyor, by simply unlocking a slide. It was drawn upon freely, in this way; no definite quantity being kept on hand, and there being no special arrangement with the holders of certificates, with regard to it, except that it was not to be reduced beyond the amount called for thereby. The fact is that it was a shifting quantity, sometimes running far below this, although sometimes possibly above it; there being certificates

outstanding at the time of bankruptcy for 138,000 bushels, while there were but 83,000 bushels on hand. The difference is ascribed to the depredation of insects, by which the grain became heated and lost weight; but it is difficult to see how 55,000 bushels could have disappeared in that way. Nor is it material, the fact being, from whatever cause, that it was not there.

The arrangement with regard to the flour was somewhat similar. It was stored in barrels in the basement of the company's warehouse under the charge of the superintendent, in three sections, two of 200 barrels each, and one of 800 barrels, divided off from each other, by upright posts, and all bearing a certain common brand. There was also a sign that it was not to be touched by an employé; but, aside from what this might vaguely imply, there was nothing to indicate that there was any control or ownership over it other than that of the bankrupt company in whose possession it was. Differing from the grain, there was no change in the quantity of the flour from the start, and certificates for the whole 1,200 barrels were issued to the one bank.

It is clear, upon this showing, that the certificate holders have no case. The certificates, admittedly, cannot be sustained as warehouse receipts, however they may bear that form. A man cannot make a warehouse of himself as to his own goods. *Bank v. Kent Mfg. Co.*, 186 Pa. 556, 40 Atl. 1018; *Security Warehousing Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117. Neither, there having been no delivery of the property, was there a valid pledge. The lien of a pledge, undoubtedly, is preserved in bankruptcy. *Hiscock v. Varick Bank*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. But to have this so, the essentials of a pledge must appear, to which possession is indispensable; there being no lien, as there is no pledge, without it. "The requirement of possession," says Mr. Justice Bradley, in *Casey v. Cavaroc*, 96 U. S. 467, 490, 24 L. Ed. 779, "is an inextinguishable rule of law adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

It is true that a symbolical or constructive delivery is recognized in favor of articles of great bulk or difficulty of handling; but the policy of the law is against the relaxation of the rule. *Sholes v. Asphalt Company*, 183 Pa. 528, 38 Atl. 1029. And even as to these there must be a surrender of dominion and a setting apart of the property, with such distinctive marks as will serve to indicate that, while in the apparent possession of the owner, it is not in fact his. *Philadelphia Warehouse Company v. Winchester (C. C.)* 156 Fed. 600. As is well said by Judge Bradford in that case, there must be enough to negative ostensible ownership, nothing of which is to be found here. The grain in question was a shifting quantity, sometimes more and sometimes less; the number of bushels called for by the several certificates being also simply an undivided portion of the general mass. No specific part was set aside to any particular holder, and much less was there anything to distinguish that it was his. It was his on paper; that is all. And he had to take his chances, whether it would be all there when he wanted it, as in the end, from whatever cause, it was not. Most significant, however, of all, it was open at all times, to be drawn upon as it freely

was, to be manufactured into flour; and it was thus not only retained in the immediate and undistinguished possession but in the complete and unrestricted dominion and control of the owners, who, to meet the needs of their business, converted and sold it at one end faster than it was replaced at the other. This never has been and never will be regarded, by the most liberal construction, as meeting the requirement of delivery, so as to create a valid pledge.

Nor is the case of the flour practically any better, although in some respects not quite so bad. It is true that it was set apart by itself in the basement of the company's warehouse, and that the original 1,200 barrels were not broken in upon or disturbed. It was also marked not to be touched by the employes, and was under the special charge of the superintendent, although not as the agent of the certificate holders, so far as appears, whatever advantage, under the circumstances, that might be. *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618. But the vital thing lacking, the same as in the case of the grain, was that there was nothing to negative the apparent ownership of the bankrupt company, in whose possession, and under whose control, to all intents and purposes, it was. Without this, it was presumptively, as it was actually, theirs, subject only to such rights as against the company, as the certificate holders might be entitled to assert before the rights of creditors had attached, with which, at this time, we are not concerned. To preserve the rights of such holders, as against creditors, either by way of equitable lien or pledge, it had to be openly and clearly indicated that the flour was theirs, without which the mere storing of it, by itself, in the basement, which in effect was all that was done, was of no avail. *Sholes v. Asphalt Company*, 183 Pa. 528, 38 Atl. 1029; *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57; *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Security Warehousing Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117; *Adams v. Merchants' National Bank (C. C.)* 2 Fed. 174; *Thurber v. Oliver (C. C.)* 26 Fed. 227; *In re Gebbie (D. C.)* 167 Fed. 609.

In *Sholes v. Asphalt Company*, 183 Pa. 528, 38 Atl. 1029, there was an attempted pledge of asphalt blocks as collateral security for a note; the blocks being stored in the company's yard. Neither at the time of making the note, nor afterwards, as it is stated in the opinion, was anything done by either of the parties to carry the pledge into effect. The pledgor did not deliver the goods, nor did the pledgees remove or take possession of them, either actually or constructively. The goods were not even separated, marked, or in any way distinguished from the unpledged assets of the company, and it was held, as against a receiver under a creditor's bill, that the pledge could not be sustained. "The rule," says *Fell, J.*, "is that delivery is essential to the contract of pledge. It is true that the rule has been relaxed in cases where, because of the nature of the thing pledged or for other reasons, the requirement of delivery would be such a hardship as to defeat the purpose of the contract; but the policy of the law is against such relaxation, and it has been mainly confined to cases in which the goods have

remained in the possession of the pledgor as agent of the pledgee under an express agreement to that effect. Even in such cases the want of constructive or symbolical delivery, or of some act whereby the goods pledged may be distinguished and set apart from the other goods in the possession of the pledgor, has not been excused. Here we have no evidence of such an agreement, or of anything in the nature of a constructive delivery; and to relax the rule for any other reason sufficiently to include such a case as this would be to abrogate it entirely."

This case is of especial importance, not only as determining the necessity, even as to bulky articles, for at least a constructive delivery, in order to create a valid pledge, and what is requisite to make that out, but also, as emphasizing the fact that, under the local law, the rights of general creditors, although having no lien, and only represented by a receiver, are superior, and must prevail over those of a pledgee, who has never had possession; it being to these rights, as we have seen, that a trustee in bankruptcy, representing creditors, succeeds.

So in *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57, there was an attempted pledge, by bill of sale, of the personal property in a hotel; but there was no delivery of the goods, and, the pledgors having become bankrupt, the trustee took possession and made a sale, and the title of the purchaser was sustained, as against the pledgee. This case is squarely in point; the pledge being held invalid as against the trustee in bankruptcy, representing creditors, there having been no delivery, constructive or otherwise, of the goods pledged, showing how the question is regarded by the state courts, which, according to *Security Warehousing Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, is controlling here.

In *Girard Trust Company v. Mellor*, 156 Pa. 579, 27 Atl. 662, *Barker Bros. & Co.*, bankers, of Philadelphia, desiring to secure those whose money they had taken for subscriptions to the stock of a company which was being formed abroad, inclosed in an envelope certain notes and bonds, which, with a list of the persons intended to be protected, they placed in a tin box, which they confided to the custody of a safe deposit company; the package being indorsed as containing securities held as collateral against the subscription deposits made. Having shortly afterwards failed and made an assignment for the benefit of creditors, it was held that, as against such assignment, the attempted declaration of trust was of no avail. "As a general rule in this state," says Chief Justice Sterrett, "a debtor cannot, as against his creditors, assign personal property as security, etc., and at the same time retain the possession thereof as theretofore. Possession must accompany the transfer as an essential part thereof. If the property is permitted to remain in the exclusive possession and control of the assignor, the transaction, while good as against himself, is a constructive or legal fraud upon his creditors, and may be so treated by them. To hold that exclusive possession may be retained by the debtor provided he agrees to hold as trustee until the same is demanded by his creditors or until default is made, would be to permit that to be done secretly and by indirection which the law condemns when done di-

rectly and openly. This principle is so firmly grounded in our jurisprudence that no court of equity should lend its aid in the enforcement of a transaction which is not in harmony with the settled law on that subject. We think the transaction in question clearly belongs to that class."

This case is particularly significant, in that creditors were represented by an assignee by deed of voluntary assignment, who is supposed to stand squarely in the shoes of the assignor, but as against whom the attempted pledge was nevertheless declared void.

It is said, however, that in *First National Bank v. Pennsylvania Trust Company*, 124 Fed. 968, 60 C. C. A. 100, a pledge of steel billets was sustained by this court, as against a trustee in bankruptcy, under circumstances similar to those of the case in hand; but, while the billets there remained on the premises of the pledgor, they were marked by signs, posted on the several piles, giving notice of the claim of the bank, which clearly distinguishes it from anything which we have here. "To complete its title or lien as against creditors and strangers," says Judge Kirkpatrick, "the bank was not obliged to take the billets into actual possession. It was sufficient to give notice of their lien, or change of ownership. This they did by posting on the billets, which were in distinct and separate piles, the signs to which reference has been made." There was thus in that case an assertion of lien in favor of the pledgee and a denial of ownership in the pledgor, which entirely satisfied the law, and made the pledge good—nothing of which is to be found here.

The case of *Davis v. Crompton*, 158 Fed. 735, 85 C. C. A. 633, is also relied on, but is not in point. The transaction which was there sustained was a conditional sale, in which, by express agreement, the title never passed, being retained by the vendor until payment in full was made. That this is a valid stipulation in many jurisdictions is shown by *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, where the subject is fully discussed; and, the property having been accepted upon these terms, it was held that the trustee, the same as the bankrupt, was bound thereby. But that is very different from anything which we have here, where not only the possession but the title was in the bankrupt company; there being nothing but the agreement that the property should stand pledged in their hands, a secret lien which the law does not permit.

It is, however, contended that, there being an intent to pledge, an equitable lien was at least created, which entitles the certificate holders to the fund. It is difficult to see how a transaction, which, for want of delivery, is ineffective as a pledge, can be pieced out, so as to make it hold as something else. There would be little left to the established doctrine with regard to pledges, if that was the case; and it is somewhat singular that, in all the litigation, where pledges of personal property have been upset, for want of a delivery, no one should have discovered this easy way out. This is not to say that an equitable lien, under some circumstances, may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one

who has notice of it and is affected with it as a superior right; within which all the cases cited in support of it will be found to fall. 19 Am. & Eng. Enc. (2d Ed.) 36. It is not good as against a trustee in bankruptcy, taking title, in the interest of creditors, by operation of law, as is the case here. In *re Olzendam Company* (C. C.) 117 Fed. 179; In *re Liberty Silk Company* (D. C.) 152 Fed. 844; *Casey v. Cavaroc*, 96 U. S. 467, 491, 24 L. Ed. 779; *Printing Press Company v. Publishing Company*, 213 Pa. 207, 62 Atl. 841.

There is nothing to the contrary of this in *Hurley v. Railroad*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729. True, an equitable right or lien was there recognized as against a trustee in bankruptcy, but upon materially different facts. The railroad there, in whose favor it was held to exist, was a party to the tripartite agreement by which the bankrupt acquired the right to mine the coal against which it was enforced, which he agreed to mine and deliver to the railroad at a certain price; the railroad on failure to comply having the right to enter and avoid the lease. It was with these relations to the property that the railroad, anticipating its payments, advanced money to the bankrupt for coal not yet mined, in order to enable the company to go on with its mining business; and it was in return for this that the delivery of a certain amount of coal was claimed and allowed. The transaction, as it was said, was not one of ordinary borrowing and lending on credit or security, but constituted, from an equitable standpoint, a pledge or hypothecation of the unmined coal to the extent of the advancements made, with which, in view of the reciprocal rights and relations of the parties, the trustee, equally with the bankrupt, was bound to comply. It is manifest that this has nothing in common with the case in hand.

The question of equitable lien is met and effectively disposed of by the Court of Appeals of the Seventh Circuit in *Security Warehousing Company v. Hand*, 143 Fed. 32, 74 C. C. A. 186, affirmed 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, which cannot be distinguished from the present case. "The appellant lenders [certificate holders here] finally assert," says Baker, J., "that, if they have neither the negotiable receipts of a public warehouseman, nor a pledge through an unequivocal possession by their agent, the security company, nevertheless they have 'equitable liens' which entitle them to the possession of the property as against the trustees. The trustee succeeds, as of the date of the adjudication, not only to the bankrupt's title and possessory right to the property, but also to the right of the bankrupt's creditors to assert that the title and possessory right as to them is in the bankrupt. Sections 70a(4) and 70a(5), 70e. * * * Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceding the adjudication. * * * The conclusion results not merely from a consideration of the nature of the trustee's succession, but as well from the inhibitions of the act. Section 67a vitiates as liens 'all claims which for want of record or for other reasons' the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured creditors represented by the trustee. Section 67d protects 'liens given or accepted in good

faith * * * and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice.' The liens thus saved are liens, not promises to give liens, not equitable claims, that what ought to have been done shall be considered done, but liens perfected according to law. 'Notice' as well as 'a present consideration' is necessary. If a chattel mortgage be given in good faith and for a present consideration, recording is not obligatory; but the imparting of notice is. Recording is one way; another is actual and continued change of possession. If a pledge be similarly given, recording is not 'necessary in order to impart notice,' because no provision has been made that a record of the fact shall be notice of the fact; but what is 'necessary in order to impart notice' is the delivery of exclusive and unequivocal possession. We think that section 67d does not change section 67a into the meaning that 'claims, which for want of record or for other reasons' are not good liens as against creditors, are good liens as against the estate if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy."

This case was affirmed, it is to be noted, and while this particular feature of it was not alluded to, except in passing, it was not disturbed. Much less did any one undertake to urge before the Supreme Court that what was not good as a pledge for want of delivery might be sustained as an equitable lien. It leaves no place, in our judgment, for the idea, which is now advanced, that any such claim can be asserted as to personal property ineffectually pledged to the detriment of general creditors acting through a trustee in bankruptcy or other representative taking title in their interest by operation of law.

The decision under review is made to rest upon this case, by which, as we view it, it is fully sustained, and should therefore be affirmed.

BUFFINGTON, Circuit Judge (dissenting). In the court below the Fourth Street National Bank of Philadelphia asserted a lien on the proceeds of certain wheat in bulk and on 1,200 barrels of flour of the Millbourne Mills Company, the bankrupt, which lien it claimed to have as security for loans made by the bank to said company. That court denied such lien and awarded the fund in question to the trustee in bankruptcy. Thereupon the bank filed this petition to review. The facts of the case are that more than four months prior to its bankruptcy the Millbourne Mills Company obtained loans from the bank on notes, and at the same time gave as security therefor its indorsed certificates, which, in the case of the flour, were as follows:

"Flour Certificate.

"Millbourne Mills Company.

"No. 1.

Philadelphia, March 8, 1907.

"This is to certify that Millbourne Mills Company has stored in its warehouse, basement floor, section A, * * * 200 barrels of flour, branded U, * * * which will be subject to its order, and only deliverable upon the indorsement and surrender of this certificate.

"George B. Hicks, Jr., Supt. of Warehouse.

"Countersigned: R. S. Dewees, President.

"Flour Certificate."

This flour was branded "U" on the barrels which were stored in a basement warehouse of the mill. The flour was divided into marked-off sections by upright posts, in each of which a certain number of barrels were stored. These were described by marks and were further identified by the exact number of barrels in the separate certificates which were issued for each lot. By agreement of the parties the flour remained in the mills company's warehouse and in the special custody of Hicks, its superintendent. After the certificates were issued, a notice was posted, "None of this flour to be touched by any employé," and pursuant to the agreement no flour was used; but it remained intact until after bankruptcy, when, on assertion of a lien thereon by the bank, it was, by agreement of the parties, sold by the trustee, and the proceeds, which were less than the bank's notes, substituted for the flour.

Two questions arise in this case: First, as between the mills company and the bank, did the latter, under the law of Pennsylvania, at the time of bankruptcy, have an equitable lien on this flour? Secondly, if so, did the trustee take the flour subject to such lien? The first question is to be settled by the Pennsylvania state decisions. "The question of the extent and validity of the pledge were local questions and the decisions of the court of New York are to be followed by this court." *Hiscock v. Varick Bank*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, and cases cited. The second question depends on the bankrupt law and federal decisions.

In taking up the first question, it should be noted in limine that the case before us is one of entire good faith. It was a business transaction of unquestioned integrity and supposed efficacy. It was not the sort of transaction involved in *Security Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, where not only was the attempted pledge void under the laws of Wisconsin, but was one the Supreme Court designated as "a mere pretense, a sham," which the Circuit Court of Appeals in *Security Co. v. Hand*, 143 Fed. 32, 74 C. C. A. 186, said, "with regard to Wisconsin law, was a fraud in fact," and which this court in *Davis v. Crompton*, 158 Fed. 742, 85 C. C. A. 633, stated was "a fraud in fact."

Before turning to the Pennsylvania decisions, we note that equitable liens are a generally recognized means of security, and their nature is thus defined in *Pomeroy's Equity*, § 1235:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation. * * * creates an equitable lien upon the property so indicated, which is enforceable. * * * In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness and intent that the property so described or rendered capable of identification is to be held, given, or transferred as security for the obligation."

This statement, cited and approved in *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, is in accord with numerous federal decisions. *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999;

Fourth Street National Bank v. Yardley, 165 U. S. 635, 17 Sup. Ct. 439, 41 L. Ed. 855; Burdon Sugar Refining Co. v. Payne, 167 U. S. 127, 17 Sup. Ct. 754, 42 L. Ed. 105; Philadelphia Warehouse Co. v. Winchester (C. C.) 156 Fed. 600; Bridgeport Co. v. Maeder, 72 Fed. 115, 18 C. C. A. 451; Clark v. Sigua Iron Co., 81 Fed. 312, 26 C. C. A. 423; Sheffield Company v. Witherow, 149 U. S. 578, 13 Sup. Ct. 936, 37 L. Ed. 853.

The characteristics of an equitable lien, thus generally recognized, obtain also in Pennsylvania; but the decisions of that state go farther and hold that, where the property pledged is sufficiently designated, retention of the property by the pledgor by mutual consent does not, as between pledgor and pledgee, affect the validity of such lien. The case of Vandyke v. Christ, 7 Watts & S. (Pa.) 373, in which Chief Justice Gibson held that retention of property in a contract of sale, while fraudulent as to creditors by St. 13 Eliz., and as to purchasers by St. 27 Eliz., was not fraudulent between the parties at common law, is the law of that state to-day, and is followed in Wright v. Wigton, 84 Pa. 163, Smith v. Equitable Company, 215 Pa. 420, 64 Atl. 594, and other cases. And that retention of the pledge by the pledgor, where this is by the agreement of the parties, will not, as between pledgor and pledgee, defeat an equitable lien, is held in Collin's Appeal, 107 Pa. 605, 52 Am. Rep. 479, followed in Wallace's Appeal, 104 Pa. 564, where the court, referring to the necessity of a change of possession, said:

"There is, however, a class of cases in which it is disregarded. They are cases in which the possession of the pledge is, by agreement of the parties, to remain with the pledgor. It is held that as the pledgor is bound, notwithstanding this provision of the contract, so are all bound who claim under him, except purchasers for value and without notice."

After a discussion of numerous cases where equitable liens were enforced, although possession was retained by the owner, the court summed its conclusions by saying:

"The foregoing cases all relate to liens upon specific chattels, as to which it is almost universally necessary that possession should accompany the pledge in the hands of the pledgee to validate the lien; but we have seen that this requirement may be dispensed with, if such is the agreement of the parties, and the lien of the pledgee may be enforced by virtue of the contract."

And in Sholes v. Asphalt Co., 183 Pa. 528, 38 Atl. 1029, where there was no separation or identification of the pledge, and it was held there was no lien, yet the exception was recognized where "the goods have remained in the possession of the pledgor as agent of the pledgee under an express agreement to that effect."

From this it will be seen that under the Pennsylvania decisions the bank had an equitable lien on this flour, and had had it for more than four months prior to bankruptcy, and, had the mills company prior to bankruptcy sought to dispose of the flour, the bank could have by bill enjoined it from so doing and on maturity of the note have enforced its lien. Indeed, the validity of the lien under the Pennsylvania decisions was conceded in the opinion of the court below, saying:

"The pledge is, no doubt, good as between the pledgor and pledgee in Pennsylvania as against creditors who have never levied."

The first question must therefore, in accordance with the state decisions, be answered in the affirmative. Such being the case, we then have the status, not of a preference or lien within four months of bankruptcy, but of a lien valid under the state law prior to the bankruptcy, existing for more than four months, and which no provision of the bankrupt law invalidates.

The second question, viz., if so, did the trustee take the flour subject to such lien? must, under the federal decisions (*York Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *First National Bank v. Pennsylvania Trust Co.*, 124 Fed. 968, 60 C. C. A. 100; *Davis v. Crompton*, 158 Fed. 735, 85 C. C. A. 633), be also answered in the affirmative, for it is clear that the trustee in bankruptcy simply succeeded to the rights of the bankrupt; and, as conceded in the petitioner's brief, took the property "subject to all of the equities impressed upon it in the hands of the bankrupt."

It is contended, however, that the force of these decisions is qualified by the late case of *Bank v. Staake*, 202 U. S. 149, 26 Sup. Ct. 584 (50 L. Ed. 967), where it was said:

"The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors."

But this language, which the court quoted from the opinion of the Circuit Court of Appeals (133 Fed. 717, 66 C. C. A. 547), must be read in connection with the subject-matter of that case. That subject was an attachment, a "lien created by or obtained in or pursuant to any suit or proceeding at law or in equity," which section 67, clause c, makes void. Under that statute it was sought to subrogate the trustee to the rights of the attaching creditor. It was of such a lien, one obtained by legal process, and which, be it observed, the statute itself declared void, that it was in effect said that the rule laid down in *Hewit v. Berlin*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and *York v. Cassell*, *supra*, that the trustee takes the estate in the same plight that the bankrupt held it, had no application because the lien before them was by the act itself declared invalid. It will thus be seen that the decisions noted are not affected by what was said in *Bank v. Staake*, *supra*.

It remains to discuss the wheat. The mills company was engaged in manufacturing flour, and to do so it was forced to carry large amounts of wheat in bulk and in bins. In order to prevent this wheat from overheating, it had to be shifted occasionally from bin to bin. At times it was necessary to withdraw parts of the wheat for grinding. To enable it to purchase and carry this wheat in reserve, the mills company borrowed from the bank on notes, and at the same time delivered to it indorsed wheat certificates in the following form:

"Grain Certificate.

"Millbourne Mills Company.

"No. 2700.

Philadelphia, 1906.

"This is to certify that Millbourne Mills Company has stored in its fireproof grain storage tanks 1,000 bushels No. 2 Penna. winter wheat; unloaded from

cars No. ———, which will be subject to its order and only deliverable upon the indorsement and surrender of this certificate.

"Benj. P. Hoopes, Supt. of Elevators.

"Countersigned: R. S. Dewees, President."

These certificates, as originally issued, covered grain in particular tanks for each certificate. The tanks adjoined the mill property and were connected with it by a slide or conveyor. This slide was locked, and by agreement of the parties was kept under lock and key by an employé of the mills company. It was agreed between the parties that the mills company could not withdraw any of this wheat without first paying enough of the loan to effect a release, or furnishing other wheat to take its place. This was always done. Later it was found necessary to shift the grain from tank to tank as the inconvenience to all parties of holding the wheat in individual tanks for individual certificates was found impracticable. To meet this practical necessity, and in good faith, the agreement was therefore modified, so that all the certificates were to cover all the grain in all the tanks of the storage system. As none but the certificates here in question were issued, and as these, owing to loss and depreciation, were, at the date of bankruptcy, more than sufficient to cover all the grain in the bins, no question of identity arose. Indeed, nothing further remained to be done by the lienor at any time, so far as the identity of the pledge was concerned. The agreement as above was kept, the grain remained under lock and key, and as withdrawals were made corresponding reductions were made on the certificates.

To me these propositions are clear:

First. It was the intent of both parties in good faith that the bank should have a lien on these goods, and the bank parted with its money on the strength of that intent.

Second. That under the decisions of the Supreme Court of Pennsylvania an equitable lien on identified personalty is good between pledgor and pledgee where by agreement of the parties possession is retained by the former.

Third. That the trustee in bankruptcy took no higher rights than the pledgor had, but simply succeeded to them.

Fourth. That there is no provision in the bankrupt act which invalidates this equitable lien, which was acquired more than four months before bankruptcy.

Because the effect of this decision is to make the rights of a trustee rise higher than the bankrupt's, by thus striking down a lien which was valid in Pennsylvania, and which is not invalidated by any provision of the bankrupt act, I am constrained to record my dissent.

RUTH v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. August 16, 1909.)

No. 2,967.

1. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a surgeon for negligence in performing an operation for appendicitis *held* to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—ADMISSION OF EVIDENCE—HARMLESS ERROR.

In an action against a surgeon for negligence in leaving a piece of gauze in the abdominal cavity of plaintiff after an operation for appendicitis, permitting experts to testify in answer to a hypothetical question that the failure to remove the gauze under the circumstances shown was negligence was not prejudicial error, conceding that the question was one for the jury, and not for the witnesses, to answer, where it was not in fact contested, but the only question in dispute was as to whether the gauze was placed and left in the wound by defendant or some one else.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

In Error to the Circuit Court of the United States for the Southern District of Iowa.

H. C. Kenline and W. C. Howell (R. P. Roedell, on the brief), for plaintiff in error.

W. R. C. Kendrick and B. F. Jones, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Johnson brought this action against Ruth to recover damages which he claims he suffered by reason of the negligent performance of an operation upon himself by Ruth for appendicitis. The act of negligence specified in the petition is that Ruth unskillfully, negligently, and inattentively permitted a sponge or pad of gauze about 24 inches long and 9 inches wide to remain in the abdominal cavity of Johnson after the sewing up of the wound. Johnson recovered a judgment in the trial court, and Ruth has removed the case here to secure a reversal thereof. Numerous errors are assigned to the rulings of the trial court. The point most seriously urged for reversal is the refusal of the trial court at the close of all the evidence to direct the jury to return a verdict for the defendant. This renders it necessary to review the evidence given at the trial.

There is evidence in the record from which the jury would be fully justified in finding the following facts:

On March 30, 1907, at Keokuk, Iowa, Ruth for a consideration agreed upon, at the request of Johnson, performed upon the latter an operation for appendicitis. When Ruth opened the abdomen, he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

found extensive adhesions caused by frequent recurrences of the attacks of appendicitis. He immediately placed pads of gauze in the opening to wall off the infected area. The appendix was then brought up, the secum with it, and as the appendix was brought up the sack ruptured, and Ruth called to his assistant Blakenship to get a pad quick. The assistant got the pad, and Ruth called for another. Another pad was gotten and placed in the body. Ruth did not remember how many pads he put into the abdomen. Johnson's case is one known to surgery as a pus case. When Ruth had finished the operation, the sponges or pads of gauze that were removed from Johnson were dropped into a tub. At the time of the operation a stab drain was put in so as to give a direct outlet from the cavity. About two weeks after the operation while Johnson was still being treated by Ruth a lump formed at the lower end of the main incision, and kept getting larger until it was about the size of a hen's egg. Ruth was informed of the lump, and upon examination decided it was an abscess. The lump or abscess was opened by Ruth, and blood and pus came therefrom. Ruth mopped out the blood and pus, ran the handle of his knife in the opening, probed open the stab wound, and placed a tube in the abscess wound. Johnson remained at the hospital until May 2, 1907. When Johnson left the hospital at Keokuk, he went home to Lockridge, Iowa, and was there cared for by one Dr. Morrow who examined his wounds, and found that the abscess wound extended down into the abdominal cavity. Pursuant to instructions contained in a letter which Johnson brought from Ruth, Morrow each day treated the abscess wound and the stab wound with pieces of gauze, one-fourth of an inch wide and four or five inches in length. Sometimes the pieces of gauze were eight or ten inches long, but narrow. The discharge from the abscess wound and stab wound increased until about four weeks after Johnson went home, when Morrow called Ruth over the telephone and told him that the wounds were discharging worse than when Johnson came home, and asked for advice. Ruth told him to keep the drain in and Johnson would get along all right. Morrow did so, but the discharge kept getting worse, and on June 1, 1907, Morrow called Ruth over the telephone and told him Johnson's condition was getting worse, and that there certainly must be something wrong. About July 1, 1907, Johnson became deathly sick and began vomiting. The odor from the abscess wound was something awful. It was getting rotten. Johnson went five days without a passage of the bowels. Gas began to come out of the opening, and about July 3, 1907, fecal matter began issuing out. Sharp, excruciating pains came from the region of his bowels and a dull stupid feeling over all. The fecal matter kept coming out of the drainage places, and soiled his clothing and dressing. Dr. Morrow telephoned Dr. Clark of Fairfield, a short distance from Lockridge, to come over at once, for something had to be done. Johnson's temperature was then 103, his pulse 120, he was vomiting badly, and bloated on his right side. On July 7, 1907, Clark, assisted by Morrow, opened the abdominal cavity of Johnson by cutting down so that the end of the incision that was made united with the lower end of the original incision made by Ruth. Clark introduced his

finger, and could feel gauze. He then put in his forceps and pulled out the gauze in question. When the gauze came from the abdomen, $2\frac{1}{2}$ or 3 inches had penetrated the ascending colon. When the gauze was removed, a pint of fecal matter came out with it, and Clark introduced his fingers into the hole left by the rag in the colon.

On January 1, 1908, the wound had healed, and Johnson for the first time was able to have a natural movement of the bowels. The size of the piece of gauze taken by Clark from Johnson was $9\frac{1}{2}$ inches by $11\frac{1}{2}$ inches. That the pads used at the time of the operation by Ruth were from eight to ten inches square. That with free open drainage such as existed in this case the gauze could have remained in the abdominal cavity without any further disturbance than did actually occur. That the gauze pad had been in the abdominal cavity from 90 to 100 days. That, after Johnson came to Dr. Morrow, there never was at any time prior to the operation of Dr. Clark an opening in Johnson's abdomen large enough to have permitted the introduction of the pad of gauze removed therefrom. That the presence of the gauze in the abdominal cavity was the cause of Johnson's illness subsequent to the operation for appendicitis. There was evidence tending to show that all of the pads of gauze that were placed in the abdominal cavity of Johnson at the time of the operation for appendicitis were removed, but no witness had any actual knowledge as to whether they were or not. Ruth testified himself that he did not know how many pads were placed in the abdominal cavity, and the nurses who seemed to have charge of furnishing the pads or sponges at the hospital could only testify that the pads were removed by reason of the fact that they were always removed in every case. No witness had a distinct recollection of what was actually done in this particular case with reference to removing the gauze pads. It thus appears that when all the evidence was in there was one question for the jury, and that was, Did Ruth sew up the wound after his operation upon Johnson and allow a pad of gauze $9\frac{1}{2}$ inches by $11\frac{1}{2}$ inches to remain in the abdominal cavity? And this was the only question left to the jury by the court; it being conceded that, if Ruth did do this, he was guilty of negligence. The jury found the issue submitted to them in favor of the plaintiff and against the defendant, and no court would be authorized to say that there was not sufficient evidence to support their finding.

It is further assigned as error that the court erred in allowing Drs. Courtwright, Scroggs, and Dorsey to answer hypothetical questions in the following language:

"Assuming that an operation was performed for appendicitis, and the main incision was closed up and a stab wound made with a drainage tube in it, and a pad of gauze $9\frac{1}{2}$ by $11\frac{1}{2}$ inches was sewed up in the wound and remained there for a period of about 98 days. State whether or not to leave it there that length of time would be the exercise of ordinary care, skill, and attention on the part of the surgeon in charge of the operation."

But even if plaintiff in error is right that the questions in the form they were put were for the jury and not for the witnesses, which we do not stop to determine, we are constrained to hold their allowance was not prejudicial error for the following reason: There can be no contention, and counsel for Ruth made none, that the placing of the gauze

pad in the abdominal cavity of Johnson and leaving the same there after the operation for appendicitis would not be an act of negligence.

The court so treated the matter in its charge, and said to the jury:

"The difference between the parties on which they do not agree and on which you must find where the truth is being as to when and where and by whom was the gauze put into the cavity and allowed to remain."

This was the only question over which there was a contest in the trial of the case, and the only question submitted to the jury for decision. In view of the evidence and the admissions made in open court by counsel for Ruth during the trial that the placing of the piece of gauze in the abdominal cavity and allowing it to remain there as described in the evidence would be negligence, we do not think they can now complain of the action of the court in allowing the question complained of to be answered.

We have examined the other errors assigned in the record, and find them without merit.

The judgment of the trial court is affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1909. Rehearing Denied May 6, 1909.)

No. 1,490.

ACTION (§ 18*)—NATURE AND FORM—SAFETY APPLIANCE ACT.

A suit by the United States against a railroad company under Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3175), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), to recover the penalty imposed by section 4 of the act for using a car in interstate commerce that is not provided with secure grab irons, while civil in form, is in effect a criminal prosecution, and the court is without power to direct a verdict against the defendant therein.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 18.*]

Duty of railroad companies to furnish safe appliances, see note to *Fulton v. Bullard*, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Northern District of Illinois.

The judgment brought here by the writ of error is one adjudging that the United States do have and recover of and from the plaintiff in error the sum of one hundred dollars, with costs; such judgment being based upon the verdict of a jury finding appellant "guilty as charged in the information."

The proceeding was by petition by Edwin W. Sims, United States Attorney, averring that the plaintiff in error was a common carrier engaged in interstate commerce, and that in violation of the act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), as amended by an act approved April 1, 1896 (29 Stat. 85, c. 87), and as amended by an act approved March 2, 1903 (32 Stat. 943, c. 976, § 1 [U. S. Comp. St. Supp. 1907, p. 885]), plaintiff in error on or about June 19, 1907, hauled on its line of railroad a certain car—one regularly used in the movement of interstate traffic, and loaded at the time with steel rails, and hauled in a train containing interstate traffic—such car not being provided with secure grab irons or hand holds, as provided for in said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

act; to which a plea averring that plaintiff in error did not owe the sum of money demanded, or any part thereof, in manner and form as complained of was filed. A trial followed, resulting in the verdict and judgment above stated.

The verdict was the result of an instruction to the jury (plaintiff in error having asked for no instruction to find for plaintiff in error) as follows: "The court instructs you to find a verdict for the government, and that the defendant, the Atchison, Topeka & Santa Fé Railway Company is guilty as charged in the information. Now you will please have your foreman sign this verdict for all."

Motions were duly entered for a new trial, and in arrest of judgment; upon the overruling of which exceptions were duly taken and preserved.

Robert Dunlap, Lee F. English, and James L. Coleman, for plaintiff in error.

Edwin W. Sims, U. S. Atty., James H. Wilkerson and Philip J. Doherty, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion.

The principal question in this case is, Did the Circuit Court err in giving to the jury the peremptory instruction to find the plaintiff in error guilty? And this question turns chiefly upon this further question, Was the prosecution of plaintiff in error by the United States, in the case under review, the prosecution of a criminal offense? For if it be a criminal offense, plaintiff in error was entitled to the verdict of the jury respecting its guilt or innocence—not a verdict in form only, but a verdict expressing the real judgment of the jury; for such is the guaranty of the sixth amendment of the Constitution of the United States, which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. *U. S. v. Taylor* (C. C.) 11 Fed. 470; *Starr v. U. S.*, 153 U. S. 625, 14 Sup. Ct. 919, 38 L. Ed. 841.

The sections of the Safety Appliance Act involved are as follows:

"Sec. 4. That from and after the first day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of \$100 for each, and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorney information of such violation as may come to its knowledge. * * *"

The turning point of the inquiry, as already stated is, Was the prosecution under these sections a criminal prosecution as distinguished from a civil suit to recover a penalty? To begin with, let us eliminate some of the matters cited as criteria of what is a criminal

and what a civil prosecution that are in fact no criteria. The first, and the one evidently most relied upon is, that the act expressly provides that a common carrier violating the provision of the statute shall be liable to a penalty "to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court having jurisdiction"—the gist of the argument being that inasmuch as the statute seems to contemplate the proceedings as a "suit," as distinguished from a criminal prosecution, it is a civil suit and is not a criminal prosecution. But, as said by Mr. Justice Field in *U. S. v. Choteau*, 102 U. S. 611, 26 L. Ed. 246:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution—it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * * To hold otherwise would be to sacrifice a great principle to the mere form of procedure."

To like effect is *Chaffee v. U. S.*, 18 Wall. 516, 21 L. Ed. 908, and *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

Another criterion urged upon us as showing that the proceeding is civil and not criminal, is the instructions given to juries in certain cases (*U. S. v. Central of Georgia R. R. Co.* [D. C.] 157 Fed. 893, *U. S. v. C., R. I. & P. R. R. Co.*, by Judge McPherson of the Southern District of Iowa, sitting by assignment in the District Court of the United States for the Western District of Missouri, 173 Fed. —, and *U. S. v. C. Gt. W. R. R. Co.*, by Judge Reed of the Northern District of Iowa, 162 Fed. 775) that proof beyond a reasonable doubt was not required—decisions that are sound enough, the conclusion being assumed that they are civil and not criminal cases, but that do not go into the question of whether the assumption itself was sound or not.

"Wrongs are divisible into two sorts or species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com. 2.

And as illustrative of the kind of wrongs that are "public wrongs" the Supreme Court of the United States, in *Wisconsin v. Pelican Ins. Co.*, supra, held that a so-called civil suit brought by the State of Wisconsin to collect a judgment rendered in one of its own courts against an insurance company on account of penalties imposed by the statute for the violation of the laws of the state, was not of a civil nature; and, in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, that a government proceeding in rem to enforce a forfeiture for a violation of the revenue law, and therefore in civil form, was in fact a criminal prosecution; and in *U. S. v. Choteau*, supra, that under a law providing that for a violation of its provisions a holder should pay a penalty of double the tax imposed, the recovery by prosecution for the penalty was in the nature of a criminal prosecution; and in *Lees v. U. S.*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150, that under an act providing that for a violation of the immigration laws,

the offender shall forfeit the sum of one thousand dollars, "to be sued for and recovered by the United States, or by any person who shall first bring his action therefor," the prosecution is in its nature criminal. To like effect is *U. S. v. Burdett*, 9 Pet. 682, 9 L. Ed. 273; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *U. S. v. Shapleigh* (Circuit Court of Appeals, Eighth Circuit) 54 Fed. 126, 4 C. C. A. 237; and *U. S. v. I. C. R. R. Co.* (D. C.) 156 Fed. 182—the latter being a decision directly upon whether an action brought like the one before us under the Safety Appliance Act, was a criminal prosecution.

These decisions would seem to settle by authority, the question, in the United States Courts, notwithstanding some adverse decisions in the State Courts, such as *Proctor & Lohman v. People*, 24 Ill. App. 599; *State of Missouri ex rel. v. Kansas City, Ft. Scott & Memphis R. R. Co.*, 70 Mo. App. 634; *Hitchcock v. Munger*, 15 N. H. 97; and *People of New York v. Wm. E. Briggs et al.*, 114 N. Y. 56, 20 N. E. 820.

Indeed, apart from authority, but upon principle, we do not see how any other conclusion can be reached. Though the Safety Appliance Law is primarily in the interest of employees in interstate commerce, its protection is not limited to them, but extends to all persons who without fault are injured in person or property by reason of the railroad's failure to provide the statutory safeguards. The penalty recovered is not money coming to the government as something that is its own; nor money a part of which is the government's own, as in the violation of Revenue Statutes (and even here the proceeding is held to be in the nature of a criminal prosecution); nor money coming to the government in the exercise of its power, *patriæ parens*, for the protection of a class; but is the punishment that the government, in its capacity as protector of society, inflicts upon the carrier who has violated the protective measures thus provided—the fine collected going into the treasury of the government simply because it must go somewhere, and, as in other criminal cases, there is no other appropriate place to direct it.

The judgment of the District Court is reversed with instructions to grant a new trial, and proceed further in accordance with this opinion.

FOLEY MFG. CO. OF ILLINOIS v. SIERRA NEVADA LUMBER CO.
OF UTAH.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,491.

SALES (§ 48*)—ILLEGALITY—CONTRACT INTENDED TO DEFAUD THE UNITED STATES.

It is a defense to an action for breach of a contract to furnish the lumber for finishing a government building, which the purchaser had contracted to build in accordance with specifications made by the government architect, that the lumber called for was not the kind required by such specifications,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but a materially inferior kind, which the contractor intended to substitute, in fraud of the government, which fact the seller did not know when the contract was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. § 48.*]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The action in the court below was in assumpsit by the defendant in error, a corporation of the state of Utah, against the plaintiff in error, a corporation of the state of Illinois, to recover damages by reason of the alleged failure of plaintiff in error to perform its contract to furnish the defendant in error all the finishing lumber and mill work required by it, under its contract with the United States, for the construction of the United States Post Office building at Salt Lake City.

The material portions of the contract sued upon are as follows:

"Finishing Lumber—For the United States Court House and Post Office at Salt Lake City, Utah.

"All finishing lumber including finished flooring shall be of the best quality, selected clear stock, thoroughly seasoned and kiln dried contain not more than 12% moisture at the time of setting in place, be bright and uniform in color, free from knots, shakes, sap or other defects.

"The finish in the basement, lookouts, Post Office working-room and money order and registry work rooms shall be Oregon fir, and elsewhere throughout the entire building, of red oak, all oak, and fir finish to be quarter sawed. The sides, bottom and back of drawers and cupboard shelves shall be of clear poplar.

"All the finishing lumber and millwork as called for in these specifications, including two set of revolving doors, we agree to furnish and deliver to the Sierra Nevada Lbr. Co. f. o. b. Chicago, freight allowed to Salt Lake City, Utah, for the sum of thirteen thousand seven hundred dollars (\$13,700.00), except the 1x3 V fir wainscoting also except all flooring, the lookout frames outside window frames and sash and doors in vent shaft that are to be covered with tin.

"All the material to be manufactured and fitted together in the most practicable manner at the shop and shipped in as large sections as possible. Trim for doors and windows not put together but mitred."

The "specifications" referred to are the specifications prepared by the Supervising Architect of the United States government, and made the basis of a contract between the United States and the Campbell Building Company (defendant in error being the sub-contractor of the Campbell Building Company) according to which said Post Office building was to be constructed.

The issue in this case arises out of the fact that whereas the oak specified in the government's specification, for the finishing of the entire building except the basement, lookouts, post office work room, money order and registry work rooms, was to be of white oak, quarter sawed, the contract between plaintiff in error and defendant in error stipulated that such oak should be red oak.

The defense was by plea of the general issue; and by special plea, that defendant in error, through its authorized representative, before and at the time of the signing of the contract, and for the purpose of inducing plaintiff in error to sign the same, represented that the above mentioned finishing work of the entire building, with the exceptions above stated, was required by the government to be of red oak; that such statement was false and fraudulent, and known to defendant in error to be false and fraudulent when made; that plaintiff in error, in signing the contract, relied on the truth of such statements; but that subsequently plaintiff in error discovered that what was required by the United States government in its specifications for the finishing of the building, with the exceptions as above stated, was to be of white quarter sawed oak, and that defendant was bound by its contract with the government, to furnish such white quarter sawed oak.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The special plea further avers:

"That as soon as it was discovered that the requirements in connection with the construction of said post office building were white quarter-sawed oak, that it stopped work upon said contract and notified the plaintiff and demanded an explanation; that thereupon the representative of the plaintiff (defendant in error) said A. C. Mack, came to Chicago, and stated to the defendant that while the government required white quarter-sawed oak in connection with the construction of said post office building, it the plaintiff, had made an arrangement with the government inspector in charge of said building whose duty it was to pass upon materials furnished and to see that they complied with the contracts and requirements of the United States government, by which said government inspector would accept red oak, contrary to the requirements of said United States government.

"And the defendant avers that the plaintiff in seeking to furnish red oak in connection with the construction of said post office building was in a conspiracy to defraud the United States government; that red oak was cheaper and inferior in quality and so known to be by the plaintiff, and the plaintiff in order to enable it to foist said red oak upon said United States government in connection with the construction of said post office building, had entered into a corrupt bargain and conspiracy with representatives of the United States government by which said inferior wood, namely, red oak, would be accepted; that the defendant, upon gaining knowledge of said conspiracy, refused to participate therein and declined to proceed with said supposed contract."

On the trial, as evidence of damages, a contract was introduced between defendant in error, and the Warren Manufacturing Company to furnish (in white oak, however) the lumber undelivered by plaintiff in error, for the sum of twenty-three thousand, five hundred dollars.

At the conclusion of the evidence, a motion for a verdict in favor of plaintiff in error was denied. Motion was also submitted on the part of defendant in error to strike out all of the evidence upon the plaintiff in error's special plea, which motion was sustained, and thereupon the court instructed the jury that the measure of damages was "the difference between the contract price that the plaintiff had with the defendant and such amount as it was forced to pay (as you find from the evidence) to complete its contract had with the defendant, to carry out the contract as defendant agreed to carry it out (as has been discussed here) to make the plaintiff whole under the evidence, and under that alone"; to all of which proper exceptions were preserved, all of which are made the subject matter of assignments of error here.

The verdict was for fourteen thousand dollars, upon which judgment was entered. The further facts are stated in the opinion.

Keene H. Addington, for plaintiff in error.

Frank B. Stephens, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

Act Feb. 20, 1893, c. 146, 27 Stat. 468 (2 U. S. Comp. St. 1901, p. 2522), provided:

"That the Secretary of the Treasury be, and he is hereby, authorized in his discretion to obtain plans, drawings, and specifications for the erection of public buildings for the United States, authorized by Congress to be erected under the supervision and direction of the Secretary of the Treasury and the local supervision of the construction thereof by competition among architects, under such conditions as he may prescribe and to make payment for the services of the architect whose plan may be selected out of the appropriations for the respective buildings: Provided, that not less than five architects shall be invited by the said secretary to compete for the furnishing of such plans and specifications and the supervision of such construction; and

provided further, that the general supervision of the work shall continue in the office of the Supervising Architect of the Treasury Department, the Supervising Architect to be the representative of the Government in all matters connected with the erection and completion of such buildings, the receipt of proposals, the award of contracts therefor, and the disbursement of moneys thereunder, and perform all the duties that now pertain to his office, except the preparation of drawings and specifications for such buildings and the local supervision of the construction thereof, the said drawings and specifications, however, to be subject at all times to modification and change relating to plan or arrangement of building and selection of material therefor as may be directed by the Secretary of the Treasury."

No question is made but that between white oak and red oak, as material for the finishing of a building such as the post office at Salt Lake City, there is a very substantial distinction; and no pretense is made that any substitution of red oak for white oak was ever submitted to, or ever approved by, any officer of the government above the local inspector. The sole attempt, at argument, to justify this departure from the specifications is that red oak "is as good" as white oak, and that subsequently, to the extent of one-half of the finishing provided, red oak went into the building without objection from the inspector.

The government of the United States can act only through its lawfully empowered officials. The power of such officials is to be found only in the laws of the United States, or such rules and regulations of the department and other superior officers, as are in pursuance of power conferred by law. And until it is shown in some such law, or in some such rule or regulation, that a local inspector has power to change the specifications drawn by the supervising architect, and made the basis of a contract between the United States and the contractor, we are not at liberty to accept his conduct as evidence of such power. On the contrary, we must, until otherwise informed, treat such conduct as either a usurpation of power, or a violation of his duty—in either case leaving his act as one outside of his authority.

That proposition settled, the rest of this case is readily disposed of; for if the substitution of red oak for white oak was unauthorized—the contract sued upon being an executory contract entered into with reference to the specific contract between defendant in error and the government—there was no proof that tended to show that the failure of plaintiff in error to furnish the red oak entailed any loss or damage upon defendant in error under its obligations to the government; for how can defendant in error be heard to say that its contract to put into the building a white oak finishing is harmed by plaintiff in error's failure to furnish it with red oak for such finishing.

We might stop here, reversing the case in consequence of what has already been said, and sending it back for a new trial; but we think we ought, in view of a new trial, to indicate our opinion upon the issue raised by the special plea, the proof to sustain which, offered by plaintiff in error, was ruled out on the trial below.

The contract of defendant in error with the government, as already stated, was for the finishing of the building in quarter sawed white oak. The building was an important government work, and to finish it in red oak without the consent of the proper officer of the

United States, whether with or without the connivance of any inferior officer, would be a fraud on the government. Now any agreement which is intended to defraud the government, even though it may not amount to a criminal conspiracy, is illegal and void. *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819. And if such agreement amount to criminal conspiracy to defraud the United States, all the parties thereto with knowledge, are guilty of an offense punishable with fine and imprisonment. Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676). The proof that was submitted, taken in connection with the circumstances, tended directly to show that a fraud upon the government was contemplated, and that plaintiff in error withdrew from its performance of its contract with defendant in error, to avoid becoming a party to such fraud. And the facts, which such proof tended to establish, in our judgment of the law justified plaintiff in error in declining to execute the contract. It is not for us to say that the proof offered was not conclusive, or even convincing. It is enough, that together with the admitted circumstances, it raised a substantial issue of fact—an issue that ought to have been submitted to the jury.

The judgment of the Circuit Court is reversed, and the case remanded with instructions to grant a new trial, and proceed further in accordance with this opinion.

OHIO COPPER MINING CO. v. HUTCHINGS et al.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1909.)

No. 2,745.

1. MASTER AND SERVANT (§ 221*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

A miner, going to work in a place which he knew would otherwise be dangerous, in reliance on a representation by a superior, who represented the employer, that it had been protected and made safe, and where the insufficiency of the protection was not obvious, cannot be charged with having assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 221.*

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. DEPOSITIONS (§ 13*)—PERPETUATION OF TESTIMONY—CONSTRUCTION OF UTAH STATUTE.

Rev. St. Utah 1898, §§ 3466, 3467, provides for the perpetuation of the testimony of a witness on presentation by the applicant of a verified petition stating "(1) that the applicant expects to be a party to an action in a court in this state, and in such case the names of the persons whom he expects will be adverse parties; or (2) that the proof of some fact is necessary to perfect the title to the property in which he is interested, or to establish marriage, descent, heirship or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated he may not know the parties to such suit; and (3) the name of the witness to be examined," etc. *Held*, that it was the intention by such statute to prescribe in the first two paragraphs two separate and distinct classes of cases, in either of which tes-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

timony might be perpetuated; that under the first the testimony of a person injured and not expected to recover might be taken and perpetuated for use in a contemplated action on behalf of his wife and minor children to recover for his death.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 28; Dec. Dig. § 13.*]

3. COURTS (§ 350*)—FEDERAL COURTS—USE OF DEPOSITIONS TAKEN TO PERPETUATE TESTIMONY.

Rev. St. § 867 (U. S. Comp. St. 1901, p. 664), providing that "any court of the United States may in its discretion admit in evidence in any cause before it any deposition taken in perpetuum rei memoriam which would be so admissible in a court of the state wherein such cause is pending according to the laws thereof," does not limit the use of such depositions to any particular cases, nor to those taken in any particular manner, but leaves such matters to be determined by the laws of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

4. MASTER AND SERVANT (§ 270*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—EVIDENCE.

In an action to recover from a mining company for the death of a miner, who was killed by the falling of the roof of the entry in which he was working, alleged not to have been properly supported, testimony of an experienced mine timberman as to the ordinary practice in timbering in mines under similar conditions, as compared with what was done at the place of the accident, was admissible in support of such allegation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

In Error to the Circuit Court of the United States for the District of Utah.

C. S. Varian, for plaintiff in error.

T. Marioneaux (O. W. Powers, on the brief), for defendants in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. The widow and children of Willard Hutchings, deceased, recovered a judgment against the Ohio Copper Mining Company for damages sustained by his death, alleged to have been caused by its negligence. The company says the trial court erred in (1) refusing its request for a directed verdict; (2) admitting a deposition of Hutchings taken in his lifetime as in perpetuum rei memoriam; and (3) admitting certain testimony of two witnesses.

There was substantial evidence of the following facts: The deceased was in the service of the company, which was engaged in mining in Bingham Canyon, Utah. The accident which resulted in his death occurred near the end or face of a drift at the 300-foot level. Owing to the unstable and treacherous character of the formation in that part of the mine, it was necessary, and it was the custom of the company, to follow up closely the extension of the drift with wooden frames or sets made of stout timbers or stulls and covered with slabs or lagging. The frames were about six feet in height and width, and a succession of them, when covered, made an entry along which the employes could move in the performance of their duties and be protected from rock and earth falling from above. The duty to construct these frames had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been intrusted by the company to employés called "timbermen." The miners, of whom the deceased was one, besides pursuing their ordinary duties in driving forward the face of the drift, also prepared the floor for the sills of the frames above referred to. While engaged in this latter work they were necessarily outside of the protection of the covered passage; and it was the duty and custom of the company, through its timbermen, to protect the miners while so engaged by placing headboards against the dangerous places above and by bracing them with stulls. The roof or hanging wall of the drift, from which the danger proceeded, ran at an angle of about 45 degrees to the plane of the floor. The deceased was on the night shift. While he was at work preparing the floor for the sills of a frame near the face of the drift, several tons of rock fell from the hanging wall and inflicted injuries which finally caused his death.

The night before this accident some rock had fallen and scared the men out, and this had been reported to a foreman charged with the duty of directing and superintending the timbering in the mine, and who was a vice principal, not a fellow servant, of the miners. On the night of the accident the deceased told the foreman he did not want to go in there; but the foreman said he had had it fixed up, and it was all right and safe enough. Relying upon this assurance, the deceased went to work, with the result mentioned. There was testimony that, instead of bracing headboards against the dangerous place on the hanging wall with stout stulls or timbers, a single headboard was used and the bracing was done by a single slab, clearly insufficient for the purpose. There was a conflict of evidence upon this subject, but we think there was proof tending to support the claim of the plaintiffs so substantial that the trial court would not have been justified in directing a verdict for the company. The specific negligence upon which recovery was had was that of the foreman in making the representation to induce the deceased to go to work.

It is also urged that the evidence disclosed an assumption of the risk by the deceased. We do not think so. The place was dark, save as it was illumined by an ordinary candle, which it was the custom of the miner to place on a ledge or niche in the wall of the drift. The bracing that had been done was above him, and was doubtless indistinct. Had he observed it in the gloom, it is questionable he could have told without particular inspection whether headboards had been properly placed, and, if so, whether braced by stull or slab. He knew that, unprotected, the place was dangerous; but he also knew that men in another branch of the service were specially charged with the duty of safeguarding it, and he was entitled to rely upon the representation of performance of that duty made by a superior who spoke for his employer, unless its untruthfulness was manifest. It was not incumbent on the deceased to make effort or take care to discover whether the assurance of safe condition given him was true, and we are unable to say that the insufficiency of the precautions adopted were so patent as to be readily observable by him. In such a situation there is no assumption of the risk. *Kirkpatrick v. Railroad*, 159 Fed. 855, 87 C. C. A. 35; *M., K. & T. Ry. Co. v. Wilhoit*, 160 Fed. 440, 87 C. C. A. 401; *Chicago, M. & St. P. Ry. Co. v. Donovan*, 160 Fed. 826, 87

C. C. A. 600; Chicago Great Western Ry. Co. v. McDonough, 161 Fed. 657, 88 C. C. A. 517; Federal Lead Co. v. Swyers, 161 Fed. 687, 88 C. C. A. 547; Western Inv. Co. v. McFarland (C. C. A.) 166 Fed. 76; United States Smelting Co. v. Parry (C. C. A.) 166 Fed. 407.

While Hutchings was in a hospital, not expected to live, his deposition was taken in a proceeding instituted by his wife on behalf of herself and their minor children under a Utah statute providing for the perpetuation of testimony. After his death the widow and children brought their action in a state court, whence it was removed to the Circuit Court on the application of the company. The deposition, which contained material testimony bearing on the vital issues of the case, was read at the trial over the objection of the company. It is contended (a) that the state statute did not authorize the perpetuation of testimony for use in such an action; (b) that the deposition was not taken in perpetuum rei memoriam within the meaning of the federal statute (section 867, Rev. St. [U. S. Comp. St. 1901, p. 664]), authorizing the use in the courts of the United States of testimony so taken; and (c) that the plaintiffs did not at the time it was taken have a present interest in an existing subject of litigation. The Utah statute (Rev. St. 1898, c. 56) provides as follows:

"Sec. 3466. The testimony of a witness may be taken and perpetuated as provided in this chapter.

"Sec. 3467. The applicant must produce to a district judge a petition verified by his oath stating: (1) That the applicant expects to be a party to an action in a court in this state, and in such case the names of the persons whom he expects will be adverse parties; or (2) that the proof of some fact is necessary to perfect the title to the property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated he may not know the parties to such suit; and (3) the name of the witness to be examined, his place of residence and a general outline of the facts expected to be proved."

Then follow in the same and succeeding sections detailed provisions relating to procedure, notice, etc., all of which were complied with. Counsel representing the company cross-examined the witness.

It is contended that the state statute should be construed as authorizing the perpetuation of testimony only in cases specifically described in the second paragraph of section 3467—that is to say, cases involving the title to property or the fact of marriage, descent, or heirship, etc.—and that the broader language of the first paragraph should be accordingly limited. In other words, the contention is that the statute does nothing more than to provide a short and speedy substitute for the ancient practice in courts of chancery, which was, generally speaking, confined to the subjects mentioned, and did not embrace personal injuries as the basis of an anticipated action at law. But to reach this construction counsel would have us read as "and" the disjunctive "or" which co-ordinates the first two paragraphs of the section. Commonly the word "or" marks the alternative, and, though it has other meanings, and may be read "and" where the context seems to require it, we think it manifest that the legislative intent was to prescribe two separate and distinct classes of cases, in either of which testimony might be perpetuated, first, for use in any action in a court in the state to

which the applicant expects to be a party and when he can name the persons he expects will be his adversaries; and, second, to prove some fact relating to title or to establish marriage, descent, etc., though no suit be anticipated, or, if anticipated, his adversaries are unknown. The use of "and" to connect the third paragraph of the section with those preceding indicates that the common function of the word "or" between the first two was intentionally employed. In other words, the statute seems plain that a person desiring to perpetuate the testimony of a witness may do so if his case is within either of the first two paragraphs, but in any event he must comply with the third. That the Utah statute as so construed is an innovation will not justify us in ignoring its clear terms. Indeed, we perceive no reason why a state may not authorize the perpetuation of testimony for use in cases like that at bar, particularly when, as here, proper safeguards are prescribed to prevent abuse and protect the rights of those to be affected.

Nor is there anything in the federal statute (Rev. St. § 867) restricting the use of testimony so taken to the limited class of cases embraced in the ancient practice. It provides:

"Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in perpetuum rei memoriam, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof."

The phrase "in perpetuum rei memoriam" is descriptive of the general character of the depositions intended, and was not designed to prescribe the particular cases in which they might be taken or the particular procedure to be followed. That was left to the laws of the states, subject as to their admission in evidence when so taken, to the discretion of the court of the United States to be exercised in the interest of justice.

It is also urged that, as plaintiffs' cause of action did not arise until the death of Hutchings, they had not, when his testimony was taken, such a present, vested interest in a subject-matter of litigation as authorized the proceeding. Here again are invoked the old rules that obtained in the chancery practice. Doubtless a court of the state would decline to make an order for taking testimony in perpetuum in a case of this character unless the applicant showed a substantial expectancy of an action and interest therein. Moreover, the interest of the moving party and the circumstances and procedure must be such as to appeal to the discretion of the court of the United States where the testimony is offered as proof. Here every element of a complete right of action in the widow and children existed, save Hutchings' death, and that was imminent. There was a potential right of action, which we think was sufficient under the statute.

A witness of 18 years' experience in mining, 12 or 14 of which was as a timberman, testified to what was customarily or usually done in mines to support treacherous and unstable ground and to protect the miners therefrom, and then he was allowed to compare the ordinary practice with what he observed at the point of the accident. This was admissible. What was ordinarily done in other mines with reference to like conditions, while not the measure of reasonable care, is competent evidence thereof. Another witness of 12 years' experience as

a timberman in mines, who was at the place of accident shortly after it happened, and who knew the character of the formation of the hanging wall, was allowed to testify that it was practicable to have supported it with headboard and stull. This also was admissible.

The judgment is affirmed.

WESTERN REAL ESTATE TRUSTEES et al. v. HUGHES.†

(Circuit Court of Appeals, Eighth Circuit. August 18, 1909.)

No. 2,814.

1. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF IN FEDERAL COURTS.

In the federal courts, in actions grounded upon negligence, the plaintiff is entitled to rest upon the presumption that he was without fault or negligence until the contrary is in some way made to appear; and the burden of alleging and proving the contrary rests upon the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 221; Dec. Dig. § 122.*]

2. PLEADING (§ 34*)—CONSTRUCTION—IMPLICATION.

What is plainly implied in a pleading is as much a part of it as what is expressed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. § 34.*]

3. PLEADING (§ 404*)—WAIVER OF DEFECTS.

Where a pleading contains an allegation which is not a nullity, but is subject to criticism as being indefinite and largely a conclusion of law, and the opposite party, without questioning its sufficiency in a timely way, takes issue thereon and proceeds to trial, the defect is waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1349; Dec. Dig. § 404.*]

4. MASTER AND SERVANT (§ 305*)—TORTS OF SERVANT—RESPONSIBILITY OF MASTER.

A master is responsible for the tortious acts of his servants, done in his business and within the scope of their employment, although he did not authorize or know of the particular act, or even if he disapproved or forbade it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.*]

5. MASTER AND SERVANT (§ 305*)—SCOPE OF EMPLOYMENT.

Servants do not depart from the scope of their employment merely because in executing the work assigned to them they exceed or violate their instructions in respect of its details or the manner of doing it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1223; Dec. Dig. § 305.*]

6. DAMAGES (§ 62*)—DUTY OF INJURED PARTY TO AVOID OR LESSEN—EFFECT OF FAILURE.

While one whose property is endangered through the negligence of another is required to exercise reasonable care to avoid or lessen the threatened injury, the consequence which the law attaches to a negligent failure so to lessen the injury is not the loss of all right of recovery, but the elimination from the recovery of such damages as could have been avoided by the exercise of reasonable care.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 119; Dec. Dig. § 62.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 15, 1909.

In Error to the Circuit Court of the United States for the District of Nebraska.

See, also, 153 Fed. 560, 82 C. C. A. 514.

William Baird (Edgar A. Baird and Claire J. Baird, on the brief), for plaintiffs in error.

Irving F. Baxter (Richard S. Hall and John F. Stout, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This case arose out of the falling of a party wall in Omaha, whereby the buildings of which it was a part were carried down and much damage was done to the stock of groceries and store fixtures of the plaintiff below, who was occupying one of the buildings under a lease from Andrew J. Hanscom, its owner. The other building was owned by the defendants below. The party wall consisted of a stone foundation, or cellar wall, seven feet high and a brick superstructure extending upward four stories. The plaintiff sought to recover from the defendants the amount of his loss, and in his petition alleged that "the defendants, through their agents and employes, were engaged in making certain extensive alterations in their said building, among other things in particular, in lowering the main floor; * * * that * * * the work of making said alterations * * * was being done * * * in a grossly negligent and careless manner, in that the defendants, by their agents and servants, did cut away and remove large portions of the stone foundation * * * without properly and adequately supporting the superstructure, * * * and did thereby so weaken said stone foundation and undermine and weaken the said brick superstructure as to cause the collapse of" the latter; that "said alterations and everything done in connection therewith were made and was done in a negligent manner," and that "the collapse of the said party wall, so as aforesaid caused and brought about by and through the negligence of the defendants and of their agents and employes, caused the collapse and fall of the * * * building * * * occupied by plaintiff." In their answer the defendants denied the negligence so charged against them, and alleged that the plaintiff negligently had contributed to the falling of the party wall (a) by permitting waste water from a large refrigerator in the building occupied by him to overflow against and into the party wall, whereby its stone foundation was weakened; (b) by storing in such building, near the party wall and above the part of the foundation which was so weakened, a large amount of merchandise, the weight of which was excessive considering the condition of the foundation; and (c) by failing to remove such merchandise or any part thereof on the evening preceding the falling of the party wall, after discovering the weakened condition of the foundation. In his reply the plaintiff denied the negligence so charged against him, and a trial of the issues resulted in a verdict and judgment in his favor, which the defendants now seek to avoid. A prior trial had resulted in a like verdict and judgment; but the judgment was reversed (82 C. C. A.

514, 153 Fed. 560) because of an erroneous ruling on a question which was resolved favorably to the defendants at the second trial.

To a proper appreciation of the questions now presented for decision, it is necessary that the case made by the evidence be stated briefly. In the construction of the party wall the sides of its stone foundation were carried up separately, the center was filled in with small stone and mortar, and the whole was bonded at the top by wider stone. The upper or brick portion was narrower than the foundation, leaving a wide shoulder on the defendants' side and a lesser shoulder on the other. Originally the joists of the main floor in the defendants' building were rested at one end upon the wide shoulder; but later the floor was raised and the shoulder was carried up correspondingly, so that the joists still could be rested thereon. On the occasion in question the defendants, through servants employed for the purpose, were engaged in lowering the floor, and at some time in the course of the work a part of the foundation of the party wall split or separated in the direction of its length, the defendants' side bulged out perceptibly, and bricks in considerable numbers fell from the base of the upper wall. Thereupon those to whom the work of lowering the floor had been committed removed a part of the defendants' side of the foundation, and placed a jack screw and header under that part of the upper wall from which the bricks had fallen, and also placed a like support under the main floor on the plaintiff's side; their immediate purpose being to prevent more bricks from falling and to take some of the weight off the foundation. Things were left in that condition overnight, and the next morning, after the defendants' servants resumed work, the party wall fell and carried down the two buildings.

At what time the foundation began to split and to bulge, what caused it to do so, and whether reasonably appropriate and adequate precautions were taken to support the upper wall, are matters in respect of which the evidence was conflicting. That for the plaintiff tended substantially to show that when the floor was lowered, so that the joists touched the original shoulder, the defendants' servants declared that the floor would have to come down about four inches more, and proceeded to, and did, pry off a substantial part of the shoulder, including several of the bond stones, which extended well under the upper wall; that this materially weakened the foundation, and undermined and weakened the upper wall, and shortly thereafter the foundation began to split and to bulge at that place, and bricks in considerable numbers began to fall from the upper wall; that the precautions then taken to support the wall were not reasonably appropriate or adequate; that other designated precautions usually were taken in like circumstances, and should have been taken in this instance; and that the overflow of waste water from the plaintiff's refrigerator had not been such as to weaken the foundation. But the defendants' evidence was otherwise, and tended especially to show that there was no intention or attempt to lower the floor beyond its original position; that the splitting and bulging of the foundation and the falling of the bricks occurred while the floor was being lowered so that the joists would rest upon the original shoulder; that no part of the foundation was pried out or removed until after it had split and bulged and bricks

from the upper wall had fallen in considerable numbers; that no more of the foundation was then removed than was requisite in placing a necessary support under the upper wall; and that the defendants' servants exercised reasonable care in all that was done by them. There was no evidence that the weight of the plaintiff's merchandise was excessive, considering the conditions prior to the splitting and bulging of the foundation and the falling of the bricks, and, while it was shown that after the wall was thus weakened the plaintiff made no effort to remove the merchandise or any part of it, there was no conclusive showing that in the particular circumstances he was negligent in that regard.

The defendants objected to the admission of the testimony that their servants pried out a part of the stone foundation, including several of the bond stones, so that the floor could be lowered beyond its original position; the grounds of the objection being, first, that the petition did not allege that the plaintiff was without fault or negligence in the premises, and, second, that it did not allege that the defendants' servants were then acting within the scope of their employment. The objection was overruled, and properly so. By the uniform course of decision in the federal courts the plaintiff was entitled to rest upon the presumption that he was without fault or negligence until the contrary in some way was made to appear, and the burden of alleging and proving the contrary rested upon the defendants. *Texas & Pacific Ry. Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; *Chicago G. W. Ry. Co. v. Price*, 38 C. C. A. 239, 246, 97 Fed. 423, 430. And while it was incumbent upon the plaintiff to show that the defendants' servants were acting within the scope of their employment, in so far as his right of recovery was rested upon their acts, it does not admit of doubt that in his petition he met this requirement sufficiently to render the testimony in question admissible. As has been seen, he there alleged, not only that "the defendants, through their agents and employes," were engaged in "lowering the main floor," but also that the work was being done in a grossly negligent and careless manner, in that "the defendants, by their agents and servants, did cut away and remove" a substantial part of the stone foundation, etc. In this there was a plain implication that the agents and servants were acting within the scope of their employment, because, if they were not, it was not true that the defendants, by them, did the acts described. What is plainly implied in a pleading is as much a part of it as what is expressed. *United States v. Babbit*, 1 Black, 55, 61, 17 L. Ed. 94; *Cornett v. Williams*, 20 Wall. 226, 250, 22 L. Ed. 254; *Brewster v. Lanyon Zinc Co.*, 72 C. C. A. 213, 224, 140 Fed. 801, 812.

The defendants also objected to the admission of the testimony that the precautions taken to support the wall were not reasonably appropriate and adequate, and that other designated precautions usually were taken in like circumstances and should have been taken in this instance; the ground of the objection being that the petition did not tender any issue of fact to which such testimony was applicable. But the petition did allege that a substantial part of the foundation negligently and carelessly was cut away and removed "without properly

and adequately supporting" the upper wall, and that this caused the wall to fall; and the defendants, without questioning the sufficiency of the allegation in point of substance or form, took issue thereon and went to trial. Doubtless it was subject to criticism as being indefinite and largely a conclusion of law; but it was not a nullity, and the defendants, by failing to take advantage of the defect in a timely way, waived the right to do so. *Atkins v. Gladwish*, 27 Neb. 841, 847, 44 N. W. 37; *Omaha, etc., Co. v. Wright*, 49 Neb. 456, 68 N. W. 618; *Fremont, etc., Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578. Plainly the testimony was applicable to the issue so tendered and joined.

A motion for a directed verdict in favor of the defendants was denied, and it is now urged that this was error, because there was no substantial evidence of negligence on the part of the defendants, and because the evidence of negligence on the part of the plaintiff was conclusive. Of this it might suffice to say that the evidence as set forth in the record has been carefully read and considered, with the result that it has been found that neither branch of the contention is tenable. But in deference to the earnestness with which it is urged that the defendants' purpose was to lower the floor only to its original position, that their servants exceeded or violated their instructions if they attempted to lower it beyond that point, and that for such an act the defendants were not responsible, it may be well to add that, by the uniform course of decision in this jurisdiction, a master is responsible for the tortious acts of his servants, done in his business and within the scope of their employment, although he did not authorize or know of the particular act, or even if he disapproved or forbade it. *Philadelphia & Reading R. Co. v. Derby*, 14 How. 468, 486, 14 L. Ed. 502; *Railroad Co. v. Hanning*, 15 Wall. 649, 657, 21 L. Ed. 220; *Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440; *Bowen v. Illinois Central R. Co.*, 69 C. C. A. 444, 451, 136 Fed. 306, 313, 70 L. R. A. 915; *Standard Oil Co. v. Parkinson*, 82 C. C. A. 29, 152 Fed. 681. True, when his servants step aside from his business or depart from the scope of their employment, for however short a time, the relation of master and servant is suspended, and the resulting responsibility ceases (*Chicago, etc., Co. v. Bryant*, 13 C. C. A. 249, 65 Fed. 969; *Bowen v. Illinois Central R. Co.*, *supra*; *St. Louis, etc., Co. v. Harvey*, 75 C. C. A. 536, 144 Fed. 806); but servants do not depart from the scope of their employment within the meaning of this rule merely because, in executing the work assigned to them, they exceed or violate their instructions in respect of its details or the manner of doing it (*Philadelphia & Reading Railroad Co. v. Derby*, *supra*), which is at most what was done in the present case.

The court refused to incorporate in its charge to the jury an instruction to the effect that, although the lowering of the floor was intrusted by the defendants to their servants, still, if the latter attempted to lower it beyond its original position, and in so doing exceeded or violated their instructions, the former were not responsible for any

act done in that attempt; but, as the proposed instruction was in contravention of the rules of law just stated, it was properly rejected.

The court also rejected an instruction to the effect that, if the floor in its elevated position was furnishing lateral support to the party wall, and if the lowering of the floor withdrew that support, and either caused or contributed to the falling of the wall, that alone did not make the defendants liable. In this there was no error. The plaintiff was not seeking to ground his asserted right of recovery upon any withdrawal of lateral support, and the court unequivocally told the jury that the defendants were not liable unless the work of lowering the floor was negligently done, as charged in the petition. To read the record carefully is to appreciate that the jury found that that work was negligently done as charged.

Error is assigned upon the withdrawal from the jury of the charge in the answer that the plaintiff negligently had contributed to the falling of the wall by overloading the building occupied by him; that is, by storing therein a large amount of merchandise, which was excessive in weight, considering the condition of the foundation. Upon looking at the answer it is manifest that this charge referred to the condition of the foundation prior to the defendants' operations—that is, before it began to split and to bulge; and upon looking at the evidence it also is manifest that there was no proof of such an overloading or excessive storing. The ruling, therefore, was right. Whether or not there was any substantial evidence that the plaintiff negligently contributed to the falling of the wall by failing to remove his merchandise, or some part of it, upon discovering, after the defendants' operations were well advanced, that the foundation was then in a weakened condition, was a different question, and was not affected by the ruling.

Quite apart from any negligent contribution by the plaintiff to the falling of the wall, and after correctly stating that one whose property is endangered through the negligence of another is required to exercise reasonable care to avoid or lessen the threatened injury, and can then charge the delinquent with the labor and expense properly incident thereto, the court instructed the jury that if the plaintiff by the exercise of reasonable care could have removed all or a part of his property from the building after discovering that the wall was in danger of falling, and he failed so to do, he could recover only such of the damages sustained as would not have been avoided by so doing. But the defendants insisted then, and still insist, that if the plaintiff negligently failed to lessen his damages he was without any right of recovery; that is, if he was negligent in failing to remove a part of his property from the building he could not recover at all, although he reasonably could not have avoided the injury to the remainder of his property. The law is not so unreasonable. On the contrary, as was indicated in the instruction given, the consequence which it attaches to a negligent failure to lessen damages is not the loss of all right of recovery, but the elimination from the recovery of such damages as could have been avoided by the injured party by the exercise of reasonable care. *Warren v. Stoddart*, 105 U. S. 224, 229, 26 L. Ed. 1117; *Douglass v. Stephens*, 18 Mo. 362; *Kansas Pac. Ry. v. Muhlman*, 17

Kan. 224, 234; 1 Sutherland on Damages (3d Ed.) § 88; 13 Cyc. 71 et seq.

The several points advanced to obtain a reversal have now been considered, and, as none has been found to be well taken, the judgment is affirmed.

MINOT et al. v. SNAVELY.†

(Circuit Court of Appeals, Eighth Circuit. July 19, 1909.)

No. 3,022.

MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—ACTION AGAINST MASTER—ISSUES—INCOMPETENCY OF SERVANT.

In an action against a master to recover for an injury to a third person through the alleged negligence of a servant in the line of his employment, the liability of defendant depends wholly upon the question whether the injury was caused by such negligence without contributory negligence. The question of the general competency or incompetency of the servant is immaterial in such case, and the reception of evidence on such an issue, tendered by plaintiff, and its submission to the jury, constitute error prejudicial to the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1271; Dec. Dig. § 330.*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

Lathrop, Morrow, Fox & Moore, R. J. Ingraham, and Cyrus Crane, for plaintiffs in error.

Fyke & Snider and James H. Richardson, for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND, District Judge.

CARLAND, District Judge. Elizabeth R. Snavelly sued Minot and Adams, as trustees, to recover damages for the negligent killing of her husband on March 2, 1908, while passing from a passenger elevator operated in the American Bank Building, Kansas City, Mo. She recovered a verdict of \$5,000. The petition specified two grounds of negligence: (1) Negligent and careless operation and handling of the elevator by the person in charge thereof at the time Snavelly received the injury which resulted in his death. (2) That the agent or servant in charge of said elevator was wholly unfit by reason of his youth and inexperience to handle the elevator with safety, which facts defendants well knew or by the exercise of ordinary care might have known. The parties to the action in this opinion will be called plaintiff and defendants respectively, as they appeared in the trial court. At the trial, for the purpose of sustaining the charge of negligence in the above specification numbered two, counsel for plaintiff, over objection, introduced the following testimony.

Witness A. J. Read, speaking of what he observed a day or two before the accident:

"Q. State what you saw, Mr. Read? A. The operator would endeavor to stop the elevator at a certain floor; and, instead of the floor of the elevator

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied August 9, 1909.

stopping on an even basis with the particular floor, it would go up probably from six inches to a foot, or would stop below that floor, and then the elevator would start, and it would start with such a jerk that it almost threw a person down. It almost threw me down.

"Q. What, if anything, did you notice with reference to his manipulation of the lever? A. His hand seemed to be pulling the lever back and forward all the time.

"Q. Do you know whether or not this young man was a regular elevator operator in that building? A. He was not.

"Q. You were acquainted with the other elevator operators—were you? A. I was.

"Q. Did you observe any difference between his management of the elevator and the management by the other operators? A. Yes, sir."

Witness G. W. Duvall:

"A. I had known this young boy for some time before this accident, and I had talked with him about being careful. He was nervous, and seemed to have trouble in stopping the cars on a level with the floor. He would often stop the car above the floor, and often below. He was quite nervous—both before the accident and afterwards."

Snavely, the deceased, was not a servant of the defendants, and hence was not a fellow servant of Corliss, the person operating the elevator. Counsel for defendants requested the court to charge the jury as follows:

"The court charges the jury that the charge in plaintiff's petition that the said defendants were negligent in employing an attendant who, on account of his youth, inexperience, and incompetency, was unfit to have charge of said elevator car in question is withdrawn from your consideration, and in arriving at your verdict you must disregard said charge of negligence in that respect."

At common law a master is not liable for injuries personally suffered by his servant through the ordinary risks of the business, including the negligence of a fellow servant, acting as such, while engaged in the same common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after actual or constructive notice of his incompetency. The exception above mentioned to the nonliability of the master to his servant for the negligent acts of a fellow servant never had any existence as a substantive ground of liability except in favor of the servant. It is a part of the fellow-servant rule, and is inapplicable to any actions, except those brought by the servant against the master for injuries received by reason of the negligence of a fellow servant.

The master is liable to third persons for the damage caused by the wrongful or negligent acts of his servant in the course of his employment as such, and he is liable irrespective of the care used in the selection of that servant or of notice of his incompetency. It necessarily follows that the specification of negligence numbered 2, above mentioned, had no place in the petition, the evidence, or the charge of the court. Notwithstanding, however, evidence was admitted tending to show general incompetency of the person in charge of the elevator, and the jury were told by the court in its charge that it was the duty of defendants to employ a reasonably safe, prudent person, in the handling of the elevator. The liability of the defendants in the case at bar depended wholly upon the fact as to whether the per-

son operating the elevator was guilty of negligence at the time Snavelly was passing from the elevator, which was the proximate cause of his death, except, of course, as this liability might be affected by the contributory negligence of Snavelly himself. As the defendants could not relieve themselves from liability for the negligence of the operator of the elevator by showing that they exercised proper care in his selection or had no notice actual or constructive of his incompetency, so it was incompetent for plaintiff to attempt to fix a liability upon the defendants by showing want of care in the selection of the operator of the elevator or actual or constructive notice of his general incompetency. We are of the opinion that the admission of the testimony herein quoted taken in connection with the charge of the court in relation thereto was necessarily very prejudicial to the defendants. We are unable to say upon which specification of negligence the jury found for the plaintiff, but, if their verdict was based upon the negligence of the operator at the time of the accident, the evidence of his general incompetency may have determined the case against the defendants.

We are invited by error properly assigned, upon the denial of a motion made to the trial court, to review the whole evidence for the purpose of determining whether there is any substantial evidence in the record to support the verdict. But, as a new trial must be ordered in any event, we prefer, for reasons which need not be mentioned at this time to leave the question of the sufficiency of the evidence as a whole undetermined.

For error in refusing to instruct the jury as requested in the instruction before quoted the judgment of the trial court is reversed, and a new trial is ordered.

NORTH AMERICAN RY. CONST. CO. v. CINCINNATI TRACTION CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1483.

1. INDEMNITY (§ 9*)—CONSTRUCTION OF CONTRACTS—SCOPE AND EXTENT OF LIABILITY.

Contracts of indemnity, such as those given by a contractor for work done in public streets, are usually intended to provide against loss or liability of one party through the operations of the other, or caused by physical conditions which are under the control of the other, and over which the indemnified has no control, and are not ordinarily to be construed as covering liability for injuries or accidents the proximate cause of which is the negligence of the party indemnified.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 16; Dec. Dig. § 9.*]

2. INDEMNITY (§ 9*)—CONSTRUCTION OF CONTRACT—SCOPE OF LIABILITY.

A contract for the rehabilitation of the tracks of a street railroad company, the work to be done without interfering with the operation of its cars, provided that the contractor should indemnify the company against all suits brought against it on account of claims for damages done or caused in the course of construction of the work, "or in consequence thereof," including injury to persons, land, or buildings. At a place where

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the company switched its east-bound cars onto the west-bound track to pass around a long excavation, 14 inches in depth, made by the contractor for replacing the east-bound track, a car was stopped in the night between street crossings, and a passenger alighting on the right-hand side fell into the excavation and received injuries for which she recovered a judgment against the company. *Held*, that the injury was not one received "in consequence" of the contractor's work, but was proximately due to the negligence of the company's employes operating the car, who with knowledge of the excavation permitted the passenger to alight on that side of the car at an unusual place, and that the company could not recover over on its indemnity contract.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 16; Dec. Dig. § 9.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The writ of error is to reverse a judgment founded upon a directed verdict in favor of the defendant in error, a traction company, against plaintiff in error, a construction company, for the sum of six thousand seven hundred dollars—the direction being given at the conclusion of all the evidence.

The action was by the traction company against the construction company, upon a contract under which the construction company was to rehabilitate the tracks of the traction company. And the particular provisions of the contract relied upon as the basis of the action, were the following:

"The said contractor will be required to take at his own expense all precautions against accidents such as maintaining lights, barricades, etc., as are required by laws and building regulations of Cincinnati or the orders of the said engineer which may be issued from time to time or by reasonable prudence and shall be responsible for all damages resulting from omission in this regard."

"The said contractor further agrees to protect, indemnify and save harmless the said company from all suits and actions which may be brought against the said company and from and against all claims of any kind for damages done or caused in the course of construction of the work provided for by this contract, or in consequence thereof, in any manner, including all damages and injury to persons, to land or buildings, all injuries to animals or vehicles or to any property whatever."

"Street Traffic, Guards and Lights.

"The said Contractor must provide plank sidewalks or bridges, properly fastened, having railing on each side, and in all respects to conform to all city regulations for keeping the streets open for travel and traffic.

"All construction herein provided for must be carefully guarded by ropes or timber barricades, and must be lighted at night by a sufficient number of red lights.

"All material along the sidewalk or roadway must be guarded and lighted as above provided."

The action here is an action over, growing out of an action brought by one Mary F. Whitteker in the Superior Court of Cincinnati, Ohio, against the traction company, wherein she obtained a judgment for six thousand dollars on account of injuries received by her in alighting from one of the traction company's cars—the construction company having had due notice of such action and having been requested to participate in its defense.

The principal facts upon which the Cincinnati judgment was founded are agreed upon as follows: The work of rehabilitating the traction company's tracks—a work that was to go on without interrupting the traction company's operation of cars—left in Madison Road in Cincinnati at the time and place where the accident occurred, where the eastbound track was being replaced, an excavation about one thousand feet in length, eleven and one-half feet wide, and fourteen inches deep, which excavation was at the time and place named, shunted by the eastbound car being switched to the westbound rails at the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

western end of the excavation, and passing along those rails to the eastern end of the excavation, being there switched back to the eastbound track. The time when the accident occurred was half past ten at night; the car was one of a type known as summer or open car, thirty feet long, with reversible seats running transversely across the entire width of the car. A footboard ran along each side of the car a few inches below the floor. There was no guard-rail or other guard on either side of the car. Mary F. Whitteker was a passenger on the eastbound car—the car being at the time in charge of a conductor and motorman employed by the traction company. She sat at the extreme south end of the seat, third from the front (the side of the car that when it stopped, was next to the excavation) and when the car was stopped in obedience to her signal, stepped to the running-board, and from there into the excavation, from which she received the injuries upon which her suit was brought. The traction company knew of the existence of the excavation, and its exact location, but no ropes or bars were put in place, on the side of the car next to the excavation, during the time that the same was being passed, to prevent passengers from alighting on that side.

All these are facts agreed upon in stipulation between the parties. It was further agreed that the precise point at which the car stopped, was a "controverted question," but there was no controversy that the point at which the car stopped was outside any street crossing—the testimony of some of the witnesses being that the car stopped almost immediately after it had passed over Cleinview Avenue, and of some, that it stopped some distance after it had passed that avenue; all the witness agreeing that Cleinview Avenue had been crossed before the car stopped.

The excavation at the point where Mrs. Whitteker got off, was marked by red lights, but had no rope or railing around it.

Edgar B. Tolman, for plaintiff in error.

William E. Church, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion.

Contracts of indemnity such as the one here sued upon, are usually intended to provide against loss or liability of one party, through the operations of the other, or caused by physical conditions that are under the control of the other—over which the party indemnified has no control, and the party indemnifying has control. Indeed, it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified, and not under the control of the indemnifying party, such, for instance, as accidents, the proximate cause of which is the negligence of the party indemnified.

The provision of the contract under consideration provides that the rehabilitation contractor agrees to indemnify the traction company against all suits brought against it on account of claims for damages done or caused in the course of construction of the work, "or in consequence thereof," including injury to persons, lands or buildings. The injury to Mrs. Whitteker was not caused in course of construction of the work. It must therefore fall, if it falls at all, within the clause "or in consequence thereof," that is to say the injury must be in the line of direct cause and effect of the work done, or the conditions created, by the indemnifying party.

The facts before us do not disclose that such was the case. Proximate cause is the wrongful act that caused the injury, usually the first

wrongful act that starts the party injured on his way to the injury. That act, in this case, was the negligence of the traction company in allowing Mrs. Whitteker to get off on the wrong side of the car, the side next to the excavation. True, if the excavation had not been there, the negligence of the traction company might not have resulted in injury. But the excavation was not wrongfully there, and was not, as against the traction company, wrongfully left unmarked and unlighted. The responsibility of the traction company for the injury in this case—the place where Mrs. Whitteker fell into the excavation being away from any street crossing or other line of travel—is not different from what it would have been had the traction company picked up Mrs. Whitteker on the sidewalk adjacent and carried her to the excavation where she fell in. In no view of this case can we see the proximate cause of the injury as other than the wrongful act of the traction company in depositing Mrs. Whitteker where she was deposited.

Upon these facts, and with this view of the true intent and meaning of the contract of indemnity between the parties, there is in our judgment no cause made for liability, and the Circuit Court was in error in instructing the jury to bring in a verdict for the defendant in error. The judgment of the Circuit Court is reversed with instructions to grant a new trial, and to proceed further in accordance with this opinion.

WOMACK v. HICKS LOCOMOTIVE & CAR WORKS.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,442.

1. MASTER AND SERVANT (§ 288*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Plaintiff was employed in the car manufacturing and repairing works of defendant, and was sent by a foreman with another employé to put pin lifters on cars then standing on switch tracks in the yards, and while so at work was injured when the string of cars on which he was working was moved by a switch engine from the opposite end. It appeared that it was customary, when workmen were working on cars on any of such tracks, to put up a signal flag to warn the engineer; but plaintiff had not worked there before, and was not given a flag, nor instructed to use one. *Held*, that he could not be charged with having assumed the risk as matter of law; it being the duty of defendant to see that proper action was taken to make the place safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1071; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff in such case was not chargeable with contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. 1089; Dec. Dig. § 289.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The facts are stated in the opinion.

Lee D. Mathias, for plaintiff in error.

Ralph M. Shaw, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The action was for damages for injuries growing out of the alleged negligence of defendant in error in not giving to plaintiff in error, its employé, a safe place in which to work. At the conclusion of plaintiff's evidence an instructed verdict for defendant was returned, upon which judgment was entered. To reverse this judgment the writ of error is prosecuted.

The question presented is, whether there was evidence tending to show the plaintiff in error's right to recovery. Defendant in error is engaged in the business of manufacturing and repairing freight cars. For more than a year, and until two or three days before the injury, plaintiff in error was an employé in the locomotive company's shops. The plant is located at Chicago Heights, and covers a tract of ground about a quarter of a mile square, containing, besides the shops, six railroad tracks, all of which diverge from one main track, used for the purpose of storing and repairing cars. The entrance to the track is through a gate in the fence enclosing the grounds.

On the day before the injury, plaintiff in error was taken by the assistant general foreman of the shops, from the shops to the tracks outside, to certain cars standing on the tracks, and directed, commencing on the west end of a string of flat cars on track No. 3, and passing over, when they were finished, to another string of cars on track No. 2, to put in pin lifters on the end of each car. The work on the cars on track No. 3 having been finished, plaintiff in error, with a fellow workman, passed immediately over, under the instruction received the day before from the assistant foreman to track No. 2, working backward upon that track upon the string of cars, some eighteen or more in number. It was at this time that the injury was received, due to the backing of a switch engine operated by defendant in error against the west end of a string of cars on track No. 2, between two of which the plaintiff in error was working. The evidence shows that the backing of this switch engine was done without warning, and that the physical situation was such that plaintiff in error did not see the danger to which he was exposed, there being eighteen or nineteen cars between him and the engine.

The plaintiff in error, as has been already said, was new to this class of outdoor work. He had, according to his own testimony, received no instructions or directions respecting the putting up of flags or signals, or any other precautions to prevent what occurred. He knew from what he had observed passing to and fro, that the switch engine operated frequently upon these tracks, and that flags were from time to time set up upon the tracks, but he had never been told and did not know (accepting his own testimony as we must on this hearing) that

these flags were used as signals not to operate upon a given track, or that the repairers were expected to put up such signals.

The contention of defendant in error, and the view adopted by the court below, was that plaintiff in error's knowledge that the switch engine frequently operated on these tracks was enough to put him into such a relation to the defendant in error that whatever risks he took in going between the cars were assumed, and that going between the cars without putting up a precautionary flag was contributory negligence. We cannot concur in this view. To begin with, it was the duty of defendant in error to provide the plaintiff in error with a reasonably safe place in which to perform his work. Doubtless the putting into his possession of a flag or other signal, with instructions as to its purposes, would be a compliance with this duty in cases where accident occurred through the employé's failure to use the flag. But in the case under consideration no such signal was provided, and no such instruction given. For all that the evidence discloses, plaintiff in error reasonably may have supposed that the company, in some other way, was performing its duty to provide him a safe place in which to do his work. Indeed, on the day previous when he was set to work, the assistant foreman said (according to the assistant foreman's testimony) that he would attend to the setting of the flags. There is nothing in the evidence that brings knowledge home to him that no such provision was being made. And whatever his knowledge otherwise, he had no knowledge, upon the evidence under consideration, that an engine or cars would be moved on the track where the repairing was going on.

These facts entirely distinguish this case from *Southern Pacific Company v. Poole*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485, upon which the defendant in error chiefly relies, for, in that case—the case of a repairer who had gone under the last car of a train which was due to start in a short time—the going under the car was “with a certainty that a caboose was to be attached to the rear”—in other words, a certain knowledge of what was about to occur that called upon him to put out a flag or some other signal of warning. And the other cases cited are cases in which either from actual instruction, or from long experience in connection with the work, the party injured must have known of the danger to which he was exposing himself in the absence of a flag or other signal. Indeed it is just at this point—the presence of such knowledge in the cases cited, and the absence of such knowledge in this case—that this case differs from the cases relied upon by defendant in error.

The judgment of the Circuit Court is reversed with instructions to grant a new trial, and to proceed further in accordance with this opinion.

THE BARALONG.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 250.

SHIPPING (§ 132*)—LIABILITY FOR INJURY TO CARGO—EFFECT OF EXCEPTIONS IN BILL OF LADING.

To entitle a shipper to recover for damage to cargo from heat, when liability for such damage is excepted in the bill of lading, the burden rests on him to show that the carrier was negligent in stowing or ventilating the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 481; Dec. Dig. § 132.*]

Burden of proof as to cause of loss or injury to goods shipped by vessel and diligence or negligence of carrier, see note to *The Patria*, 68 C. C. A. 398.]

Appeal from the District Court of the United States for the Southern District of New York.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for appellant.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and Wm. S. Montgomery, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This case was decided by the District Court in September, 1907, upon the authority of an earlier decision of that court in the case of *The St. Quentin*, reported in 162 Fed. 883. And we agree with the District Court that the two cases are similar in principle. After careful consideration we are unable to differentiate between them in any material particular favorable to the libellant. Under both bills of lading we think that, in view of the exception of damage from heat, the burden rested upon the libellant to show that the carrier was negligent in stowing or ventilating the cargo or otherwise. This he failed to establish. Indeed, here the evidence goes far toward establishing freedom from negligence on the carrier's part. It follows, therefore, that the same principles which required this court to reverse the decision of the District Court in the case of *The St. Quentin*, 162 Fed. 883, require us to reverse its decree in the present case.

The decree is reversed, with costs, and the cause remanded, with instructions to dismiss the libel, with costs.

NOTE.—The following is the opinion of Adams, District Judge in the court below:

ADAMS, District Judge. This action was brought by E. E. Androvette, the owner of 189 bags of shellac, against the steamship *Baralong*, to recover the damages claimed to have been suffered by reason of the delivery of a portion of the shellac in bad order. It was shipped at Calcutta for New York on the 28th of August, 1906, in good order, according to the bill of lading, and delivered, according to the evidence, in damaged condition by some of the shellac being fused and stuck together. The damage was doubtless due to heat and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

unless there was some negligence on the vessel's part, it was protected by a clause in the bill of lading exempting the carrier for damage caused in that way.

It is urged by the libellant that although heat caused the loss, the clause of the bill of lading is ineffective because the heat was caused by the negligence of the vessel in failing to fully ventilate the cargo.

The injured shellac was stowed in the square of one of the hatches. Other shellac stowed in the wings of the ship was uninjured. It is probable that there was a draught in the former which the latter would not be subjected to and that doubtless will account for the damage. This case seems to be similar in principle to *The St. Quentin* (decided by Judge Holt January 17, 1907) 162 Fed. 884, where it was held that the damage was due to negligence in furnishing insufficient ventilation. The evidence here shows that some of the shellac was blocked when shipped, but probably not injured thereby, the real damage was due to excessive heat in the particular place of stowage of the damaged shellac, which must have been caused by negligence. Although the burden of showing this was upon the libellant in view of the exception, there seems to be no other explanation of the damage than that some negligence existed in the stowage and ventilation, subjecting the shellac to an extraordinary degree of heat. The exception does not suffice to relieve the claimant from responsibility for these deficiencies. The testimony shows that the refuse lac required something like 140 degrees Fahrenheit to make it fuse, while the testimony from the steamer is that the heat to which it was subjected did not at any time exceed 90 degrees. Taking all the testimony into consideration, it sufficiently establishes negligence on the part of the vessel in subjecting the injured lac to a degree of heat which the exception does not cover and which can only be accounted for by negligence.

Decree for libellant, with an order of reference to ascertain the extent of the damages caused by the negligence of the vessel.

NOVELTY GLASS MFG. CO. v. BROOKFIELD.

(Circuit Court of Appeals, Third Circuit. August 12, 1909.)

No. 6, October Term, 1908.

1. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS—FAILURE TO FILE DISCLAIMER.

Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396), which provides that a patentee who has inadvertently claimed more than he is entitled to cannot recover costs in a suit for infringement unless he has filed a disclaimer as to the invalid claims before commencement of the suit, makes it obligatory on the courts to deny costs in such case both in the Circuit and appellate courts, although the decision that certain claims are invalid is first made by the latter court in affirming the decree of the court below as to other claims on general assignments of error which challenge the validity of all of the claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607-612; Dec. Dig. § 325.*]

2. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS ON APPEAL—PLEADINGS.

The question does not depend on the pleadings in the appellate court, and cannot be made to. Even, therefore, if the assignments of errors are severable or distributive between the different claims of patents, and in consequence have to be overruled, the costs must nevertheless be denied; such assignments only going to the issues raised according to which the decree below is to be considered.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 325.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—FAILURE TO DISCLAIM—COSTS.

The effect of failure to disclaim is negative merely. The statute denies costs, but does not give them, and defendant is not entitled to recover costs, because of the want of disclaimer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 325.*]

4. PATENTS (§ 322*)—SUIT FOR INFRINGEMENT—FAILURE TO DISCLAIM—PROFITS AND DAMAGES.

Much less is the plaintiff upon that account to be refused an account for profits and damages.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 322.*]

On Motion to Modify Mandate.

For opinion on the merits, see 170 Fed. 946.

Joseph C. Fraley, for the motion.

Robert N. Kenyon, opposed.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. But one claim of the patent in suit having been sustained, a motion is made to deny costs to the complainants. This motion, in our judgment, must prevail. By the express provision of the statute (Rev. St. § 4922 [U. S. Comp. St. 1901, p. 3396]), whenever a patentee, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, has claimed more than he is entitled to, while he may maintain a suit for infringement of the part which is bona fide his own, no costs are recoverable unless a proper disclaimer has been entered before the commencement of the suit as to the rest, for which provision is made by section 4917; nor, even then, if the disclaimer has been unreasonably neglected or delayed. Where these conditions appear, the court has no discretion, and costs must be denied as a matter of law.

In the present instance the complainants relied on the first, second, third, sixth, seventh, and eighth claims of the patent involved, which were thus put at issue, and all but claim 2 found to be beyond what the inventor was entitled to; the first being too broad, and the others being distinguished from the second by elements not of sufficient significance to be made the subject of separate claims. Within the meaning of the statute, the inventor had thus got more by his patent than he could maintain, and was required, in consequence, to disclaim the rest, in order to save the good from the bad, which not having been done before suit was brought, even though the patent is in part valid, there can be no costs.

The question does not depend on the pleadings in this court, as argued, and cannot be made to. The assignments of error may not, as they stand, be severable or distributive between the different claims, and may have to be overruled, as they have been; one of the claims being found good. But that does not control. It only goes to what are to be regarded as the issues raised, according to which the decree below is to be considered and adjudged. We have decided that it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is entitled to a modified affirmance, having been justified so far as it is based on the one claim, but not as to the rest; and this brings up the judgment to be entered here and the mandate to be sent down. The statute, while allowing the patentee to cure his patent—when found to cover more than it should, which would under ordinary circumstances make it wholly bad—declares that no costs shall be recovered unless the privilege of disclaiming has been exercised before suit brought. This we have no authority to disregard. As indicated in the opinion disposing of the appeal, the decree must be affirmed as to claim 2 of the patent; but, there being no disclaimer as to the others, it will be without costs. And this applies as well to the costs in this court as in the court below; the same infirmity attending the suit here as there.

This relief is merely negative, however. It denies costs, but does not give them; and we see no occasion, in the conclusions reached with respect to the patent, to direct that the defendants shall recover any costs here, or any further portion of their costs below than was there allowed them. Much less do we feel that the complainants shall be denied the right to an accounting. The substance of the invention which the defendants are found to have deliberately infringed is contained in the claim which has been held to be valid, the others disallowed, excepting the first, being addressed to comparatively minor features; and we are not persuaded that profits have been included in the amount which the defendants have been directed to pay, which are ascribable to the use of the special form of device in either of them, distinct from the general invention, or that, in defending the suit, the defendants were put to any appreciable extent to costs and expenses beyond what they would have been had these claims been eliminated.

The judgment in this court and in the court below will therefore be without costs, except as the court there has allowed the defendants a certain portion of them; and, as so modified, the decree sustaining the second claim of the patent, finding infringement, and ordering the payment of profits, will be affirmed.

T. W. & C. B. SHERIDAN CO. et al. v. ROBERT O. LAW CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1909.)

No. 1,530.

PATENTS (§ 283*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.

Where no special equities are pleaded, a suit in equity cannot be maintained for infringement of a patent which expired before the suit was brought.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 448; Dec. Dig. § 283.*]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bill filed December 19th, 1907, was in the usual form for an injunction (no prior adjudication or other special equity being set forth) restraining the infringement of letters patent No. 493,553, issued March 14th, 1893, and letters patent, No. 428,741, issued May 27th, 1890, upon machines for covering books and binding books—the latter patent expiring May 27th, 1907, about seven months before the commencement of the suit.

To the bill appellees filed a demurrer on the ground that the bill showed a misjoinder of an expired and a living patent, thereby making the bill multifarious. Upon the demurrer having been sustained by the court below, appellant elected to stand thereby, and thereupon the bill was dismissed, and this appeal taken.

A. G. N. Vermilya, for appellant.

Dwight B. Cheever, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion.

The court below, with the acquiescence of counsel for both parties, treated the demurrer as raising the question whether, no special equities having been pleaded, the complainant was entitled to an injunction upon a patent that had expired. Upon the authority of *Root v. Railway Company*, 105 U. S. 189, 26 L. Ed. 975, and other decisions, notably *Consolidated Safety Valve Company v. Ashton Valve Co.* (C. C.) 26 Fed. 319, we are of the opinion that in answering this question in favor of the appellee, the court committed no error. True, as intimated by Judge Seaman, in *McDonald v. Miller* (C. C.) 84 Fed. 344, a patent being about to expire, there may be special circumstances entitling the patentee to an injunction against the manufacture of infringing devices pending the expiration of the patent; as for instance, the manufacture of a supply of articles covered by the patent preparatory to their being put upon the market the moment the patent expires; for such manufacture within the time of the patent, in contemplation of providing the market, the moment the patent expires, would be a distinct damage to the monopoly of the patentee, who is entitled, against the manufacturer as well as against the user, to the injunction of "hands off" until the patent has actually expired.

But no such special equities are shown in this case. The appellee is a user, not a manufacturer. It made no preparation, prior to the expiration of the patent, to flood the market—the whole act complained of being its preparation to use the patent in its business as a binder of books, after the patent had expired. And if as the result of such preparation the appellant has suffered any injury, a full remedy is furnished at law.

The decree of the Circuit Court is affirmed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. BROOKLYN BOTTLE STOPPER CO. et al.

(Circuit Court, E. D. New York. July 15, 1909.)

1. PATENTS (§ 256*)—INFRINGEMENT—MACHINES SOLD UNDER LICENSE CONTRACTS—VIOLATION OF CONDITIONS.

A manufacturer of patented machines for applying a special pattern of seal or cork to bottles may lawfully sell such machines under license contracts binding the purchasers to use the same only in connection with seals or corks made by the seller, and a violation of such contract by a purchaser or by a secondhand purchaser having knowledge of such restriction will constitute an infringement of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 256.*]

2. PATENTS (§ 259*)—CONTRIBUTORY INFRINGEMENT.

Complainant made machines for applying a special form of seal or cork to bottles, protected by patents, which it sold only under license contracts providing that they should be used only with seals or corks made by complainant, which were not protected by patent. Its machines were practically the only ones in use in this country. Defendants, with knowledge of such facts, made a similar seal, which could be used on complainant's machines, and sold the same to all whom they could induce to buy; the result being that they were chiefly bought for use and used on complainant's machines. *Held*, that defendants were chargeable with contributory infringement of complainant's patents, and would be enjoined from selling their product to any purchaser who was bound by the restrictions of complainant's license contracts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 401; Dec. Dig. § 259.*]

Contributory infringement of patents, see notes to Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485; Æolian Co. v. Harry H. Juelg Co., 86 C. C. A. 206.]

3. PATENTS (§ 290*)—SUIT FOR INFRINGEMENT—PARTIES LIABLE.

Individuals, who organized a corporation with a small capital for the sole purpose of enabling them as individuals to make and sell an infringing article through the corporation without being subject to personal liability, may be joined with the corporation as defendants in a suit for the infringement and held jointly liable therefor.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 290.*]

In Equity. On final hearing.

Philipp, Sawyer, Rice & Kennedy (Edwin G. Baetjer, Robert H. Parkinson, and James Q. Rice, of counsel), for complainant.

Louis C. Raegenar (S. L. Moody, of counsel), for defendants.

CHATFIELD, District Judge. The present action involves primarily an issue of fact with relation to the knowledge, and necessarily resultant intent, with which the defendants attempted to make, and made, sales of caps for use as corks, upon bottles containing liquids which require hermetical sealing.

The particular form of the cap in question is that of a tin disk, with the edge so bent over and crimped as to form a shallow metallic flange, capable of compression over an annular shoulder upon the lip of the bottle to be closed, and with a thin packing or disk of cork inside of the cap, to insure perfect sealing, when applied by an appropriate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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machine, adapted to compress the crimped flange and the cork disk upon the neck and opening of the bottle. This method of sealing and form of cork is a comparatively recent adaptation, and the patent under which the business has grown up was issued, upon the 26th day of April, 1892, No. 473,776, to William Painter, of Baltimore, Md., who in turn assigned his patent to the complainant.

The testimony shows that at the present time some 85 per cent. of the bottling business of the United States is using this form of seal, and the figures given in the testimony, as to the number of seals sold and used each year, are enormous. The complainant corporation was organized under the laws of the state of Maryland, has built up a large and profitable business in supplying these caps, known as "Crown corks," has built machines under patents making use of the method above referred to, for applying the corks in question, and has sold its machines under a license, by the terms of which the purchasers agreed to buy their corks from the complainant corporation alone.

At various times litigation with relation to the form of the cork has been had, with a result that the cork itself has been held open and free from patent rights (*Crown Cork & Seal Co. v. Standard Stopper Co.*, 136 Fed. 841, 69 C. C. A. 200 [Second Circuit]); and the complainant, inasmuch as it was unable to prevent the manufacture and sale of such corks, has endeavored to derive a profit from its ownership of the method patent, and from the manufacture and sale of the patented machines for the use of this method, by an attempt to restrict all persons to the purchase of its own seals or corks, by means of the license agreement above referred to. The present action necessarily involves a consideration of the scope of the complainant's rights in attempting to restrict the use of the machines and the method above referred to, by means of the licenses required, and a determination as to whether the laws of the United States with respect to patents allow the enforcement of the patent by injunction and awarding of damages, for the use of such articles as these Crown caps, in violation of such a license; that is, whether such a use would be an infringement of any of the patents involved. Another question that must be considered is whether unconscious or unwitting use of such caps, by a party obtaining possession of one of the machines in question by sale or any other manner of acquisition, can be the subject of injunction, in the absence of any license agreement with the party making such use; but apart from these questions, and perhaps independent of them, is the issue of contributory infringement, involving the issue of fact spoken of at the outset of this opinion.

The complainant corporation obtained, by assignments duly filed, and upon which the patent was granted to the complainant as assignee, the rights to a machine operated by power, for doing the work described in the patent of April 26, 1892, and this later patent was issued December 5, 1899, under No. 638,354, upon the application of William Painter, as an assignor to the Crown Cork & Seal Company of Baltimore, Md. This patent provided for the automatic application of seals to the bottles, by a movement of the bottle supports, and the automatic feeding of the caps to these bottles; the machine, as has been said, being operated by power. Upon the 20th day of February, 1900,

another patent, under No. 643,973, was issued to the Crown Cork & Seal Company, as assignee of William Painter and John T. Hawkins, inventors, to cover a mechanism designed to be an improvement over the feeding mechanism of the patent last mentioned, and substantially provides for a hopper or feeding-chute, to direct the crowns to the sealing mechanism, and an independent rotating device, adapted to receive the crowns and direct them to the chute.

The present action was instituted by the filing of a bill of complaint, in the month of September, 1907, and it must be noted that patent No. 473,776, issued on April 26, 1892, has expired since the beginning of the action, and soon after the final submission of the case. The complainant alleges that the defendant corporation was organized by the three individual defendants, for the purpose of evading liability for what are charged to be infringing acts and operations, both on the part of the corporation and of the individual defendants; it being charged that the corporation has insufficient financial responsibility to answer the damage which it is alleged to have caused, and that it is managed and controlled by these defendants substantially as a cloak for their personal acts. The extent of these infringing operations is stated to be considerable, and to have caused much damage to the rights of the complainant; and the defendants are charged with knowledge, not only of the complainant's patents and its business, but of the extent thereof, and the system of licenses alleged, as has been said, to be intended to cover, and to actually include, substantially all of the operations of the parties in the United States, making use of the method of sealing bottles by means of such corks or stoppers as those hereinbefore described.

The testimony shows without dispute that the corks or seals manufactured and sold by the defendants are substantially identical in appearance with those of the complainant, and that no one but an experienced and expert mechanic can distinguish between them. The testimony further shows that the defendants' stoppers can be used and applied by the machines of the complainant, and practically all of the witnesses who have been shown by the testimony to be customers of the defendant have used or are using machines originally manufactured by the complainant, and, when sold, delivered subject to the signing of a license in the form required by the complainant at the time. Many of the machines have come into the hands of persons now using them by the sale of business or plant, and even, in some instances, the sale of an individual machine. The complainant has been, according to the testimony, alert in following up such sales, as soon as information has been gained, and suits instituted or new licenses obtained from these purchasers.

The defendants furnished evidence as to some 93 customers, of whom 80 have been shown to be licensees of the complainant, and of some 20 witnesses, who are using cap machines without a license; but, of these 20, 18 are shown to have machines previously licensed to other parties, and obtained in some manner from these other parties. One machine was not identified, and the original license, if it existed, could not be traced. With reference to the other, no license was

signed; but the purchaser was informed by the salesman of the terms under which the machine was sold, and placed his order with that knowledge. The defendants also produced three dealers, who testified to having bought machines at various times from different concerns, which, with two exceptions, were shown to have originally had licenses from the complainant.

A hand machine, built under a patent to one Fox, No. 702,716, June 17, 1902, shown by the testimony to be used in at least four places by saloon keepers who bottle their own material to be sold over the counter, seems to be capable of applying Crown corks; but it is claimed by the complainants that Fox's machine is an infringement of patent No. 473,776, and its use is not shown to have been extensive enough to seriously affect the issues in this case.

Another concern, the Crown Cap & Machine Company of New Jersey, which acquired the plant of the Eastern Cork Company, is testified by one of the witnesses to have made 50 machines, and the Eastern Cork Company to have made 100 machines, under the Beyer patent, No. 850,288, similar in purpose to the machines of the complainant; but the only sales actually traced in the testimony were testified by other witnesses to be a presentation to Katz Bros. Brewery, and that the machines did not prove satisfactory and were not used.

Certain other machines manufactured by the Standard Stopper Company, used a substantially different cap; but the use of these machines has been discontinued, and it would seem that if the defendants relied upon an impression that their customers, represented by these various witnesses, were not using the complainant's machines, and were not subject to the operations of the license, then their reliance has proven unfounded, and such sales can only be justified, if at all, upon the broad questions which must be considered hereafter.

The result of the testimony leads to the conclusion: That the complainant controls substantially the entire output of machines capable of using seals or corks of the description involved, and also supplies almost entirely the seals or corks themselves for use upon these machines; that the system of licensing has been consistently followed out; that no laches or acquiescence, of such extent as to work an estoppel, has been shown in following up any exception to the universality of this license system; and that the complainant by its methods of sale, its acts in dealing with sold or assigned machines, and in prosecuting all parties who do not comply with its license system, or who may seem to infringe its patents, has done all that could be expected of it, and has shown a state of facts upon which the defendants did not have the right to sell to or invite the purchase of their own caps, by any one who was not affirmatively known to them to be using a machine and method which did not infringe the complainant's patents, or, if they did make such sales, that it was at their peril if the sales proved infringements.

This determination brings us to a consideration of just what rights the complainant has under its licenses, and as to what would constitute contributory infringement.

It is claimed by the defendants that under the decision of *Cortelyou v. Charles E. Johnson & Co.*, 207 U. S. 196, 28 Sup. Ct. 105, 52 L.

Ed. 167, and 145 Fed. 933, 76 C. C. A. 455, reversing (C. C.) 138 Fed. 110, such materials as these caps cannot be the subject of a license in connection with their use upon patented machines. In the recent case of *A. B. Dick Co. v. Milwaukee Office Specialty Co.* (C. C.) 168 Fed. 930, the Circuit Court for the Eastern District of Wisconsin, following the opinion in the case of *A. B. Dick Co. v. Henry* (C. C.) 149 Fed. 424, upholds the doctrine of contributory infringement set forth by Judge Ray in the latter case, and says that such is the settled law of the Circuit Court of Appeals of the Seventh Circuit; while in the still more recent case of *A. B. Dick Co. v. Henry*, upon appeal from Judge Ray's decision, the Circuit Court of Appeals in the Second Circuit, upon the 16th day of March, 1909, certified to the Supreme Court the direct question whether the acts of the defendants constituted contributory infringement of the complainant's patents. Until the determination of the question by the Supreme Court of the United States, it would seem to be established law that the right to restrict the use of such articles as the caps involved in this suit can be made the subject of a license in connection with the possession of patent rights upon the machine upon which the articles are used, and these caps do not seem to be of the nature of the "ordinary commodities of life" referred to by the Circuit Court of Appeals in the case of *Cortelyou v. Charles E. Johnson & Co.*, *supra*.

If the patent upon the form of cap had been held valid, the complainant's right to that cap would have made the entire question one of infringement, no system of licenses would have been necessary, and, of course, no question of contributory infringement, through inducements to cause violation of the license rights, would have arisen; but, inasmuch as the patent on the cap was held invalid, the only way open to the complainant to obtain a profit from the extensive use of its machines, after the sale of the machines themselves, was to establish a system of licenses, by which the monopoly granted through the patents to the machines could be extended and made profitable, by requiring the purchase of the caps to be used, from the complainant company, in connection with the patented machine.

It is claimed by the defendants that the right to make and sell these caps has been secured to them by the decision in the suit based upon the cap patent, and that, having the right to sell such a product, the doctrine of license (by which the use of a patented article may be secured in its full enjoyment to the holder of the patent), cannot be so extended as to effect the same results which would have followed if the patent upon the caps had been held valid. It is contended that the doctrine of license should be limited to use of the patented article or machine, and cover thereby only such products as are necessarily employed, and are peculiarly fitted, as elements of a combination, to the operation of the machine itself, in performing functions, or carrying out the method, covered by the patent.

As has been said, this particular question is now before the Supreme Court of the United States; but up to the present time the doctrine of license has been treated broadly enough to justify such a contract in the form of a license as that exacted by the complainant from the purchasers of its machines, and it may be made the basis of the collec-

tion of a royalty upon the use of that machine, in the form of an agreement to secure to the patentee profits from such use, through the sale of the particular supply needed for the operation of the patented machine itself.

It may be assumed that there can be no contributory infringement, even where such acts complained of are knowingly committed, unless the use itself would constitute infringement on the part of those whose operations are contributed to by the defendants; but, having reached the conclusion that such use of a patented machine as that involved in this action could be made the basis of a license for the supplying of caps for the operation of these machines, we must pass to a consideration of whether the licensees and purchasers of secondhand machines from these licensees could be charged with infringement of the machine patents, by using those machines with caps purchased in violation of or without consideration of the license under which the machine was originally sold.

It is clearly established that the purchaser of a patented machine, where no title has been reserved or license for limited use required, is entitled to a free and full use of that machine, including the right to sell it to other parties, and that such use by the original purchaser or his vendees cannot be infringement. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and cases therein cited. It would seem to follow that a machine may be sold absolutely, so far as title to the machine is concerned, but subject to a license as to its use, and that infringement of the patent may result from a violation of the license, although this is independent of the right to use or sell the machine, when full observance of the conditions of the license is respected by the licensee or his assigns. It must also follow that a violation of the license can be made the basis of a suit for damage; but, where the license covers the right to enjoy the benefits of the patent, that a suit for infringement will lie, when such a license is violated, either knowingly or unintentionally, if the violation of the license is sufficient to constitute such infringement. Further, if the machines sold under license contain a plate or notice of the condition or existence of the license, then a purchaser of the machine cannot disregard the license merely because he was not the original party thereto. In other words, such a license, in connection with a patented article, runs with the machine as a part of the monopoly granted by the patent. Such monopoly is not a violation of the interstate commerce or anti-trust laws. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and *Heaton-Peninsular Co. v. Eureka Co.*, *supra*.

The peculiar question presented by the present case is whether such a license system can be created by oral notices, advertisements, written contracts with the purchasers of the machines, and a substantially uniform and complete method of bringing home to all persons engaged in the trade actual knowledge of the existence of the licenses in question.

It need not be decided in this case whether the purchaser of a secondhand machine, who could show that he had no knowledge whatever of the existence of a license, might be free from a suit for in-

fringement, prior to the time when such a license was brought to his attention. Nor need we consider the exact position of each one of the present owners of a secondhand machine of the complainant, for the testimony shows that substantially all of these owners of secondhand machines had knowledge, from which they must be presumed to have been warned, of the existence of the license in question, and, as has been said previously, substantially all of the machines referred to in the testimony were shown to have been originally sold under a license, good as against the original purchaser, and against any one, at least having reason to know that the license had existed.

The testimony of the individual defendants themselves, especially in connection with the exhibit called the "New England Bottling Company letter," proves that the defendants were endeavoring to sell their product (which it may be admitted they had a right to make and sell) to any one who could be induced, by considerations of cheapness or preference, to use their caps. The defendants contend that they have the right to assume that the persons purchasing were entitled to buy, in that they claim they are not shown to have had knowledge that these purchasers were making any use, or purposed to make any use of this product, in violation of the licenses in question.

The defendants claim that the burden is not on them to make sure that their customers were properly and legally respecting their license rights and the patents of the complainant, but that, on the other hand, the burden rests upon the complainant to show that it has made sales to parties for the very object of a violation of license rights, if these license rights are held valid. But the defendants further contend, and apparently believed at the time of writing the New England Brewing Company letter: (1) That no such license rights could be maintained with respect to the complainant's patents; (2) that such license rights could not be enforced against the users of the machines purchased from any source other than the complainant; and (3) that they were not responsible, as has been said, unless they were shown to have had actual knowledge of the situation, even if the first two propositions be decided against them.

But it seems to the court that the complainant has made out a case upon which it must be held that it was entitled to insist on certain license rights, such as it exercised under its patents; that subsequently practically all of the parties who have been shown to be customers of the defendants could not use caps other than those of the complainant, without laying themselves open to a suit for infringement; and that the defendants knew of the substantial uniformity of the complainant's license system, knew that practically no machines were in actual use except those of the complainant, and knew that its customers were, in almost every instance, liable to the effects of an action for infringement, unless the validity of the licenses could be successfully attacked, when the question should be raised.

All the cases which have been brought to the court's attention involve license rights of which notice was given by a plate or inscription, made a part of the patented machine itself. Thus knowledge of the license in each case was brought home to all persons using or having possession of the machine. Such an inscription or plate upon the ma-

chines of the complainant would remove one of the greatest elements of uncertainty in the present case; but it is considered that the knowledge possessed by the defendants in the present action, of the substantially universal license system of the complainant, and of the extremely limited sale of the caps in question, possible to persons not affected in some way by the complainant's rights under these licenses, put the defendants upon notice, and made it necessary for them to avoid sales to persons who could only use the caps in such a way as to infringe the complainant's patents.

In the case of *Cortelyou v. Charles E. Johnson & Co.*, 145 Fed. 935, 76 C. C. A. 457, the court said:

"To compel the dealer to make inquiries and take the precautions necessary to save himself from being sued as an infringer would place intolerable burdens upon business."

But this holding would not apply, it seems, to sales made under such circumstances, and to parties where the vendor had reason to know that a violation of patent rights was being invited and induced. In the present case the testimony shows exactly this condition of affairs, with a total disregard of the validity of the licenses, because of an apparent reliance on the part of the defendants upon an ability to show that in some instances caps might be applied to machines carrying no permanent notice of the license, in the hands of purchasers from licenses, and instances where these caps might be applied by machines contended by the users not to infringe the complainant's patents.

In the case of *National Phonograph Co. v. Walker* (C. C.) 169 Fed. 146, the court refused to determine, upon an application for a preliminary injunction, the scope of a license relating to phonograph records, in the hands of persons other than the original licensee; but no reported case seems to have passed upon the precise question here considered, and the defendants cannot justify their attempts to sell, and their sales, of caps, to any customer who may buy, in the face of their knowledge of the rights claimed by the complainant, unless they can justify sales to licensees themselves, and should be enjoined from selling to any parties as to whom they cannot show justification, with an accounting for profits on all sales made to those at least who knowingly have machines issued under licenses of the complainant, and upon which the caps sold by the defendants were in fact used.

It is true that the New England Brewing Company letter resulted in no sale, and an injunction could not issue for a mere inducement to consider an act of contributory infringement, where the matter never proceeded beyond the question of discussion; but the position taken by the defendants in that letter, and their statements upon the witness stand, are sufficient to justify the issuance of an injunction against them, restraining them from selling their caps to any person who is restricted in the use of such caps to machines manufactured by the complainant, and sold under a license, and to an accounting for any profits which may have been derived from such sales as can be proven to have been made to such parties, and where it cannot be affirmatively shown that the use made of the caps sold was not in violation of the license.

The first patent covering the method and the machine for using that method has expired. The testimony does not show with exactitude just which machines, and under which patents, the licenses affecting the defendants' customers have been issued; and it necessarily follows that sales made since the expiration of this patent, of caps to be used upon machines as to which the patent has expired, could not be contributory infringements of such patents. It also necessarily follows that a license to use a patented machine, and to employ only certain methods or certain products in such use, ceases to be a patent question with the termination of the period as to which any right of monopoly can be enforced. The right of enjoyment, which is secured under the license, would be a mere question of contract, after the expiration of the patent itself. The present action was begun and tried before the patent expired, and at that time the complainant was entitled to an injunction and accounting. All other questions can be disposed of upon the accounting, and the complainant may have an injunction, accordingly, against the defendant corporation.

As to the individual defendants, the testimony shows that they are engaged in the cork business, and formed the defendant corporation for the purpose of manufacturing and supplying caps of the nature described, in which they have made use of the cork disk previously referred to. The testimony as to the amount of capital stock paid in, the persons interested in the formation and conduct of the business, and all of the circumstances connected therewith, indicate that the three individual defendants organized the corporation for the sole purpose of enabling them as individuals to carry on, in corporate form, a side line or business, in which they could as individuals have the entire management and direction, but in which they would not be responsible beyond the small amount of investment shown in the present case.

The property of the corporation has been shown to have been largely destroyed by fire, and yet the individual defendants have proceeded to carry on the activities of the business, and the personal element of the three individual defendants has been present in all acts of the corporation set forth in the testimony. Upon these facts, under the authority of such cases as *Peters v. Union Biscuit Co.* (C. C.) 120 Fed. 679, *Saxlehener v. Eisner* (C. C.) 140 Fed. 938, affirmed 147 Fed. 189, 77 C. C. A. 417, and *Whiting Safety Catch Co. v. Western Wheel-Ed Scraper Co. et al.* (C. C.) 148 Fed. 396, it must be held that the individuals were properly joined as defendants, that they should be united with the corporation in any decree that may be made, and that they should personally be held responsible for the expenses of the litigation in case the corporation is unable to answer therefor.

The complainant may have a decree in accordance with the foregoing against all the defendants.

ARMSTRONG v. BELDING BROS. & CO.

(Circuit Court, D. Connecticut. July 6, 1909.)

No. 1,217.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—THREAD PACKAGE.

The Schroeder patent, No. 546,251, for a thread package, is a pioneer patent of merit, and entitled to a liberal construction, being the first device for packing individual skeins of embroidery silk which protected them from being tangled and soiled, and enabled the user to draw out the silk thread by thread without breaking the package. The Schroeder patent, No. 546,123, is also valid as covering a specific improvement on the package of No. 546,251, which was the earlier invention. Both patents also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Livingston Gifford and Ernest Chadwick, for complainant.

Robert B. Honeyman, A. Parker-Smith, and Gross, Hyde & Shipman, for defendant.

PLATT, District Judge. This is the usual patent suit, based on claims 1 and 2 of Schroeder patent, No. 546,251, dated September 10, 1895; the sole claim of the Armstrong patent, No. 523,139, dated July 17, 1894; and claims 1 and 2 of a later Schroeder patent, No. 546,123, dated September 10, 1895. The inventions covered by these patents are said to be capable of conjoint use. They are stated above in the order of their importance, because the date of the invention of the first-named Schroeder patent is stipulated to be as early as January 1, 1894, and the Armstrong and later Schroeder patents stand on the dates of their respective applications, viz., May 18, 1894, and June 11, 1895. For convenience the claims at issue are here set forth.

Schroeder Patent, No. 546,251.

Claim 1: "A thread package, consisting of a folded casing embracing the skein, the said casing being provided with a bearing piece, folded upon itself, the bight of the fold forming a bearing for the skein and a partition between the sides of the skein, the said folded bearing piece being permanently attached to one only of the opposite sides of the casing, substantially as set forth."

Claim 2: "A thread package, consisting of a folded casing for embracing the skein, one of the folded parts of the casing located between the walls of the casing being further folded, the bearing edge of the fold extending transversely to the longitudinal direction of the skein and forming a partition between the sides of the skein, substantially as set forth."

Armstrong Patent, No. 523,139.

Sole Claim: "A thread package, consisting of a casing or envelope, inclosing a skein as set forth, said casing being closed at one end within the doubled portion of the skein to prevent the withdrawal of the latter, all substantially as specified."

Schroeder Patent, No. 546,123.

Claim 1: "A thread package, comprising a folded body portion, an end portion reinforced by folded flaps and further folded within the end of the casing,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

forming a bearing over which the threads of the skein may be withdrawn from the package, substantially as set forth."

Claim 2: "The thread package, comprising the folded body portion and the end portion formed integral with the body portion and reinforced by folded flaps, the said end portion being further folded within the end of the casing to form a bearing over which the threads of the skein may be withdrawn, substantially as set forth."

The Schroeder patent, 546,251, is entitled to generous treatment. It was the first invention which undertook to preserve and care for individual skeins of embroidery silk. Up to that time the silk had always been packed and sold as shown in Complainant's Exhibit Old Style Package. The invention did what its author said it would do. Tangling and soiling of the skeins were practically done away with; the worker could remove the entire skein, thread by thread, without breaking up the package; color and size could be duplicated at the store, without carrying a sample; and, in general, it was a boon to maker, seller, and user.

It is more than a package or envelope. It is really a machine, with a well-defined mode of operation. The mechanical idea has to do with the removing of thread after thread of the skein without tangling the silk or destroying the envelope. A portion of the package, being left free on one side, can be folded upon itself, and then, after further folding, can be used as a support over which the skein of silk is thrown. The sides of the package are then folded over each other and over the support, thus retaining the skein snugly within the package or casing. The support serves to separate the skein and to furnish a bearing piece over which each individual thread can, after the skein has been cut at the bottom end, be drawn forth and used by the worker.

This invention was a new and useful thing. The attempt to hunt out something which might suggest the idea among envelopes and fly books and embroidery cases is vain and unconvincing. The peculiar characteristics of floss silk make it impossible to wind it upon spools or to run it through holes in cardboard or wood. It is, therefore, evident that nothing in the prior art tended in the remotest degree to shed any light upon the problem which confronted Schroeder and Armstrong at the time of the interference in 1894. The end pull mode of operation upon the silk threads within the inclosing and retaining package is the essence of the invention. It demands the co-operation of the silk, the bearing piece, and the casing, and it works like a charm.

The word "pioneer" has been worked overtime in patent opinions; but I am bound to say that it can be applied to the Schroeder invention with very good grace. The Neergaard exhibits are unconvincing. The raw edges never were used as bearing pieces, and were never thought about as useful for such a purpose. Moreover, they could not have been so used, if any one had thought of trying to do so. To rely upon them as anticipating devices is to ignore every principle of law which has been laid down by the courts regarding such matters.

If my notion about the Schroeder invention is correct, every question discussed by the contestants herein answers itself. It would be wasted time to dissect the infringement proposition. The defendant's structure reads upon the claims of the earlier Schroeder patent with un-

usual exactness. Whenever it goes in any degree beyond the patent discussed, it invades the later Schroeder patent; and certainly the defendant presents no excuse for a trespass on Schroeder by showing that at the same moment it was stepping upon other people's corns.

Just a word about the birth of the Schroeder idea: Armstrong and he had the same notion, and both applied for patents—Armstrong on August 4, 1894, and Schroeder on June 22, 1894. The subject-matter of the interference was:

"A thread package, consisting of a folded casing for embracing the skein, one of the folded parts of the casing located between the walls of the casing being further folded, the bearing edge of the fold extending transversely to the longitudinal direction of the skein and forming a partition between the sides of the skein."

Armstrong had filed another application on May 18, 1894, which resulted in patent 523,139, dated July 17, 1894. That was cited against his August 4th application, but did not narrow in any way the subject of interference. Schroeder carried his date of conception back of January, 1894, and won the interference contest. Armstrong then bought up Schroeder, and used the claims of his August 4th application as fitting and appropriate to the invention set forth in Schroeder's specifications. They appear to fit the invention described by Schroeder with exactness, and I can see no reason for searching into a controversy between Armstrong and the patent examiner to learn what meaning should be attached to the claims when fitted upon the Schroeder disclosures. No such right inheres to an invader of the Schroeder preserve as it was finally ticketed, labeled, and issued from the Patent Office. The claims which appear in the Schroeder patent are, as I have said, perfect fits for the Schroeder disclosure, and that ought to be the end of the contention about the effect of the claims and what they mean.

Schroeder in 546,251 was the first to utilize a folded-over part of the skein-embracing casing as a bearing for the withdrawal of the threads. Armstrong, in patent 523,139, shows an extension of one portion of the casing upon which a skein can be hung, and which is then folded over so as to prevent the withdrawal of the skein. Complainant says that this end extension, when folded over, forms a bearing upon which the individual threads can be drawn out. Nothing is said in the specifications or claim about its acting as a bearing piece, and I doubt whether it has that function inherent to its construction. It is certain that, if Armstrong had made such a claim for his invention, it would have been a pertinent reference against his claims in the August 4th application. As here construed it was unimportant, as I have said just above in discussing the transfer of claims.

The value of the folded-over extension as a bearing piece belongs to Armstrong, because he bought it from Schroeder, and the only importance to be attached to his invention of 523,139 lies in the fact that he gets from it the right to fold over endways an extension of the casing, and thus prevent the removal of the doubled skein through which the extension has been passed. The patent may be valid. Whether infringed or not is another matter. If my views of the earlier

Schroeder patent are correct, it is better to eliminate it from our discussion.

The later Schroeder patent embodies the essential elements of the earlier Schroeder patent and an endwise-folded bearing flap which is first reinforced by portions of the side extension folded over it. There is nothing new presented against this patent, except Fraley, 534,390, "silk or thread package," and Smith, 536,313, "skeinholder."

Fraley has a "skein retainer" within his casing, which is introduced as a separate entity, and after fastening it within the casing he tries to get a bearing for the individual threads by his combination. This is a complicated effort to arrive at a result which Schroeder gets by using a folded portion of the casing itself as a bearing. Smith's way of getting the individual threads out is more complicated than Fraley's. They have no value as anticipations. It would be unfair to this patent to treat it in any other way than as a specific improvement upon the broader conception of the earlier Schroeder patent. Thus treated, it is infringed.

The defendant's structure has a flap, folded first sideways and then endways, which is utilized as a bearing piece over which the individual threads can be drawn forth. It therefore infringes the underlying essential principles of the first Schroeder patent and the specific improvements thereon to be found in the second Schroeder patent. Defendant's thread package conforms exactly to the requirements of a patent which it owns; but, of course, that furnishes no excuse for an invasion of complainant's property.

If both parties owned nothing more than improvement patents, it goes without saying that the differences of detail in construction are enough to save the defendant. The complainant's patents, however, if entitled to the rank which I am sure they deserve, taken as a whole, entitle him to the protection which he seeks.

The claims of the two Schroeder patents in suit are valid and infringed. The defendant should not be held accountable for invasion of the sole claim of the Armstrong patent.

Let a decree be drawn in accordance herewith.

CASEIN CO. OF AMERICA v. A. M. COLLINS MFG. CO.

(Circuit Court, E. D. Pennsylvania. July 21, 1909.)

No. 14.

1. PATENTS (§ 328*)—PRIOR USE—ENAMELING COMPOUND FOR COATING PAPER.

The Hall patent, No. 626,537, for an enameling compound for surfacing paper and method of producing the same, is void for prior use of the compound for many years, produced by the same method.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*

Priority and continuance of public use of invention as affecting patentability, see note to *Eastman v. Mayor*, etc., of City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 328*)—PRIOR USE—ENAMELING COMPOUND FOR COATING PAPER.

The Hall reissue patent, No. 11,811 (original No. 609,200), for an insoluble waterproof compound for coating paper, etc., is void for prior use of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the same or similar compound for more than two years prior to the application.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Wetmore & Jenner, for complainant.

Harris S. Sparhawk and Horace Pettit, for defendant.

HOLLAND, District Judge. This suit was instituted alleging infringement of two letters patent issued to William A. Hall, relating to casein coatings for paper. For the first he filed his application April 5, 1897, and the original patent was issued August 16, 1898, being No. 609,200, hereinafter called the "formaldehyde patent." An application for the reissue of this patent was filed November 17, 1899, and the reissue bears date March 6, 1900, being numbered 11,811. The other patent, No. 626,537, was applied for July 25, 1898, and issued June 6, 1899. This will be referred to hereafter as the "free acid patent." Both these patents were duly assigned to the complainant company, a corporation organized under the laws of New Jersey. It is alleged in the bill that the inventions and improvements described and claimed in these patents are capable of conjoint use in the same compound and in the method of preparing the same, and are in fact so conjointly used by the defendant; and, further, that the latter has infringed both these patents, for which the usual demand for relief is made.

The answer admits the issue and reissue of the formaldehyde patent to Hall, but denies the validity of the reissue on the ground that: (a) It is for a different invention from that for which the original was granted; (b) that Hall was guilty of laches in applying for the same; and (c) that the original was not surrendered for insufficiency arising without fraudulent intent. It is further alleged that both the original and reissue are void for lack of patentable novelty in view of the prior state of the art and by reason of certain enumerated prior patents and publications, and prior knowledge and use by certain enumerated persons, and denies infringement of said reissue letters patent.

As to the "free acid patent," the answer admits the issue of this patent, but denies the novelty and utility of the alleged invention, or that Hall was the first inventor, and alleges that the said invention was without patentable novelty in view of the prior state of the art, and of certain prior patents and publications, and because of prior knowledge and use by certain persons; and further alleges that the said invention is incapable of producing the result described in said patent, and was in public use in the United States for more than two years before the application for the patent.

Patent No. 626,537 for the "free acid patent" will be first considered. The claims of this patent are as follows:

"1. An insoluble coating or enamel for paper composed of casein, a free acid, an alkali, and clay or other suitable mineral base, in substantially the proportions specified.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"2. An insoluble coating or enamel for paper composed of casein containing a free acid, in substantially the proportions specified.

"3. The method of producing an insoluble coating or enameling composition for paper which consists in precipitating casein by the use of an acid, partially washing the casein so as to leave a portion of the acid combined therewith, drying out the acid casein thus produced, dissolving said casein by means of a suitable alkali, and introducing a mineral body or filler to the alkaline-casein solution thus formed."

This patent is for a new and useful improvement in enameling compounds and method of producing the same. The invention has for its object the production "of a coating or enameling for finishing and surfacing paper," etc. The composition, as stated in the specification "belongs to that class of clay coatings in which a mineral base—such as clay, blanc fixe, or a similar ingredient—is used to give body to the composition."

Of the numerous matters of defense set up in the answer, it will be necessary to consider only one, to wit, public use of the mixture and sale of the product for more than two years in the United States before the application for the patent. An examination of the evidence, both documentary and oral, clearly establishes that an insoluble coating or enamel, such as described in the "free acid patent," was produced and used for the purpose of coating walls, signs, paper, and other articles for many years prior to the date of the patent.

It will be noticed that this patent was issued to cover a composition of matter and the method of producing it. The claims are three in number, two of which claim the composition, and the third the method of producing it. The description informs us of the ingredients essential to the product, which are, as stated: 80 per cent. of a mineral base, 17 per cent. of casein, containing about 1 per cent. of the free acid used to precipitate the curd. In mixing the casein and mineral base, a small amount of alkali, about 3 per cent. of the composition, is used, and any suitable alkali, such as borax, ammonia, or carbonate of soda, will be suitable for the purpose. We find from the specifications a further description as to the method of producing the casein, which is accomplished by precipitating the curd from milk by the use of any suitable acid which will throw down the curd, and the patentee states that he leaves a small portion of the acid in the curd or casein for the reason that the effect of the acid is to render the curd insoluble after the composition has been applied and has become seasoned, and furthermore it leaves the curd in a wholesome and clean condition, without imparting to it the "cheesy" odor resulting from rennet curdling or natural souring.

Three ingredients are used in the composition—casein, mineral base, and any suitable alkali. This patented enamel requires casein produced as above described. An examination of the evidence shows that this composition had been produced and used for a long time prior to the issuing of the patent. Milk had been subjected to the use of the same acid for the purpose of throwing down the curd after which the acid was washed out; but frequently it occurred that some of the acid remained in the curd, and in fact it is somewhat difficult, as the evidence shows, to entirely eliminate all the acid by washing, so that prior to the issuing of the patent the very same kind of case-

in was frequently produced, although we do not find it anywhere claimed in the prior use that the remaining acid in the casein was of any advantage to it in the production of an insoluble enamel coating; but it was produced prior to the patent, the same as it is being manufactured at the present time. This casein was used in connection with a mineral base of about the same proportion as that stated in the specifications, and an alkali was also used in connection with casein and the mineral base long prior to the issuing of the patent for the same purpose as stated in the patent; that is, to cut and dissolve the curd in mixing it with the mineral base. This coating was sold upon the market without any statement as to the particular functions of the various ingredients entering into it, but that it was made in the same way the evidence clearly establishes.

The formaldehyde patent is for a new and useful improvement in insoluble waterproof compounds which are to be used for coating paper, and it is peculiarly adapted for surfacing walls of rooms or of advertising signs intended for outdoor service, or of paper, cloth, leather, or analogous substances, which it is desirable should receive an insoluble coating and one which is pervious to but unaffected by water, and yet remains in such condition as to readily take the inks in printing or decorative work. The proportions of the mixture are 80 per cent. of a mineral base, 16 per cent. of casein, and one part alkali, and $3\frac{1}{2}$ per cent. of formaldehyde. It is claimed the mineral base acts as a retarding agent, preventing the composition from setting too rapidly after it has been mixed, and that the formaldehyde is to render it, when fully dried out, insoluble in or insensible to the action of weather, either at normal or at high temperature. We find from the evidence that there is nothing at all new in this combination, as all these substances had been used in about the same proportions long prior to the issuing of the patent. The Zimmerman British patent, applied for in 1894, discloses the use of the casein solution with formaldehyde forming an insoluble film; but it is endeavored to draw the distinction between a film coating, in that it is essential that a paper coating should contain a mineral base. It is established that a mineral base in varying proportions had been used for years prior in producing coatings for different use, and Zimmerman could have used in his mixture what was then being used by other firms manufacturing insoluble coatings in such proportions as were then in use and produced the best results; but, aside from whether or not Zimmerman could have added a mineral base to his composition after the patent was issued in the same proportion as used in the latter, the evidence shows that the same mixture with formaldehyde had been used as early as 1889. These prior mixtures consisted of casein precipitated by acid, dissolved in an alkali mixed with clay or other suitable mineral base as a coating, and as early as in the year 1894 formaldehyde was used in the production of an insoluble coating, not experimentally, but in a commercial stage.

We conclude that the ingredients used in the composition both of the free acid patent and the formaldehyde patent had been used by the public for more than two years before the application for the

patents in question, intermixed in the same manner, and producing the same result, and that both patents are invalid.

For the reasons stated, the bill should be dismissed, with costs to defendant, and it is so ordered.

UNITED STATES V. PATTERSON.

(District Court, D. Oregon. August 9, 1909.)

No. 5,136.

PERJURY (§ 11*)—FEDERAL STATUTE—OATH TO APPLICATION FOR PATENT.

A willfully false statement in an oath to an application for a patent, made as required by Rev. St. § 4892 (U. S. Comp. St. 1901, p. 3384), that the applicant verily believes himself to be the original, first, and sole inventor of the device for which the patent is sought, is of a material matter, and constitutes "perjury," within Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653).

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 40; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

On Motion for New Trial.

The trial court instructed the jury in this case as follows:

You have heard the testimony in this case, and you have listened to the argument of counsel, and it becomes my duty at this time to advise you touching the law of the case as applied to the facts which have been narrated in your hearing.

The defendant is charged by the indictment herein with having sworn falsely, under an oath administered to him by C. W. Hodson, a notary public for Oregon, in a matter material to an inquiry before the Commissioner of Patents of the United States. The indictment is drawn under section 5392 of the Revised Statutes of the United States, which provides that every person who, having taken an oath before a competent tribunal, officer, or person in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury.

A copy of the oath alleged to have been taken and subscribed is set forth in the indictment, whereby the defendant, Charles A. Patterson, swears "that he verily believes himself to be the original, first, and sole inventor of the improvement in buckles described and claimed in the annexed specifications," whereas it is alleged by the indictment that he, at the time of taking said oath, namely, the 14th day of March, 1907, well knew that he was not the original, first, and sole inventor of said improvement in buckles, as described and claimed in said specifications.

Under the law of Congress relating to patents it is requisite for one desiring to obtain a patent right upon a new invention, or any novel improvement on an old invention, to make application therefor in writing to the Commissioner of Patents, and file the same in the Patent Office, specifying in certain manner and particulars the invention desired to have patented. The law further requires that the petitioner shall make an oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, or improvement for which he solicits a patent. Such an oath, declaration, or affidavit constitutes in part the proof upon which the Commissioner of Patents acts in determining whether or not the invention claimed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is new and useful, and is such a one as to entitle the claimant to a patent thereon. Thus it is that the claim for the patent forms the basis upon which this inquiry proceeds, and the oath, declaration, or affidavit subscribed in support of the application is therefore touching a matter material to the inquiry before the Commissioner of Patents, and is such a one upon which perjury may be predicated under said section 5392, if the party taking the oath or making the declaration or affidavit swore falsely with relation thereto, or if at the time of taking said oath he did not believe the matter or facts set forth therein to be true.

The plea of not guilty puts in issue all the material allegations of the indictment, and this casts upon the government the burden of proving or substantiating all of such allegations, to your satisfaction, beyond a reasonable doubt.

The law presumes the accused to be innocent until he is proven guilty. This is not a presumption to be regarded lightly, but is real and substantial, and attends the accused until it is overcome by evidence satisfying your minds of his guilt.

The real issue in this case is reduced to very narrow limits. The oath or declaration alleged to have been subscribed and verified by the defendant, I instruct you, was touching a matter material to an inquiry before the Commissioner of Patents, which disposes of that element in the case. Furthermore, the proofs touching the defendant's subscription and verification of the oath, declaration, or affidavit set forth in the indictment before C. W. Hodson, a notary public for Oregon, is very persuasive, so that there can scarcely be any question about that. Indeed, neither the defendant nor his counsel make any special question upon the subject. But, however that may be, I leave it for you to determine whether or not the defendant so subscribed and verified such oath or declaration.

The pivotal controversy is touching the alleged improvement upon the buckle which has been exhibited to you. The first question with reference to this is: Who was the original, first, and sole inventor of the improvement claimed? I refer to the invention which consists of an improvement upon a one-piece buckle; the principal features or elements of the improvement being a clamping plate, having an inner flat face, connecting with side bars at one end, the inner face of said plate lying at an angle to the normal strain, and a counter bar joining the side bars at the opposite end, with an approximately semicircular projection extending rearwardly in a plane coincident with a plane therefrom passing through a median longitudinal line of the side bars. Or, to simplify it, the invention consists of this binding plate composing the front of the buckle and the projection or lip on the connecting bar at the rear. All other features or elements claimed for the improvement are purely arbitrary and without inventive utility. I call your attention to the binding plate, which is this front piece of the buckle. This is one element of the invention. And then this lip or extension on the after bar, which is another part or element of the invention. Something has been said and testified to here before you relative to a mechanical principle which has been attempted to be illustrated by the plate marking the quarter part of a circle. But that element is not claimed in the patent itself, and it is not a part of the claim here, so that you may as well put that out of your minds. Another element as spoken of in the claim is the forward edge of the clamping plate being of appreciable width to form a binding face, and lying in a plane coincident with the plane of the forward edge of the side bars and at an angle to the plane or inner face. That refers to the face of the plane at the front of the buckle being coincident with the sides of the bar; but that is not a matter of invention. That is merely arbitrary, so that that matter is not in this case. It is also claimed in the patent that this pin is placed at right angles with the clamping face. That is an old device, and it is not claimed as a part of the improvement here; so that the improvement or the elements of the improvement are reduced to two, as I have stated them to you: Simply the binding plate, composing the front of the buckle, and the projection or lip on the connecting bar or rear. So that you can disabuse your minds of all other complications about this patent, and reduce it to these two elements or conditions.

Was it Van Emon, or was it the defendant, who was the inventor of this new improvement? Both of these men claim to be the original or first inven-

tor of said improvement. If the defendant was the original, first, and sole inventor of such improvement, then that is the end of this case; because, if so, his oath or declaration would be true, and he would not be guilty of perjury under the indictment. But if Van Emon was the original, first, and sole inventor—and this you must ascertain—then another question will arise, which has two aspects, namely: Whether the defendant knew that Van Emon was such original, first, and sole inventor, and, having such knowledge, took the oath or made the declaration in question; or whether he had no such knowledge of such fact, but, knowing that he himself was not such inventor, verified said oath or declaration—because in either event he could not have believed the alleged facts stated in said oath or declaration to be true.

In this relation, I further instruct you that, to constitute perjury, the false oath must have been taken willfully and corruptly; that is to say, it must have been taken with some degree of deliberation, and with an intent to testify falsely, and the accused must not, at the time, have believed the facts so verified and sworn to to be true. The intent or motive being a condition of the mind, you must determine as to that by the acts and demeanor of the accused, and by all the attendant facts and circumstances. Men do not usually act without some impelling influence, some purpose in view; and for the ascertainment of that purpose, or the intent or motive behind it, where there is no express declaration respecting it by the accused, resort must be had to his acts and demeanor, his relationship with the principal and controlling facts in the case, and all the attendant circumstances that may throw light upon the subject.

False swearing, in an honest belief that the statements verified are true, could not constitute perjury; and if the defendant, when he made oath to the declaration in question, truly believed that he was the original, first, and sole inventor of the specified improvement, and honestly and in good faith believed such statement to be true, he would not be guilty of the charge. The law also presumes that a person to whom a patent has been issued is the original and first inventor of the device or thing patented; that is to say, the production of the patent makes a *prima facie* case in his favor. But this presumption or *prima facie* case may be overcome by proof to the contrary, and has been overcome in the courts, because patents have been set aside and canceled on subsequent ascertainment and proof that the claimant was not in truth and in fact such original and first inventor.

It is further essential to this case, before a conviction can be had, that Van Emon must have been the original and first inventor of the improvement upon a one-piece buckle containing the same elements that defendant has obtained the patent upon, which principal and essential elements I have explained to you heretofore. For the ascertainment, therefore, as to who of these parties, Van Emon or the defendant, was the original, first, and sole inventor of this improvement in question, you will take into consideration the relationship of the parties, the purchase of the Larson claim or application for patent jointly by Van Emon, the defendant, and Mrs. Parrish, the opportunity afforded the parties, namely, Van Emon and the defendant, for ascertaining minutely the elements of such claim, the suggestions and discussions between them and others as to its utility, and touching any improvement thereto, and especially the improvements in question; the further joint application for a patent upon a buckle by Van Emon, the defendant, and Mrs. Parrish, the purpose they had in view in making such application, and the final withdrawal of such claim, and how and why it was done; and the subsequent application of the defendant alone for the patent to the improvement in question, and how and why he so made the application alone, and without joining with the other parties concerned in the previous claims for a patent particularized by the last invention upon a one-piece buckle.

You will further take into consideration the models that have been produced here by the respective parties, namely, Van Emon and the defendant, and determine, if you can, who originated or produced the first and primary idea of the improvement, which is shown forth by the one-piece buckle patent—whether, considering all these, together with other testimony in the case bearing upon the subject, bearing in mind at the same time the credibility of the witnesses and the weight to be given such testimony, Van Emon produced the original, first, distinct and definite idea of the improvement, not vague and

fanciful, but well-defined, exact, and susceptible of demonstration, or whether the defendant was the original, first, and sole inventor, as he declares under oath that he believes he was. If he was not such original, first, and sole inventor thereof, as I have said before, and was conscious that Van Emon was such inventor, if you so find that Van Emon was, or was conscious that he (defendant) was not such original, first, and sole inventor, and deliberately, with culpable and corrupt intent, swore to such declaration that he believed he was the original, first, and sole inventor of such improvement, and did not at the time believe the declaration to be true, he would be guilty under the charge. Otherwise, he should be acquitted.

I will explain to you now the significance of the expression "reasonable doubt." It is such a doubt as exists in reason—not captious, frivolous, or whimsical, but of substantial moment—and intercepts or arrests satisfactory conviction in the mind, and causes hesitation and uncertainty as to the real fact. Applied to a finding as to the guilt of the accused in criminal practice, it is such a doubt, suggested by the dictates of reason, common sense, or common understanding, not fanciful or far-fetched, as will intercept fair conviction in the minds of the jury touching the guilt of the accused under the charge for which he is being tried, after a careful survey and consideration of all the testimony in the case. Stated objectively, it is that state of the case which, after entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty as to the truth of the charge. If, therefore, upon such proof as here adduced, considering it in its fullness and entirety, there remains in your minds a reasonable doubt as to the guilt of the accused, he is entitled to the benefit of it by an acquittal; that is, the evidence must establish guilt under the charge to a reasonable and moral certainty—a certainty that convinces and directs your understanding, and satisfies your reason and judgment, acting under your duties and obligations as jurors.

It is the province of the court to instruct you touching the law governing the cause at issue, and you will take and accept the law given to be the law in the case. But it is your sole province, under the instructions of the court, to find the fact or facts from the testimony adduced; that is, you must judge of the effect of the evidence and return your verdict accordingly. And here I will say to you that, if the court has expressed an opinion upon the fact or facts in the case, you will not be controlled by that, but you must use your own judgment upon that subject. Your power and authority of judging of the effect of evidence is, however, not arbitrary; but your function in that regard should be exercised with legal discretion, and in subordination to the rules of evidence. For instance, you are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds. To justify conviction upon a charge of perjury, it must be supported by the testimony of two credible witnesses, or by one witness worthy of credit and other corroborating proof or circumstances.

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character on oath, or by contradictory evidence. And a witness false in one part of his testimony is to be distrusted in all.

Being the judges of the effect and value of the evidence, you are necessarily the judges also of the credibility of the witnesses. This you must determine by the manner in which the witness deports himself upon the witness stand—whether he appears to be candid and fair, or whether he is evasive, or is swift, or is reserving part of the truth, not detailing the whole truth, and also by testimony serving to contradict or impeach the witness, or by any facts or circumstances appearing in the case tending to his discredit, considering at the same time any bias or interest the witness may have in the cause. In this relation, I direct your attention to the fact that the defendant has taken the witness stand in his own behalf, which he had a right to do, if he so chose. Having gone upon the stand, it was competent for the government to discredit his testimony, as that of any other witness, and by the same methods. You can properly consider, therefore, his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony,

the nature and extent of his interest in the result of the trial, and the impeaching evidence, whatever it may be, in determining how much credence he is entitled to.

Now gentlemen of the jury, you will take this case, and, under the instructions that I have given you, acting fairly and impartially, and without prejudice or bias, either towards the government or towards the defendant, as triers of fact, you will determine from all the testimony adduced at the trial whether the defendant is guilty or not guilty under the charge contained in the indictment, as I have explained it to you, and render your verdict accordingly.

Walter H. Evans and J. R. Wyatt for the United States.

H. H. Riddell, R. A. Wade, and E. S. J. McAllister, for defendant.

WOLVERTON, District Judge. This is a motion for a new trial, based upon the instructions of the court touching the alleged crime charged in the indictment, namely, perjury, and what act or asseverations on the part of the defendant would render him guilty of that offense.

The indictment is drawn under section 5392 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3653), which provides that every person who, having taken an oath before a competent tribunal, officer, etc., that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. It is alleged in the indictment that the defendant took an oath before C. W. Hodson, a notary public, to the effect that:

"He verily believes himself to be the original, first, and sole inventor of the improvement in buckles described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used before his invention or discovery thereof."

The indictment negatives the statements in the oath in the following language:

"Whereas, in truth and in fact, the said Charles A. Patterson, at the time when he so swore and made his said declaration and affidavit as aforesaid, well knew that he was not the original, first, and sole inventor of said improvement in buckles," etc., and that he "well knew and believed that the same had been known and used before his alleged invention and discovery thereof."

The theory upon which the case was tried, and that upon which the court instructed the jury, was that the charge of perjury was based upon the words contained in the oath, namely:

"That he verily believes himself to be the original, first, and sole inventor of the improvement in buckles."

This is indicated by the instruction of the court, as follows:

"Was it Van Emon, or was it the defendant, who was the inventor of this new improvement? Both of these men claim to be the original or first inventor of said improvement. If the defendant was the original, first, and sole inventor of such improvement, then that is the end of this case; because, if so, his oath or declaration would be true, and he would not be guilty of perjury under the indictment. But if Van Emon was the original, first, and sole inventor—and this you must ascertain—then another question will arise, which has two aspects, namely: Whether the defendant knew that Van Emon was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such original, first, and sole inventor, and, having such knowledge, took the oath or made the declaration in question; or, whether he had no such knowledge of such fact, but, knowing that he himself was not such inventor, verified said oath or declaration—because in either event he could not have believed the alleged facts stated in said oath or declaration to be true.”

It will be seen that the word “sole” has a material bearing, both on the theory upon which the case was tried and on that upon which it was put to the jury by the instruction of the court. If perjury cannot be predicated upon the use of that word, in connection with the words “original” and “first,” the oath having been made in a proceeding to obtain a patent, then a new trial should be granted; otherwise, it must be conceded that the judgment is proper. The theory upon which the court proceeded is that the oath was taken in an inquiry before the Commissioner of Patents as to whether a patent should issue for this improvement in buckles to Patterson, the applicant for the patent.

“Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.” Section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382).

It is further provided (section 4888, Rev. St. [U. S. Comp. St. 1901, p. 3383]) that, before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents (specifying what the application shall contain), which application shall be signed by the inventor and attested by two witnesses. Then follows the requirement of section 4892 (page 3384), which is as follows:

“The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used.”

Then by section 4893:

“On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor.”

It is plain to be seen from these statutes that the Commissioner of Patents has a very important duty to perform in this relation, namely, that of an examination of the application and proofs, for a determination as to whether or not the applicant is entitled to the patent applied for. It seems to me, therefore, that the subscribing of the oath in question was the production of matter material to that inquiry, and a false oath taken with reference thereto would bring the case within the intendment of section 5392 of the Revised Statutes, and

would render the affiant guilty of perjury. And this is the especial theory upon which the court instructed the jury in the case.

By rule 46 adopted by the Commissioner of Patents, with the approval of the Secretary of the Interior:

"The applicant, if the inventor, must make oath or affirmation that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used, and shall state of what country he is a citizen and where he resides, and whether he is a sole or joint inventor of the invention claimed in his application."

This rule, if not authorized by law, of course, could not make that perjury which is not constituted perjury under the statute of Congress. One of the purposes of the inquiry, as indicated by the rule, was to determine whether the applicant was the sole inventor, or whether he had invented a device jointly with some one else. If he were jointly interested with some one else, it is plain that he would not be entitled to a patent in his own right; so that this condition was one very material to the inquiry before the Commissioner of Patents. The Commissioner, if it had appeared by the application in question and under the affidavit made by the defendant, Patterson, that he was a joint inventor with some other person, would not have issued him any patent at all, or else would have issued the same to Patterson jointly with the other individual entitled with him to an interest therein. So it is the use of the word "sole" was a thing material and important in the inquiry being made, and that an oath taken with reference thereto, if false, constituted perjury under section 5392. After all, the word "sole" is a shorter way of saying that the applicant does not know and does not believe that the same, namely the invention, was ever before known or used. If the applicant was a joint inventor with some one else, it follows, without question, that it would have been previously known and used. Hence the word "sole" means the same thing, practically, as is couched by signification in the clause just alluded to. But it seems to me, however, that the use of the word "sole" in the affidavit as subscribed, in connection with the words "original" and "first," has a significant and material bearing in the inquiry which was then being prosecuted before the Commissioner of Patents, and that a false oath with reference thereto renders the affiant guilty of perjury.

I am familiar with the doctrine as announced in the cases of *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, and *Robnett v. United States* (C. C. A.) 169 Fed. 778; but in those cases the oath was taken with reference to matter not deemed material to the inquiry, and it seems to me they do not have application here.

For these reasons, the motion for a new trial will be denied.

MORIMURA BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1908.)

No. 5,015.

CUSTOMS DUTIES (§ 36*)—CLASSIFICATION—PAPER NAPKINS—"PRINTED MATTER."

The provision for "printed matter" in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), does not include Japanese napkins made of crinkled paper and ornamented with designs in colors, stenciled, stamped, or printed thereon.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.*

For other definitions, see Words and Phrases, vol. 6, pp. 5563, 5564; vol. 8, p. 7763.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,651 (T. D. 28,350), affirmed the assessment of duty by the collector of customs at the port of New York. The Board's opinion reads as follows:

FISCHER, General Appraiser. This protest relates to the assessment of duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 407, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), as manufactures of paper, on certain napkins made of crinkled crepe paper and ornamented with designs in colors stenciled and stamped or printed thereon from blocks of wood. The importers claim that duty should have been properly assessed at the rate of 25 per cent. ad valorem, as printed matter, under the provisions of paragraph 403 of said act (30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]).

This class of merchandise has been the subject of many decisions of the Board, all of which have followed previous rulings rendered under Tariff Act Aug. 27, 1894, c. 349, 28 Stat. 509, and there appears to have been a uniform customs practice extending back for many years in returning such articles as manufactures of paper. The tariff act of 1894 provided a higher rate of duty on "printed matter" than on "manufactures of paper"; and the importers of paper napkins then claimed that such articles were in fact manufactures of paper, and not the printed matter provided for under the then tariff. In G. A. 2,863 (T. D. 15,682) they were held to be printed tissue paper; and in G. A. 3,043 (T. D. 16,019) the Board reversed its previous ruling and sustained the importers in their claim that Japanese napkins were properly dutiable as manufactures of paper. In the latter case the importers of record (Morimura Bros.) are the same concern who appear in the case at bar.

In that case the record was quite extensive, and the processes of the manufacture of such paper napkins were dwelt upon at length, and the importers succeeded in establishing their claim that the said napkins were manufactures of paper and not printed matter. The present tariff act provides a higher rate of duty on manufactures of paper than on printed matter; and the same firm now appears and, reversing its previous position, seeks to prove the article to be in fact printed matter. The testimony in the present case, the samples, and the record before us add no new feature to the issue, and succeed in no way in convincing us that Japanese paper napkins are less manufactures of paper than they were under the previous tariff act. These napkins are completed articles, and adapted for a particular purpose, and to be used as any other ordinary napkin would be used. The design in colors printed on such articles is merely decorative, and the article, as an article, has its usefulness, irrespective of the decorative feature. It thus falls directly within the ruling of U. S. v. Hensel (C. C.) 152 Fed. 578, T. D. 27,856, wherein so-called lace-paper tops and dollies, cut or stamped out of sheets of paper and with printed inscriptions thereon, were held to be in fact man-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ufactures of paper, and not printed matter; the court following and citing the case of *Kraut v. U. S. (C. C.)* 134 Fed. 701, T. D. 25,829, affirmed 142 Fed. 1037, 71 C. C. A. 684, T. D. 26,946. According to such authority "printed matter," in paragraph 403 of the tariff act of 1897, does not include an article or material on which the printing is a subordinate feature.

This being the case, Japanese paper napkins with designs in colors printed thereon are clearly not included within the provisions for printed matter. That they are is the only claim set up by the importers in their protest; and the same must therefore be overruled, and the decision of the collector affirmed.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

YAMANAKA & CO. v. UNITED STATES.

MORIMURA BROS. v. SAME.

(Circuit Court, S. D. New York. May 20, 1909.)

Nos. 5,329, 5,330.

1. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—"JOSS LIGHT."

A dried paste of sandalwood dust and clay, in the form of sticks, cones and coils, which, when lighted, yields a fragrant odor and is burnt at the altars and shrines of joss houses and temples in China and Japan, is "joss light," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 587, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1684).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—COMMERCIAL DESIGNATION.

Articles which are in truth and fact joss sticks or joss lights are subject to classification as such under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 587, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1684), notwithstanding that they may have no commercial designation as such.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

The articles in controversy were held in the board's decisions not to be subject to classification as joss sticks or joss light, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 587, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1684), because not shown to be so known in trade and commerce. The importers contended that it was not necessary to prove commercial designation, but that it was sufficient to show that the articles were in fact joss sticks or joss light.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise is a dried paste of sandalwood dust and clay, variously in the form of small sticks, cones, and coils. When lighted it yields a fragrant odor. The testimony in the record fully establishes that it is used in joss houses and temples

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in China and Japan, being burnt at their altars and shrines. Clearly it seems to be the joss light intended by Congress to be allowed free entry under paragraph 587 of the tariff act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]).

Champion v. U. S. (C. C.) 150 Fed. 239, T. D. 27,495, has no application here. The goods there considered were not, in truth and fact, joss sticks, but were allowed that classification because of their being so denominated in trade. The articles before me now, being actually joss sticks or lights, are clearly entitled to exemption from duty.

The decision of the Board of General Appraisers is reversed.

HAVEN & CLEMENT v. JAMES.

(Circuit Court, N. D. Georgia, W. D. August 12, 1909.)

1. GAMING (§ 12*)—WAGERING CONTRACTS—SALE OF COTTON FOR FUTURE DELIVERY.

A contract for the purchase or sale of cotton for future delivery on the New York Cotton Exchange, made subject to the rules and by-laws of the exchange, which provide that actual delivery of the cotton shall be contemplated by such contracts and may be required thereunder, is valid, and not illegal as a wagering contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.*]

2. GAMING (§ 12*)—PURCHASE OR SALE OF COMMODITY ON EXCHANGE—MODE OF SETTLEMENT.

The fact that a contract for the purchase or sale of cotton on an exchange for future delivery, made by a broker in his own name, but on behalf of a customer, is settled between the brokers by setting it off against other contracts, or "rung out," as permitted by the rules of the exchange, does not extinguish it, or render it invalid as between the broker and his customer, who had knowledge of such rules.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.*]

At Law. On motion by defendant for new trial.

Brown & Randolph and Spencer R. Atkinson, for plaintiffs.

Smith, Hammond & Smith and C. E. Battle, for defendant.

NEWMAN, District Judge. This case having been tried by the court with a jury, and a verdict having been rendered in favor of the plaintiffs, the defendant made a motion for new trial, and the present hearing is on that motion.

The suit was brought by Haven & Clement against D. W. James for \$10,145, "for work and labor done, services rendered, and money paid out and expended by said plaintiffs during the months of October, November, and December, 1904, at the instance and request of the defendant," which amount it is alleged the defendant afterwards, in consideration of the premises, promised to pay the plaintiff upon request. Plaintiffs were engaged in buying cotton on the New York Cotton Exchange, and the amount stated is claimed to be due by the defendant to the plaintiffs on account of transactions between them.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is alleged that they were employed by James, at various times named in the declaration, to buy and sell cotton in accordance with his desires. It is further alleged that plaintiffs—

“being at said time (referring to the dates mentioned in the declaration) brokers engaged in the buying and selling of cotton for a commission, they made said several purchases and sales of cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contracts of purchase and sale for future delivery at the times aforesaid, in accordance with the rules and by-laws of the New York Cotton Exchange, for all of the cotton so purchased and sold; and plaintiffs further show, as members of the New York Cotton Exchange, that parties from and to whom said purchases and sales were made did not and do not know the said defendant, but look solely to the plaintiffs for a compliance with said contracts of purchase and sale, and hold your petitioners liable, bound for due compliance therewith.”

It is then alleged that the defendant well knew that the plaintiffs were to make, and did make, said purchases and sales under and subject to the rules and by-laws of the New York Cotton Exchange, and were held personally bound for carrying out contracts in accordance with the rules and by-laws of the exchange. They allege that they advised the defendant that the several purchases and sales of cotton were made for his account and in accordance with his instructions, subject to the rules and by-laws of the New York Cotton Exchange; and that:

“Said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated as provided by the rules of said exchange, all of which was well known to the defendant.”

It is further alleged that:

“After said purchases and sales of cotton were made, as hereinbefore charged by them, for the said defendant, at his instance and request, for future delivery at the times aforesaid, cotton declined or advanced, as will appear from the bill of particulars attached to the original declaration, until the loss in the purchases and sales amounted to the sum of \$9,280, which sum plaintiffs were bound to make good and pay, and which they did make good and paid to those from whom said cotton was bought or sold as the case may be, all of which was done for the benefit and at the instance and request of the said defendant.”

It is then alleged that the defendant promised to remit upon request and to place in the hands of plaintiffs a sufficient sum to protect the plaintiffs, but that he failed in this respect—that is, in the sum of \$9,280 mentioned—and thereby became indebted to them in that sum. It is then alleged that the defendant is indebted to plaintiffs (in addition to the \$9,280) for commissions for services rendered by them, in the sum of \$840 for work done and services rendered, said commissions being based upon the rules of the New York Cotton Exchange; that it was well known to the defendant, and under the rules of said exchange, plaintiffs were entitled to \$7.50 for 100 bales of cotton bought or sold—the commissions for the same 100 bales bought and sold being the sum of \$15. They allege that the defendant is indebted to them in the sum of \$25, being collection charges charged and paid by plaintiffs upon certain checks remitted to plaintiffs by defendant in checks drawn on banks in the state of

Georgia; said collection charges being paid by plaintiffs for collecting these checks through their bank in New York. They allege they are entitled to interest at the rate of 6 per cent.

To this declaration a demurrer was filed, which was overruled. An answer was then filed. Defendant denied liability upon various grounds. Defendant denied that he had any transactions with the plaintiffs in the purchase and sale of cotton, except in the purchase and sale of cotton futures. He denies that certain advances which—"plaintiffs claim were made by them, were made by the direction and request of defendant, or with his knowledge and consent, but were voluntary acts of plaintiffs, for which they have no right to hold defendant liable, and for which he denies any and all liability."

By an amendment to the answer the defendant says that no purchase and sales of actual cotton were contemplated by either party to the transaction, or were made, or intended to be made; that it was fully understood between the parties that the purchases and sales were simply purchases and sales of futures, and were only wagers dependent on the course of the fluctuations of futures and to the variations of the price thereof; that no actual cotton was bought, sold, or delivered, or received by plaintiff, in connection with any of the alleged transactions described in the complaint; that the deliveries or receipts of cotton which the plaintiffs may claim to have made, or which may have been made in the plaintiff's books, were not genuine or bona fide deliveries or receipts of cotton, but were in fact known and understood by both plaintiffs and defendant, and by any other persons, firms, or corporations with whom the plaintiffs may have dealt, or pretended to deal, to be merely fictitious transactions, not involving the delivery or receipt of any actual cotton; that these contracts were in violation of certain statutes in New York against betting and wagering; that the New York Cotton Exchange was not a market or exchange for dealing in any actual cotton, or for the purchase, sale, or delivery of any actual cotton, and that it was well known to both the plaintiffs and the defendant that said exchange was not such an exchange or market for the dealing in actual cotton, but was an agency solely for the purpose of wagering money upon the fluctuations of prices of futures, which prices in themselves were fictitious, and not in accordance with the contemporaneous price at which actual cotton was or could be bought for actual delivery in any market; that at the times mentioned in the complaint the New York Cotton Exchange maintained, through its rules and through the action of its classification committee, a fictitious and arbitrary classification of cotton, upon an arbitrary and uncommercial table of differences, providing grade, premiums, and discounts not in accordance with the actual differences of grade recognized by dealers in or users of actual cotton; that at the times mentioned in the complaint there was at the port of New York, and within reach thereof for the purpose of delivery under contracts, only a very small quantity of cotton in comparison with the amount of apparent dealings upon said exchange within the time referred to, and an amount totally inadequate for the fulfillment of the contracts made on said exchange, had the same been bona fide; that all the foregoing facts show the lack of intent to deal

in, and the difficulty or impossibility of dealing in, actual cotton on the floor of the exchange as a legitimate business proposition, or in any wise to deal therein, except for the purposes of and as gambling transactions, and were at all times mentioned in the complaint and for a long time prior thereto well known to plaintiffs and to all persons with whom any transactions or pretended transactions were had.

The answer further sets up that if the plaintiffs actually made any real or pretended transactions for the defendant, as alleged in their complaint, then they, the said plaintiffs, claiming to act under certain by-laws, rules, regulations, and customs of the said exchange, on or after the date of the said initial transactions set forth in their said complaint, and prior, respectively, to the second or "closing out" transactions, and before the defendant gave any orders for such closing out (if any in fact were given), offset, closed out, "rang out," settled on differences, and canceled the said original transactions or "contracts," as they are called upon the said exchange, and each of them, and thereby released all parties thereto, so that the defendant's rights arising by virtue thereof were canceled and utterly destroyed; that such offsetting, closing out, "ringing out," settling upon differences, and cancellation was done and had without notice to or the knowledge of defendant and against and in violation of his rights in the premises; that the defendant had no knowledge or notice of the by-laws, rules, regulations or customs of the said exchange under which plaintiffs pretend and claim to have acted or of any right or authority claimed by them so to offset, close out, "ring out," settle on differences, or cancel the said transactions or "contracts"; that the said by-laws, rules, regulations, and customs which are claimed to authorize the same are wholly unreasonable and unlawful, and at all times have been utterly void as against this defendant, and of no binding force and effect upon him; that the losses, if any, made, occasioned, or paid upon, as well as any other payments made upon such offsettings, closing out, "ringing out" on differences, or cancellation, were not made, occasioned, or paid by virtue of any authority of the defendant, or by virtue of any right of the plaintiffs against him, or otherwise, in the premises, nor is he in any way responsible therefor, nor do they, or any matters or things growing out of the same, in any way fix or determine his liability to the plaintiffs, if any, nor are they binding upon him, nor do they give rise to any cause of action against him; that by such action the plaintiffs violated and abandoned their agency, to the total exclusion of any right to recover any sums whatever claimed in their complaint, or otherwise, from this defendant, because of any of the transactions or accounts in said complaint mentioned.

On the issue thus made the case went to trial before a jury. A considerable amount of evidence was offered by both parties. The plaintiffs offered evidence tending to establish their claim as to the various items named in the declaration and aggregating the sum claimed. No contest whatever was made, as the court understood it, over the amount of the plaintiffs' claim; the whole contest being over the validity and legality of the transactions, the defendant claiming that it was a mere wagering agreement and that he was not liable for that reason. There was some evidence which tended to show explicitly

that the defendant dealt in actual cotton. A telegram of November 25, 1904, from the defendant to the plaintiff was as follows:

"What is the last day for tendering December cotton? Can tender Tuesday."

And a letter from the defendant to Mr. Sterrett Tate, agent of the plaintiffs, as follows:

"Your telegram received late this afternoon. The wires here have been so very busy that the operator could not get in at all. It was 3 o'clock before I heard a line from you to-day. A large block of the cotton that your house carried for me was for other parties, and I have the cotton receipts as collateral. I will get the matter all straight next week. Say to your people to rest easy, as the thing broke worse to-day than any of us were looking for. Your house should not lose a dollar, though, if it was double the amount. Thanking you for your kindness in the matter."

There was evidence to show that the defendant bought and sold actual cotton, having a warehouse at his place of business in Blakely, Ga. Certain slips, being memoranda of purchases and sales made by plaintiffs on account of defendant as set out in the declaration, are offered in evidence. Telegrams in cipher and letters from the plaintiff to defendant indicate purchases or sales according to the transactions.

Mr. Haven, one of the plaintiffs, after identifying the various telegrams and letters, made the following statement:

"The total amount of gain which Mr. James made upon the purchases and sales is \$4,820. The total amount of losses which he made upon these sales is \$24,100. The total amount of Mr. James' net loss upon the entire transaction, after deducting his profits, is \$19,280. We received from Mr. James on account of these matters on November 5, 1904, \$5,000; December 5th, \$5,000. Deducting these amounts from the net losses leaves \$9,280 due. The total amount of our commissions is \$840. Another charge against Mr. James for these two \$5,000 checks there, is \$25 collection charges. That makes the total amount of the claim \$10,145. That was December 5, 1904. Referring to the loss of \$19,280 on account of these transactions, as to how that matter taken care of by my firm—well, we have paid the money out on those contracts. We paid out \$24,100, and took in \$4,800 and also took in \$10,000, that Mr. James paid. We paid out this amount of loss, \$24,000, because we were liable on these contracts."

This is not denied in any way, as I gather from the evidence. The defendant offered evidence for the purpose of showing that the entire transactions between the defendant and the plaintiffs constituted an agreement for wagering on the fluctuations in the price of cotton, and that the claims made by the plaintiffs on the defendant were invalid for this reason. There were some minor items of defense, as stated, which were referred to in the charge; but the main defense in the case was on the ground that it was wholly a gambling transaction.

After argument, the case was submitted to the jury with the following instructions from the court:

"The first proposition that I submit to you in connection with the law of this case is this: That under the law, as settled now by the highest authority for us, the Supreme Court of the United States, these contracts made in the New York Cotton Exchange are valid and binding, when they are put in writing by slips of the character introduced in evidence here. The Supreme Court has held distinctly that they are sufficient memoranda in writing to bind the parties—to make a good contract between the parties to these slips. These contracts for the future delivery of cotton are sustained upon the ground

that under the law of New York, under the charter of the New York Cotton Exchange, and under the contracts, the delivery of the cotton—the actual cotton—can be required. Therefore these contracts are sustained as valid sales of a commodity, if the commodity is demanded by the purchaser. Now it is incumbent upon the plaintiffs in this case—that is, up to this point in the case, the plaintiffs have the burden upon them of showing you that a contract such as I have described was made by them in this form for Mr. James, the defendant.

“It is claimed by the defendant that what is called ‘ringing out’ extinguished these contracts that were made by Haven & Clement for Mr. James; that when the ringing out was made, and the matter carried through, that all these contracts which they had made for Mr. James were thereby extinguished. It is claimed on the part of the plaintiff that this is not true. They say that the contracts provided that they should remain in force until they were finally executed, notwithstanding this arrangement; that the contract to deliver on the part of any particular broker who sold to Haven & Clement, or their contract if they sold, existed and could have been enforced under the rules of the exchange, notwithstanding these contracts had, as they called it, been ‘rung out.’ This is a matter for you to determine from the evidence. I do not express any opinion, but leave it for you to say if the contracts had been extinguished by this ‘ringing out,’ if any existed, between Haven & Clement and the other brokers. Then, if the basis upon which the validity of the contracts rested was gone, of course, if the contract was ended which provided for the actual delivery of the cotton, and which could have been enforced, if that was gone and extinguished, the basis upon which the contract rested, of course, would go with it; that is, the right to demand the actual delivery of the cotton. So, in my judgment, if that was the effect of it, the plaintiff would not be entitled to recover, because the validity of the contract would be gone, for the reason stated. It is for you to determine. If you believe there still existed the right to demand the delivery of the cotton, then you will pass to some other points of defense in this case, which are set up by the defendant.

“It is next claimed by the defendant that the evidence shows that Mr. James and the plaintiffs’ representative, Mr. Tate, had an express understanding that this arrangement made by Mr. James with the plaintiff firm was a mere wagering arrangement, and that both parties so understood it. If what he says about that— He told you about that on the stand; that there was to be no delivery of cotton; that is, it was simply taking—I do not remember the exact expression he used—a ‘flier’ or something like that, but you will remember what he said, and that Mr. Tate so understood, that he told Mr. Tate about that. And you heard what Mr. Tate said. He denied it. If there was an agreement between Mr. Tate and Mr. James, and if Mr. Tate was to do the business as he described it, and if he had authority to make this sort of an agreement, of course these contracts would fail, and could not be enforced at all. If the arrangement Tate had with James was that it was to be a mere wagering contract, and no delivery contemplated at all, the contracts could not be sustained. That is for you to say. But my understanding of Mr. James was upon the line indicated by me heretofore—that Mr. James wanted Mr. Tate to understand that ‘this thing I am to do with you has nothing to do with my business at Blakely; it is entirely separate and distinct.’ Of course, he may have intended it differently; but that is the impression I got. If you understood it differently, and if you believe they had the understanding here claimed by the defendant and his counsel, it would render these contracts invalid.

“The defendant also claims, as I understand it, that when these contracts were closed out on December 3d, he was allowed to go beyond his margin. As I get the idea from the defendant, he states that he had an arrangement with Mr. Tate that he was never to allow him to go beyond his margin, and that when his margin which he had put up with them was exhausted, they were to notify him, and if he did not increase it they were to close him out, and that by allowing him to go beyond his margin he was injured. Of course, if they failed to comply with his instructions to the extent that he was injured by their holding it contrary to his instructions, they ought not to recover against him. You heard the claim about the \$5,000, about there being a mis-

apprehension about a check for \$5,000 being on the way, or something of that kind. That is another defense for you to pass upon, as you believe about the evidence. Of course, if Mr. James gave Mr. Tate instructions to close him out as soon as his margin was exhausted, unless they heard from him, they should have done it, and to the extent to which he was injured by that there ought not to be any recovery against him. Mr. Tate testified, as I understand, the contrary, and also explained another matter; that is, that sometimes the market fluctuates so rapidly that it was simply impossible to do that. That is a matter for you to consider.

"Now you take this case, gentlemen, and apply the evidence to it. There is a large amount of evidence, some documentary, these depositions, and some oral evidence. Give it all fair consideration, and, as you believe about this case, so find. I believe the four points to which I have called attention are the controlling points, and if you are satisfied, under the instructions that I have given, that the plaintiffs are entitled to recover, find a verdict in their favor for the amount that I believe there is no dispute about, \$10,125. This is contained in some of the papers there which will be given you."

I think the charge fairly presented the issues in the case to the jury. It was brief; but the case had been elaborately and thoroughly presented to the jury in evidence and argument, so that they understood fully the issues upon which the case turned. According to my understanding there has been no doubt of the validity of the contracts made for the purchase and sale of cotton on the New York Cotton Exchange under the charter, by-laws, rules, and regulations of the exchange, since the decision by the Supreme Court in *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. In that case, in the opinion by Mr. Justice Jackson, it is said:

"Upon the third assignment of error, which presents the question whether the transactions in which the parties were engaged were illegal, because they were wagering contracts, under the New York statute against wagers, bets, etc., the evidence in the case clearly fails to make out such a defense. In entering into their arrangement, it is shown by the correspondence and by other testimony in the case that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery was not in fact to be actually delivered. In their correspondence as to the terms on which the agency was to be undertaken the plaintiffs were distinctly informed that the defendants did a large business for the best and most reliable people of their locality; that they would hold themselves personally responsible for all orders sent, and hold their correspondents responsible for all orders executed as to margins; that they handled sometimes from 3,000 to 5,000 bales of cotton a day, and that their customers dealt in orders for from 500 to 1,000 bales at a time, and were entirely responsible. It was also testified by both the plaintiffs and defendant Bibb that there was no understanding or agreement, either express or implied, between them, at the time of entering upon the transactions or during their progress, that the cotton sold for account of the principals was not to be delivered at the time stipulated in the contracts of sale made for their account. It is not questioned that, if the transactions in which the parties are engaged are illegal, the agent cannot recover, either commissions for services rendered therein or for advances and disbursements by him for his principal (*Story on Agency*, §§ 330, 344, and authorities cited); the reason for this rule being that in such illegal transactions, of which the agent has knowledge, he is regarded as particeps criminis, which precludes him from the recovery of either commissions or advances. *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225.

"But the facts of this case do not bring the transactions in question within the operation of that principle; for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the

transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. In addition to this, it is shown that the rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases, which have no application to the present case. These rules, which were authorized to be made by the statute of the state of New York, under which the exchange was incorporated, enter into and form part of the contracts of sale in this case. The defendants, in one of their earliest communications to the plaintiffs, informed them that they would use in their telegraphic correspondence what was known as 'Shepperson's Code,' which provided that, 'unless otherwise stated as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed,' and, further, 'that with every telegram sent by this table the following sentence will be read as a part of the message, viz.: This sale has been made subject to all the by-laws and rules of our Cotton Exchange in reference to contracts for the future delivery of cotton.'

The contracts in question in this case were evidenced by a slip, such as are referred to in the opinion in *Bibb v. Allen*, and the cipher code known as "Shepperson's Code" was used in connection with the transactions, in that case as in this. Mr. Justice Jackson distinguishes *Bibb v. Allen* from *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, which is strongly relied upon by defendant in this case.

In *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183, in the opinion by Mr. Justice Peckham, this is said:

"In *Irwin v. Williar*, 110 U. S. 499, 507, 4 Sup. Ct. 160, 28 L. Ed. 225, the trial judge in substance charged the jury that the burden of showing that the parties were carrying on a wagering contract and were not engaged in legitimate trade or speculation rests upon the defendant. Contracts for the future delivery of merchandise or stock are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. The proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences; in other words, a mere wagering contract. This charge was approved by this court, and the principle was again approved in *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, *supra*."

In the present case, the court instructed the jury that:

If "there was an agreement made between Mr. Tate and Mr. James, and if Mr. Tate was to do the business as he described it, and if he had authority to make this sort of an agreement, of course, these contracts would fail, and could not be enforced at all. If the arrangement Tate had with James was that it was to be a mere wagering contract, and no delivery contemplated at all, the contract could not be sustained."

The instructions of the court seem to me to follow the rule thus laid down in *Clews v. Jamieson*, *supra*.

The last decision on this subject by the Supreme Court is *Board of Trade v. Christie Grain & Stock Company*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, Mr. Justice Holmes, in delivering the opinion of the court, says:

"It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of any grain, but that there is a settlement, either by the direct method, so called, or by what is known as 'ringing up.' The direct method consists simply in setting off contracts to buy wheat

of a certain amount at a certain time against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A. has sold to B. 5,000 bushels of May wheat, and B. has sold the same amount to C., and C. to D., and D. to A. Substituting D. for B. by novation, A.'s sale can be set against his purchase, on simply paying the difference in price. The Circuit Court of Appeals for the Eighth Circuit took the defendant's view of these facts and ordered the bill to be dismissed. 125 Fed. 161, 61 C. C. A. 11. The Circuit Court of Appeals for the Seventh Circuit declined to follow this decision and granted an injunction as prayed. 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59. Thereupon writs of certiorari were granted by this court and both cases are here.

"As has appeared, the plaintiff's Chamber of Commerce is, in the first place, a great market, where, through its 1,800 members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But Legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183."

And again in the opinion, as pertinent to this case:

"But, again, contracts made in the pit are contracts between the members. We must suppose that from the beginning, as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then, as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

"The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way, and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business con-

tract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

A still further extract, which appears to bear upon the question now under consideration, is as follows:

"In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession; the less being needed the more rapid the circulation is."

On the trial of the present case the question as to whether the "ringing out" extinguished these contracts was submitted to the jury, as is shown by the charge. I thought on the trial that this was the proper course, and still think so. The jury necessarily found the issue against the defendant. When the contracts for the sales of cotton were "rung out," as related in the evidence, and Haven & Clement were thereby left liable to James on the contract, I do not think the effect was, as contended, to render the contracts invalid and relieve James from the indebtedness. This is fully established by decisions of the Supreme Court and of the Circuit Court. The latest decisions on this subject are *Clews v. Jamieson*, supra, and *Board of Trade v. Christie Grain & Stock Company*, supra. See, also, on this question, *Clarke v. Foss*, 5 Fed. Cas. 955; *Williar v. Irwin*, 30 Fed. Cas. 38; *Ward v. Vosburgh* (C. C.) 31 Fed. 15; *Pardridge v. Cutler*, 68 Ill. App. 569-579; *Irwin v. Williar*, 110 U. S. 507, 4 Sup. Ct. 160, 28 L. Ed. 225; *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764; and *Hansen v. Boyd*, 161 U. S. 403, 16 Sup. Ct. 571, 40 L. Ed. 746.

The only reason drawn from the authorities why this would not be true, so far as I can discover, is that James should be ignorant of the rules of the New York Cotton Exchange on this subject. There was evidence tending to establish the fact that he was fully acquainted with the rules of the exchange, and of such character that the jury might well have considered it sufficient to establish the fact.

The other minor matters referred to in the charge are peculiar to this case, and I think were fairly submitted to the jury.

It is claimed that a recent decision by the Circuit Court of Appeals for this (the Fifth) Circuit, in *Williamson v. Majors* (decided May 19, 1909) 169 Fed. 754, is an important authority in favor of the defendant, and in favor of granting a new trial. I do not think so. The opinion is by Circuit Judge Pardee. In the opinion Judge Pardee, among other things, says:

"There was much evidence bearing on the question as to whether the Memphis establishment, managed by Bettis Majors, was or not a bucket shop, and on the allegation that each and every order of Williamson to buy or sell cotton futures was executed on the exchange and strictly according to rule, and as to the impeccability of the rules of the New Orleans Cotton Exchange in

the matter of actual delivery of all products sold therein and thereon—as to all of which, and under our view of the other issues, no finding need be given here.”

He then proceeds to quote from *Embrey v. Jemison*, 131 U. S. 343, 9 Sup. Ct. 776, 33 L. Ed. 172, and says:

“We find nothing in *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, or in *Board of Trade of the City of Chicago v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, cited by appellee, nor in any other Supreme Court decision brought to our attention, in conflict with or even modifying *Embrey v. Jemison*, *supra*, and that case must influence the decision of the main issues in this case; but in view of the pleadings, and considering that the transactions complained of were in Tennessee, that the present case is now pending in the Circuit Court of the United States in Mississippi, and relief is asked under the laws of the last-named state, it is proper, if not necessary, to further consider the questions involved under Tennessee and Mississippi laws.”

Judge Pardee then proceeds to discuss those laws. It is unnecessary to discuss the facts in that case, or the opinion of the court further. I do not think it means anything more than that the contracts between Williamson and Majors were mere wagering contracts on the facts appearing in the record, and it is not intended, of course, to differ with the decisions of the Supreme Court from which I have quoted.

As the jury were properly instructed as to the law of the case, and as the evidence is sufficient to support the verdict, I would not be justified in setting it aside. Consequently the motion for new trial must be denied.

For want of time I have not gone into the interesting questions raised in this case as fully as the exhaustive argument and briefs of counsel on both sides merit, but I have stated what I regard as the controlling reasons for deciding the motion as indicated.

THE H. A. BAXTER.

(District Court, D. Connecticut. July 22, 1909.)

No. 1,580.

1. ADMIRALTY (§ 101*)—LIBEL—SALE OF VESSELS—DISTRIBUTION OF PROCEEDS—PRIORITY—SEAMEN'S WAGES—FEES AND COSTS.

Where a vessel is seized and sold under a libel, seamen's wages and preferred fees and costs are entitled to be first paid out of the proceeds.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 697; Dec. Dig. § 101.*]

2. SHIPPING (§ 62*)—MASTER—AUTHORITY.

In admiralty law, the master of a vessel is the agent of the owner, with authority to bind the ship for repairs and supplies ordered in a foreign port, which he does by ordering such repairs, etc., without other agreement.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 257-269; Dec. Dig. § 62.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MARITIME LIENS (§ 69*)—SALE OF VESSEL—LIEN FOR REPAIRS—DECREE.

Where libellant had procured a decree pro confesso on default for necessary repairs to a vessel, ordered by the master while in a foreign port, for which the libellant had a lien, it was entitled to have the amount thereof allowed in full as a preferred claim out of the proceeds of the sale of the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 107; Dec. Dig. § 69.*]

In Admiralty. On exceptions to the report of the clerk, as special master to state, marshal, and report claims under the twenty-fourth admiralty rule.

Fred P. Latimer, for John W. Burton and others.

Currier & Barnard, for Charles A. Borkholm and others.

John C. Geary, for Davis & Co.

Waller & Waller, for New London Marine Iron Works Co.

Hyland & Zabriskie, for Burt & Mitchell Co.

Carpenter, Park & Symmers, for Gardiner B. Reynolds Co. and another.

Schutz & Edwards, for Eastern Coal Co.

Wray & Callaghan, for Elmer A. Keeler.

Alexander & Ash, for Alex Miller and another.

Delagnet Berrier, for Hudson Oil & Supply Co.

Gross, Hyde & Shipman and Eugene D. Flanigan, for trustee.

PLATT, District Judge. This is not a pleasant case, and is full of tangles and knots. It grew out of the insolvency of the Robinson, Baxter & Dissosway Towing & Transportation Company, which formerly owned the steam tug Baxter. Losing its active manager by death, and a large fleet of vessels by storm, it became financially involved and went to the New York state courts for protection; but the creditors petitioned it into bankruptcy in the Southern district of New York, and later the entire matter went to the Northern district of New York, where a trustee was appointed, who is now looking after the affairs of the estate. About the time when troubles were beginning to reach the surface of things, the Baxter happened to be in New London, in this district, undergoing repairs. Creditors of the embarrassed company came down upon the poor steam tug like wolves upon a sheepfold. (I have used a milder comparison than the one which almost slipped off my pen.) Libels were filed in this court *ad infinitum*, if not *ad nauseam*.

After much manoeuvring, which was unwarrantably extended by the actions of the New York creditors and the probable oversight of a New York judge, the tug was finally sold for \$5,500, although a far better price would have been obtained if there had been no interference. The clerk has now, under our rule, found, marshaled, and reported the claims against the fund in the registry, and that report is before the court under exceptions from certain creditors. It will unduly extend this opinion to rehearse the various exceptions in detail, but they have been carefully examined. No one criticises so much of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the report as deals with seamen's wages and preferred fees and costs, and to that extent it is accepted at the outset.

There is then left for distribution a balance of \$4,042.68. It is over the treatment of this balance that the contest rages. The clerk first charges the residue with the claim of the New London Marine Iron Works for repairs between December 23, 1907, and January 20, 1908, amounting, with costs, to \$1,216.98. He finds that this claim covers the last repairs upon the tug, that they were made upon the credit of the vessel, that but for them the tug would have brought next to nothing at the sale, and, in short, that they are of the highest order of merit and entitled to precede the others. If the report is accepted in this respect, the fund will be reduced to \$2,825.70, and the other claims which are entitled to rank as maritime liens must be prorated, so that it is essential to settle the status of the Marine Iron Works claim before going further.

Exceptions to the report on this claim have been filed right and left. The proctor for Hudson Oil & Supply Company thinks that the work was not done on the credit of the vessel, and, if it was, that the lien ought not to be carried beyond January 7, 1908 (the date when the marshal took possession). The proctor for Burt & Mitchell Company also objects to the right of lien in toto, and certainly to so much thereof as represents work done after an order to stop came from the trustee, or after the marshal took possession. The proctor for Borkholm, Central Coal Company, and North River Coal Company thinks that no right of lien existed. Proctor for the trustee of the bankrupt estate objects to everything in sight.

The clerk finds as a fact that the repairs were made upon the credit of the vessel, and that finding should not be disturbed, unless the proofs upon which he based his conclusion show plainly that he is wrong. The New London Marine Iron Works, libellant, had obtained upon default a decree pro confesso, and the petition upon which the decree was based contained an allegation that the repairs were furnished upon the order of the "master and agent of the owner of the tug." This language is not unusual in libels which are intended to claim a right of lien, and is, so far as I can understand, in no sense ambiguous. It refers to one person as doing the ordering, and calls him the "master and agent" of the "owner." In admiralty law the master is the agent of the owner, and, when he orders necessary repairs or supplies in a foreign port, the implication is that, if nothing more is said, he binds the ship. It is of the essence of seafaring business that this should be so.

With such an interlocutory decree on file, there was nothing left for the clerk to do except to compute the value of the service rendered, and to find the extent of the lien security, and assign it the position which it deserved. The other lienors had no right to dispute the libellant's right to hold the tug for services. If the law were not so, the question as to whom the services were rendered would be an open one, and the evidence shows that the master brought his tug to the libellants in a badly crippled condition and ordered the repairs. The owner was consulted later about the extent of the repairs, but such talk could not divest the libellants of their right of lien. The

repairs were essential to further navigation of the tug, and were charged on the books of the libelants directly to the tug.

When the master first approached the libelants, neither party may have known about the insolvency; but the bargain was about a disabled vessel in a foreign port in charge of the master, and the libelants could proceed upon the work with absolute safety, so far as what they did was necessary, and the only point in talking with the owner would be to settle the extent of that necessity. The work had not gone far before the libelants knew about the insolvency; but they kept along and put the tug in such shape that the marshal was able to get a reasonable sum for her at the sale. She would have been almost unsalable as a crippled and disabled hulk. The services were exceedingly meritorious, and it would be a perversion of justice if, upon technicalities, the libelants should lose the whole or a part of the reward which belongs to them.

It is not clear that the trustee ordered them to stop, and what they did while the marshal had possession brought a large return to the other creditors, some of whom have only themselves to berate for the delays in the sale, which resulted in a probable loss of over \$2,000 to the registry fund. For these reasons, the report upon the claim of the New London Marine Iron Works is accepted.

Then there remains in the fund \$2,825.70. In disposing of this balance the clerk has heard much testimony, and received additional evidence under commissions, and reports his conclusions upon a large number of claims which he finds ought to come in and be allowed to participate pro rata, since their aggregate amount is considerably larger than the balance to be distributed. He finds in this list that the claims of Hudson Oil & Supply Company and Burt & Mitchell Company have no right of lien back of May 2, 1907, the date of the beginning of the next claim. This cuts off \$711.46 from the former and \$266.46 from the latter. The date selected, the proctors for these libelants insist, is arbitrary and capricious, and not founded on reason. I am not sure that the reason for it is not as plain as that assigned for some of the settled rules in vogue in other districts, and it seems to coincide with the reasoning of the late Judge Townsend in *The John T. Williams* (D. C.) 107 Fed. 750. At any rate, it works out justice in this particular case, and must not be considered as a binding precedent. Some definite rule must be evolved and adopted before such a situation will exist.

The testimony adduced before the clerk regarding these claims has been examined with as much care as one's last efforts in hot weather permit, and I am bound to say that, except in so far as they may be governed by the defaults, it is not certain that either claim is entitled to be protected as a maritime lien. The situation, however, presents this apparently unsurmountable obstacle. If the report of the clerk in regard to them shall not be accepted, there will be no gain to the bankrupt estate, because the claims which have undisputed rights of priority are enough to practically absorb the fragment of the fund which has not hereinbefore been lawfully distributed. The prorated lienors have not disturbed themselves about these claims, but have left that burden upon the shoulders of the proctor for the trustee,

who, as it turns out, can hope to gain little, if anything, even should he succeed.

It is a curious circumstance that the proctors who fidget so much about the loss of a portion of their claims are, with the same breath, criticising without mercy the claim of the Marine Iron Works, because, as they insist, and again insist, those repairs were not done upon the credit of the vessel, but were the result of a bargain with the owner. Their own claims are weighted down by the same infirmity. They can see the mote in the Marine Company's eye, but ignore the beams in their own eyes. I am convinced that it will be an act of wisdom on the part of these belligerent proctors to accept with grace the more than half a loaf offered them by the clerk as master, even if his conclusions have been reached somewhat irregularly. If they continue their warfare, they may discover, when they open their hands at the end of it, that, while clutching at what they think is substance, they have in reality been grasping a shadow. After serious consideration, it seems to me that the facts leave the final conclusion in sufficient doubt, so that it is my duty to accept the report of the clerk on these claims.

Those who filed libels find fault with the clerk because he let in claimants against the proceeds who waited until after the sale. The clerk has acted in accordance with the rules of this district, and I can see no reason why the rule should be changed. It is not thought that a creditor waives his right of lien by not hurrying to pile up his libel on top of others which are amply sufficient to hold the ship and effectuate a sale. Such a rule might please proctors; but I cannot see how it could benefit any law-abiding, peace-loving citizen. If there shall arise in the district many such situations as the one in hand, a rule compelling litigants to pause before creating unnecessary expense would be more appropriate than the one suggested.

Exception is taken about the taxing of costs in advance of action by the court; but it strikes me that the fault-finding creditors have been treated with exceptional generosity in the report.

Let the final decree be prepared in accordance with the report.

THE DOMINGO DE LARRINAGA.

THE EDWARD LUCKENBACH.

(District Court, E. D. New York. July 26, 1909.)

1. TOWAGE (§ 11*)—TUG AND TOW—COLLISION WITH TOW—USE OF LONG HAWSERS IN NEW YORK HARBOR.

The use of long tow lines in New York Harbor, while not to be commended, does not render the tug liable for damages caused to her tow by collision with another vessel through the fault of the latter, to which the length of the tow did not contribute.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 18; Dec. Dig. § 11.*]

2. COLLISION (§ 95*)—STEAMER AND VESSEL IN TOW—NEGLIGENT NAVIGATION.

A collision in New York Harbor between a steamer going out to sea and a schooner in tow coming through Gedney's Channel into the Main

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ship Channel held to have been due solely to the fault of the steamer in failing to exercise care to avoid crossing the tow, although the schooner's lights could be seen, showing that she was in tow.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision.

MacFarland, Taylor & Costello, for libelant.

Butler, Notman & Mynderse, for the Domingo De Larrinaga.

Peter S. Carter, for the Luckenbach.

CHATFIELD, District Judge. The libelant is the owner of the schooner Arthur C. Wade, which upon the 20th of March, 1906, was brought into collision with the steamer Domingo De Larrinaga in what is known as Gedney's Channel, in New York Harbor, at about 8:12 in the evening. The testimony shows that the Wade, with a cargo of lumber, through some leak which prevented her from proceeding under sail (but which was kept down by the pump and did not interfere with her progress in tow), had been brought from Norfolk, Va., by the steam tug Edward Luckenbach. At the time in question this tow was proceeding westward in Gedney's Channel, the Luckenbach having a barge on a hawser 150 to 200 fathoms in length, and back of the barge the schooner Wade, with a hawser 150 fathoms long between the barge and the schooner. The trip had been made thus from Norfolk, the weather being clear and the sea calm, and the captain of the Luckenbach testified that he did not shorten the hawsers before going through the channels of New York Harbor, because of some ground swell which might cause trouble if the schooner and the barge were hauled up close to each other and the tug.

The testimony of the witnesses seems to place the position of this tow somewhat north of the center of the channel, or nearer the red or northern line of buoys marking Gedney's Channel, and the three boats in the tow were proceeding in a comparatively straight line, parallel to the buoys of the channel, prior to the accident. The tug and the barges had proper lights and seem to have been properly steered, the barge attempting to follow in the wake of the tug and the schooner in the path of the barge; and the only testimony in relation to their movements, especially that of the helmsman upon the Wade, which seems entirely worthy of credibility, is to the effect that the path of the tow, up to the time of the accident, had not substantially changed from a straight line. The testimony fixes the location of the Wade at the time of the collision at a point nearly through Gedney's Channel, toward the west. The men upon the tug observed, while they were still in Gedney's Channel, the steamer Domingo De Larrinaga coming down the Main Ship Channel, some mile or more away, on her way to sea, and proceeding at what the testimony shows was a speed of some nine or ten knots per hour. The Larrinaga observed a tug, and is said by her witnesses and by the pilot who was on board to have made out from the light carried that a tow was following, but did not observe, until just as the Larrinaga was entering Gedney's Channel, the lights of the schooner Wade. Prior to that time it would appear that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the officers and pilot of the Larrinaga had assumed that the tow consisted of the Luckenbach and the barge, or, if they had any idea that any other vessels were in the tow, they did not locate them by their lights.

Gedney's Channel is extremely narrow, and the turn from the Main Ship Channel into Gedney's Channel requires a vessel passing out to operate under a strong port helm, especially if any other vessels be in the channel. The Larrinaga, thus passing out and meeting the tow, cannot be considered as crossing and having the tow upon her starboardhand, as is suggested by libellant, so as to bring her under rule 19 (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), but she was bound by the provisions of rule 25 that in narrow channels each vessel must keep to starboard, but as near to the center of the channel as possible. Under these circumstances the Larrinaga was bound to proceed in such a way as not to intersect with her course the waters of the channel where the tow had a right to be, yet it would seem that she was unable to stop directly at the turn because of the conditions of wind and tide. The witnesses agree that the tide was running ebb at the rate of about a mile and a half per hour, that the wind was blowing from the W. N. W., or almost directly down Gedney's Channel; and, as the Larrinaga was making a turn from the Main Ship Channel into Gedney's Channel, the wind and tide would both have a tendency to set her upon the mud bank at the western corner of the channel. The testimony shows that there was no moon, some of the witnesses thinking that it was starlight and some that it was cloudy; but all agree that there was no fog or storm, and that the lights of all the vessels could be seen at the distances with which we have to do in this case.

Some testimony was introduced to indicate that the Larrinaga made an abrupt turn to port, and it is argued from this that the helmsman of the Larrinaga put his helm to starboard, rather than to port, under a mistake of orders. But the testimony of every one upon the steamer contradicts this, and no such movement of the vessel could have taken place without notice by some one, and such a cause is not necessary to explain what happened. The Larrinaga gave a signal of one whistle to the Luckenbach. She gave no signals at all to the Wade, nor did she pay any attention to the fact that the Wade was a sailing vessel, and that a steamer, therefore, could not cross her bow with impunity. The testimony shows that the Larrinaga did cross the bow of the Wade. An examination of the chart and a consideration of all the testimony would indicate that the Larrinaga must have described a considerable arc in making the turn into Gedney's Channel at the speed under which she was proceeding, and from a point so close to the corner as she had to go when passing the Luckenbach and the Independent. Further, the Larrinaga had shown her red light to all of the vessels until just before the collision, when her green light became evident to those upon the Wade, and yet the testimony agrees that she passed across the Wade's bow, coming in collision and doing damage, and then proceeded around the Wade, passing her to starboard, and then going to sea.

The testimony shows that the Wade at some time came to anchor almost in the line of the black or southerly line of buoys of Gedney's

Channel, and between buoy 6 and 8. As soon as possible she displayed a flare light as a signal of distress. Those upon the Larrinaga did not see or give any heed to this signal; but at the speed at which they were going it may be assumed that this shows nothing beyond the fact that they had already reached a point far from the scene of the collision, and did not pay further attention to the Wade. The Wade was some hours later taken up to Sandy Hook by the Luckenbach, which had learned of the loss of its tow, and which had come to anchor after arriving at a safe place of anchorage. The damage to the Wade was repaired, and for this the libel was filed. The Larrinaga also suffered some injuries, but no claim has ever been made, and she has defended, not only by alleging that she was without fault herself and that the Wade was at fault in the way in which she was steered, but also the Larrinaga has brought the Luckenbach into the case as a party defendant, and claims that the Luckenbach was at fault in proceeding at too great speed, with too long hawsers, and in following an improper course in making the turn into the channel in such a way that the wind and ebb tide necessarily drifted her tow down into the waters which the Larrinaga had a right to be navigating under these circumstances.

None of these objections seem to be borne out by the testimony, with the exception of the question of the length of the hawsers. While there is some difference as to the exact position occupied by the Luckenbach at the time of the accident, and the weight of the testimony would seem to indicate that she had, at least partially, made the turn into the Ship Channel, and that therefore the tow must have begun to settle across the channel, under the influence of the wind and tide, nevertheless no negligence has been shown in this respect; nor did the positions of the vessels relieve the Larrinaga from the care which should have been exercised in making the turn at the speed at which she was proceeding.

As to the length of hawsers, a comparatively difficult question presents itself. A vessel using hawsers of such a length in towing through the narrow channels of New York Harbor is bound to use the greatest caution, and must be held responsible for any accident that is caused directly from the unnecessary length of the tow, and must follow such course as not to impede navigation more than would be the case if shorter towing lines were in use, unless extraordinary conditions of storm or danger compel the maintenance of the long tow lines, and in such time of storm or danger the care of the tug must be measured by the conditions which exist. In the present instance no particular danger was present. The Luckenbach merely considered it safer to keep the barges far apart than close together, but must therefore be held for any accident which was occasioned merely by the length of the tow, or by the inability of the boats to follow in the proper course.

On the evidence as a whole, however, it does not seem that in the present case either the length of the tow or the course followed by the tug affected the situation. The Larrinaga was able to observe the tow at all times, to make out the signals of the Wade indicating that she was in tow, and to avoid the difficulty which evidently presented

itself in making the turn into Gedney's Channel. She used no care in so doing, and whether she mistook the position of the Wade, or assumed that she was not in tow, or whether she was unable to prevent intersecting the path of the tow by the course which, under her own momentum and velocity, she was compelled to take, makes no difference. The evidence indicates that the accident could have been avoided by the Larrinaga with due care and a proper appreciation of the situation; and under such circumstances, while the use of such long tow-lines cannot be commended or countenanced, nevertheless their presence, unless contributing to the accident, should not be made the basis of merely punitive damage.

The libellant may have a decree against the Larrinaga alone.

UNITED STATES, to Use of GRISCOM-SPENCER CO., v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court, E. D. Pennsylvania. August 16, 1909.)

No. 528.

UNITED STATES (§ 67*)—CONTRACTORS' BONDS—EXTENT OF LIABILITY.

A surety on the bond of a contractor with the United States for a public work, conditioned for the payment by such contractor of all claims for labor and materials, as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), is not released from liability to a subcontractor by the taking by the latter of a note from the contractor for his claim due in three months, but which did not mature until final settlement had been made between the contractor and the United States and a few days after receivers in insolvency had been appointed for the contractor.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

At Law. Sur rule for judgment for want of sufficient affidavit of defense.

See, also, 171 Fed. 247.

Samuel Crowther, Jr., and George Quintard Horwitz, for plaintiff.
R. Stuart Smith and Morgan, Lewis & Bockius, for defendant.

HOLLAND, District Judge. This suit for \$2,120, with interest, is instituted in the name of the United States, to the use of a subcontractor, under the Act of Congress approved August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]), to recover for material furnished in the construction of four mine planters for the United States army. It is alleged in the statement of claim that the Neafie & Levy Ship & Engine Building Company, of Philadelphia, undertook the building of four vessels for the United States army, by a contract dated June 24, 1903, for the sum of \$122,000 each. The shipbuilding company, in compliance with the requirements of the above-mentioned act of Congress, filed a bond in the sum of \$100,000, with the United States Fidelity & Guaranty Company, the defendant,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

as surety, for the completion of the contract, and, inter alia, to "promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract." The vessels were completed, delivered, accepted, and final payment made on November 3, 1904. The use plaintiff, at the request of the contractor, furnished certain feed water heaters on March 4, 1904, which were used in completing the work. These claims were not paid, and on December 9, 1904, the contractor passed into the hands of a receiver appointed by the common pleas court of Philadelphia county. Thereafter the use plaintiff filed an affidavit with the War Department and received a certified copy of the contract and bond, under date of May 29, 1908, and in accordance with the above-mentioned act of Congress brought suit against the surety on the bond.

To this statement of claim the defenses made in the affidavit filed are: (1) That a vessel is not a public building or public work, within the meaning of the acts of 1894 and 1905, and that the cause of action did not accrue until the use plaintiff had obtained a "certified copy of the contract and bond," which was on the 29th day of May, 1908, and at that time the statute of limitation in Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), amending the act of 1894, was applicable to this case, and under the provisions of this latter act the right of the use plaintiff to recover is barred by the limitation of one year therein contained. It will not be necessary to consider these questions, because they have been considered by Judge Lanning in the case of *United States of America, to the Use of Williamson Brothers, v. United States Fidelity & Guaranty Company* (April Sessions, 1909, No. 596) 171 Fed. 247, wherein he disposed of them against the contention of the defendant.

The second defense set up is that on September 15, 1904, the use plaintiff accepted the promissory note of the contractor, payable December 15, 1904, for \$2,151.80, which included the contract price of the heaters, plus \$41.80 interest on the note to date of maturity. The note was immediately discounted by the use plaintiff at a Philadelphia bank, and it is claimed that by accepting and discounting a note for the full contract price of the heaters the use plaintiff extended the time of payment for the material furnished beyond the termination of the contract, and deprived the surety of the opportunity of compelling the appropriation of the sums received from the government to the payment of the claims, and therefore released the surety.

On September 15, 1904, when the use plaintiff accepted the promissory note of the contractor, the government had not then made final payment to the latter for the completion of the work. On that date the use plaintiff accepted these promissory notes, payable in three months, and they fell due on December 15, 1904, which was more than a month after November 3d of the same year, the date of final payment by the government. The defendant claims that the effect of the acceptance of this note by the use plaintiff in law extended the time of payment beyond the termination of the contract, and thereby released the surety. The plaintiff, however, insists that the mere acceptance of the note was not payment of the contract price, nor did it extend the time of payment in law. This contention is no doubt sustained by

the Pennsylvania authorities upon which the plaintiff relies. Unless there is a special agreement that notes accepted by a creditor from his debtor shall be received as payment, the debtor remains liable for his original debt (*Collins v. Busch*, 191 Pa. 549, 43 Atl. 378); and, further, unless it is especially agreed that the acceptance of notes by the creditor shall extend the time of payment, suit may be instituted by the creditor against the debtor on the original debt before the notes fall due (*Shaw & Leigh v. First Associated Presbyterian Church*, 39 Pa. 226; *Buck v. Wilson*, 113 Pa. 423, 6 Atl. 97; *United States, to the Use, etc., v. Hegeman*, 204 Pa. 438, 54 Atl. 344; *Philadelphia v. Howell*, 19 Pa. Super. Ct. 76; *Hummelstown Brownstone Co. v. Knerr*, 25 Pa. Super. Ct. 465). It would seem, however, that the United States courts hold that by the general commercial law a promissory note accepted by the creditor for his claim, while it does not discharge the debt for which it is given, in the absence of a special agreement to that effect, still operates to extend until the maturity of the note the time for the payment of the debt. The creditor may return the note when dishonored and proceed upon the original debt; but in the meantime the action upon the original debt is suspended. *Harris v. Johnston*, 3 Cranch, 311, 2 L. Ed. 450; *The Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Looney v. District of Columbia*, 113 U. S. 261, 5 Sup. Ct. 463, 28 L. Ed. 974; *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125; *Guarantee Co. v. Press Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242.

It is held by the defendant that in passing upon questions of general commercial law the federal courts are not bound by the decisions of the court of the state where the contract in question was made and is sought to be enforced. While this may be true, we do not think that it is important in the determination of the defendant's second matter of defense, for the reason that the Supreme Court of the United States considered the same defense in the case of *Guarantee Co. v. Press Brick Company*, *supra*, and, we think, decided it against the defendant's contention. In that case there was a suit instituted by the subcontractor against the surety under the same act of Congress. Notes had been taken by the use plaintiff for material furnished, one of which was not payable until after final settlement by the government, although there was no insolvency of the contractor intervening between final settlement and date of payment of the note, as there is in this case; but the Supreme Court in that case uses this language:

"In this covenant the surety guarantees nothing to the principal obligee, the government, though the latter permits an action upon the bond for the benefit of the subcontractors. The covenant is made solely for their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of 60 days, or whether, after the materials are furnished, the time for payment is extended 60 days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain."

It was further held that the requirement that the obligor should "promptly" make payment to his materialmen "is satisfied by such payment as the subcontractor shall accept as having been promptly made." Were it not for the fact that the contractor became insolvent a short while before the maturity of the note accepted by the use plaintiff in the case at bar, *Guarantee Co. v. Press Brick Co.* would be decisive of this case. In the latter case the contingency of insolvency had not supervened, and the court said:

"That the facts * * * did not call for an expression of opinion as to whether, if an unusual credit were given, and in the meantime the principal obligor had become insolvent, or the surety were otherwise damaged by the delay, it might not be exonerated."

There is no averment in this case to lead to the conclusion that an unusual credit was extended, resulting in injury to the defendant. The transaction was conducted in the usual way, and only a usual credit extended. It is not alleged that there was anything unusual either in the purchase of the material or extension of credit, and the liability resulting was a liability for which the defendant contracted when it signed the bond. The fact that the contractor became insolvent before the note given by him to the use plaintiff became due is no defense, because it cannot be said as a matter of law that three months was an unusual credit to extend to the contractor by the use plaintiff for the materials furnished. It is no unusual thing for subcontractors and contractors to take one, two, three, and even four months notes for materials furnished in all lines of construction, and, so long as it is not averred the usual course was violated in the extension of credit, it is no defense that the usual credit given in this case happened to extend the time to a point six days beyond the date when the receivers were appointed for the contractor, which was December 9, 1904. The date of final settlement was not definitely fixed in the contract, and the use plaintiff could not know when it would take place. While it is true he had furnished the material for which the notes were taken on March 4, 1904, and accepted three months notes on September 15, 1904, there was no unusual extension of time; and, as stated by the court in *Guarantee Co. v. Press Brick Co.*, *supra*, it could make no difference to the surety that "after the materials are furnished the time for payment is extended 60 days [in this case 90 days] and a note given for the amount maturing at that time."

We are of opinion, therefore, that the affidavit of defense is insufficient, and that judgment should be entered for debt, interest, and costs. It is so ordered.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court, D. Minnesota. Second Division. August 14, 1909.)

1. COURTS (§ 367*) — FEDERAL COURTS — AUTHORITY OF STATE STATUTES — *LISPENDENS*.

Rev. Laws Minn. 1905, § 4389, providing that the pendency of an action relating to real estate is notice to purchasers or incumbrancers only from the time of the filing of notice thereof in the office of the register of deeds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the county in which the land is situated, is a rule of property of the state relating to real estate, and applies to a suit in equity pending in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. PUBLIC LANDS (§ 120*)—PATENTS—BONA FIDE PURCHASER.

In a suit in equity by the United States to cancel a patent to lands, the rule as to what constitutes a bona fide purchaser is no different from what it would be if the complainant were an individual.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*

Bona Fide Purchasers, see note to *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 13.]

In Equity.

C. C. Haupt, U. S. D. Atty., and Paul A. Ewart, Asst. U. S. Atty.
W. H. Norris, for defendant railroad companies.

Durment & Moore, for other defendants.

WILLARD, District Judge. This is a bill in equity filed by the United States under authority of Act Cong. March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595), providing for the adjustment of land grant made by Congress to aid in the construction of railroads, and for a forfeiture of unearned lands, etc.

The grant in question in this case is contained in the act of Congress passed on the 4th day of July, 1866 (chapter 168, 14 Stat. 87); it being the same grant which was before the Supreme Court in the case of the *United States v. Chicago, Milwaukee & St. Paul Railway Company*, 195 U. S. 524, 25 Sup. Ct. 113, 49 L. Ed. 306. At the trial the government conceded that as to all the lands described in the bill of complaint, except 160 acres, the suit was barred by the limitation of five years contained in Act Cong. March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603). The defendant Evans claims to be the owner of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 21, township 104, range 26, being a part of the 160 acres as to which the government did not admit that the suit was barred by the statute of limitations; and, as to this tract, he claims to be a bona fide purchaser within the provisions of the acts of Congress above cited, 24 Stat. 556, and 29 Stat. 42. The Supreme Court in the case of the *U. S. v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, and in the case of the *U. S. v. C. M. & St. P. Ry. Co.*, 195 U. S., 524, 25 Sup. Ct. 113, 49 L. Ed. 306, has defined the meaning of the phrase "bona fide purchaser" as it occurs in these acts. The brief of the government contains a statement of the facts relating to the Evans purchase from the railway company as such facts appear from the evidence, and from that statement it clearly appears that Evans is within the decisions above cited a bona fide purchaser of the tract claimed by him, and the bill therefore as to him cannot be maintained.

Another tract included in the said 160 acres, as to which the government did not admit the bar of the statute of limitations, is the N. E. $\frac{1}{4}$

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the S. E. $\frac{1}{4}$ of section 31, township 104, range 25. On the 1st day of May, 1886, the railway company conveyed this tract by warranty deed to Jacob Klenk, and on the 12th day of July, 1904, Jacob Klenk conveyed the same property to the defendant Frederick Klenk, who on the 10th day of January, 1905, mortgaged it to the defendant the Northwestern Mutual Life Insurance Company. The facts resulting from the evidence, as the same are stated in the brief of the government, show that also with regard to this tract Jacob Klenk was a bona fide purchaser thereof within the decisions above referred to. The bill therefore cannot be maintained either against Frederick Klenk or against the Northwestern Mutual Life Insurance Company.

Of the 160 acres above referred to there remains the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 31, township 104, range 25. One Gillson made a homestead entry of this land on the 16th of January, 1872. He was in possession thereof, claiming adversely to the railway company until 1880, and he exercised control over the same until 1886 or 1887. During this time the defendant Jacob Klenk rented this land from Gillson, and occupied the same as his tenant for three years. Before Klenk bought the land from the railway company, he told Gillson that he was going to make such a purchase, and Gillson then stated to him that he, Gillson, claimed to own the land. Upon this evidence there can be no doubt that the defendant Klenk was not a purchaser in good faith, and without notice of defects in the title of the railroad company. This action was commenced in February, 1901. Jacob Klenk was at that time made a defendant herein, but his son Jacob C. Klenk was not made a party to the suit until the 7th day of March, 1905. Prior to that time, and in July, 1904, the defendant Jacob C. Klenk bought the land from his father Jacob Klenk, who by warranty deed conveyed the same to him in that month. This deed was duly recorded in the proper office on the 13th of July, 1904. The evidence shows that Jacob C. Klenk had no notice or knowledge of any defects in his father's title, and, under such evidence, was a bona fide purchaser within the decisions above referred to, unless the pendency of this suit at the time he bought in 1904 charged him with notice of such defects. The claim of the government is that he acquired his right over three years subsequent to the date of the filing of the original bill of complaint, that he was a purchaser pendente lite, and took his title subject to the result of the pending suit. The claim of the defendant Jacob C. Klenk upon this point is that by the laws of Minnesota then in force (section 4389, Rev. Laws Minn. 1905) the pendency of an action was notice to purchasers or incumbrancers only from the time of the filing of the notice thereof in the office of the register of deeds of the county where the land was situated. In the case of *Romeu v. Todd*, 206 U. S. 358, page 362, 27 Sup. Ct. 724, page 725, 51 L. Ed. 1093, there was presented a similar question to the one presented in this case. By the Spanish law in force in Porto Rico the pendency of an action was notice to subsequent purchasers only from the time of the filing of the notice of such pendency in the proper register's office. The United States court for Porto Rico held:

"As this is a proceeding on the equity side of the court, it is governed by the principles of equity followed by the federal courts as distinguished from

suits at law where local statutes are adopted. As local laws have no binding force upon the United States courts in matters of procedure in equity and maritime law, the laws of Porto Rico relating to the filing of notice of lis pendens have therefore no application in this case, and the sufficiency of this bill must be determined by the rules and principles followed in like proceedings in the courts of the United States."

That court held that the pendency of an equity cause in the courts of the United States affecting real property constituted constructive notice as to third parties, any rule of a state law notwithstanding. That case was taken to the Supreme Court of the United States, but the question decided in the lower court was not passed upon by the appellate court. That court held that the laws in force in Porto Rico had been by the Foraker Act (Act April 12, 1900, c. 191, 31 Stat. 77) adopted as the laws of the United States, and that, therefore, a court of the United States sitting in that island, created by an act of Congress, had no authority to disregard a local law which Congress by express legislation directed to be continued in force. In reaching that conclusion the court assumed, for the sake of the argument:

"That an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a Circuit Court of the United States sitting within a state, * * * although there had been no compliance with a statutory rule of property prevailing in such state requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties."

Whether or not that assumption is correct is the question to be decided in this case. It does not fall within the provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), which declares that:

"The practice, pleadings, and forms and modes of proceedings in civil cases other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The case falls rather within the rule, speaking generally, which requires a Circuit Court sitting within a state to enforce the laws of that state, so far as they relate to real property. Thus in the case of *Hinde v. Vattier*, 5 Pet. 398, p. 401, 8 L. Ed. 168, the court said:

"There is no principle better established, and more uniformly adhered to in this court, than that the Circuit Courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state court ought to do. *Wilkinson v. Leland*, 2 Pet. 656, 7 L. Ed. 542. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the Constitution, treaties, or statutes of the United States do not otherwise provide."

In *Olcott v. Bynum*, 17 Wall. 44, the court said on page 57 (21 L. Ed. 570):

"It was held by the court below that this evidence was incompetent to establish the existence of the lost deed, and that the complainant had therefore failed to show any connection with the property in question. Upon the ground of this objection the bill was dismissed. Whether this ruling was correct is an inquiry which meets us at the threshold of our examination of

the case. It is one to be determined by the *lex loci rei sitæ*. It is to be considered solely in the light of the statutes and adjudications of North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a local court of that state."

It is the duty of the federal court to apply the rules of the local courts, whether the proceeding before it is an action at law or a bill in equity. In the case of *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858, the court said on page 633, speaking of a statute of Illinois which gave a mortgagor a right to redeem from foreclosure sale:

"It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the declaration of independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the circuit court for their own guidance." * * * "On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceedings are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract." * * * "We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights."

It is true that the Minnesota statute above referred to does in a certain manner undertake to determine what effect shall be given to a suit in equity pending in the courts of the United States. But that effect is purely incidental. The act is not limited to proceedings in the United States court, but is general and extends to all actions. Moreover, it would not seem to interfere with the equity practice or procedure any more than did the Illinois statute allowing a redemption from a foreclosure sale, which, as has been said, the Supreme Court held directly applicable to a foreclosure decree rendered in a circuit court of the United States. In fact, the Minnesota statute is not a law relating to procedure, but is rather a law governing the substantive rights of persons dealing with real estate. It is a law to which resort must be had when it is necessary for the courts to determine who is and who is not a bona fide purchaser of real estate. It will be noticed that the Supreme Court in the case of *Romeu v. Todd*, above cited, used this language, "Although there had been no compliance with the statutory rule of property prevailing in such state," thus indicating that a law similar to the Minnesota law would not be considered as procedure law, but rather as a statutory rule of property.

The government in its brief relies upon the case of *King v. Davis*, 137 Fed. 222, decided in the Circuit Court for the Western District of Virginia, in which it was held that a Virginia statute similar to the Minnesota statute here in question could not have any effect upon a suit in equity in the United States Circuit Court. But that case seems

to have been decided upon the proposition that, under the Virginia law, clerks in the state court could not be compelled to file notice of lis pendens relating to cases pending in the federal court. There is no difficulty of that kind in connection with the Minnesota law. The section above quoted requires the registers of deeds to record all notices which may be presented to them; and by section 537, Rev. Laws Minn. 1905, a register of deeds is required to keep suitable books, and required at large and in full, word for word, to enter all instruments left with him for record. The fact that the complainant in this case is the United States cannot affect the result. In the case of *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 67 C. C. A. 1, decided in the Circuit Court of Appeals, Eighth Circuit, on July 28, 1904, the court said on page 677 of 131 Fed., on page 10, of 67 C. C. A.:

"Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor, with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity."

In the case of *United States v. Stinson*, 197 U. S. 200, the court said on page 204, 25 Sup. Ct. 426, 49 L. Ed. 724:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct offense as against it, yet certain propositions in respect to such an action have been fully established. * * *

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumption of law and fact that attend the prosecution of a like action by an individual. * * *

"Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser for value without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties."

In this case the defendant Jacob C. Klenk bought the property in question, and paid \$4,000 therefor. He had no actual notice of the pendency of this suit, nor had he any notice or knowledge of any adverse claim to the land, or of any defect in his father's title thereto. No notice of lis pendens as required by the Minnesota law was filed until the 18th of February, 1905, after the purchase by Jacob C. Klenk; nor was he made a party to this suit until the 7th day of March, 1905. At that time the suit was barred as to him by the period of limitations contained in the act of 1896, and, although he bought during the pendency of the action, he is not bound by the result therein as to his grantor Jacob Klenk, because no notice of the pendency of the action was recorded in the proper register's office, as required by the Minnesota law, prior to his purchase.

The government conceded at the trial that the value of the land could not be recovered from the railroad company.

Let a decree be entered dismissing the bill as to all the defendants therein.

UNITED STATES v. ALBERT LORSCH & CO.

(Circuit Court, S. D. New York. May 12, 1909.)

No. 5,392.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—CUT AGATE—"PRECIOUS STONES ADVANCED"—"MANUFACTURES OF AGATE, GARNET, ETC."

Small pieces of agate, garnet, etc., advanced from their natural state by cutting or other process, for the purpose of fitting them for use as settings for jewelry, and known commercially as agates, garnets, etc., are more specifically provided for as "precious stones advanced," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), than as "manufactures of agate, garnet, etc.," under Schedule B, par. 115, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,825 (T. D. 29,-337), sustained the importers' protest against the assessment of duty by the collector of customs at the port of New York. The Board's opinion reads:

SHARRETTS, General Appraiser. The merchandise in controversy consists of precious stones, such as agate, cornelian, jasper, onyx, rock crystal, etc., advanced in value and condition by cutting, polishing, or engraving, not set, but intended to be set as jewelry. No articles of utility, such as handles, bearings, slabs, rollers, etc., are included in the importation. Duty was assessed by the collector upon said merchandise at the rate of 50 per cent. ad valorem under paragraph 115, Schedule B; the importers claiming the same to be dutiable at 10 per cent. ad valorem under paragraph 435, Schedule N, of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, 30 Stat. 192 [U. S. Comp. St. 1901, pp. 1636, 1676]).

The provision of paragraph 115 for manufactures of agate, alabaster, chalcidony, chrysolite, coral, cornelian, garnet, jasper, jet, malachite, marble, onyx, rock crystal, or spar, not specially provided for, is no more specific than the provision of paragraph 193, Schedule C, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), for articles or wares not specially provided for, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal. No one would seriously contend that, because Congress provided denominatively for articles composed wholly of gold in paragraph 193, gold mountings for diamonds or other precious stones were removed from paragraph 434, Schedule N, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), leaving the provision therein for parts of jewelry to apply only to such as were made of brass or other metal not named in paragraph 193. Precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set, or, in other words, precious stones advanced from their natural state to a condition exclusively fitting them to be set as jewelry, comprise even a more limited class of goods than jewelry or parts thereof. Both terms have a commercial and popular meaning that differentiates them from manufactures of agate, garnet, etc., on the one hand, and articles or wares composed of iron, steel, gold, etc., on the other.

It is instructive to note that paragraph 434 provides for jewelry, including precious stones set. Hence the words "precious stones not set," contained in paragraph 435, construed in *pari materia*, would seem to point conclusively to precious stones especially prepared to be set as jewelry; and in this connection it may be remarked that both paragraphs are grouped under the subheading of "Jewelry and Precious Stones." It is an elementary principle of tariff construction that, when Congress has provided for an article depend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ent upon its use, such a provision dominates all others. For instance, white-wood, sycamore, and basswood planks prepared for use in the construction of vessels would be free under paragraph 699, § 2, Free List, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689), and not dutiable under Schedule D, par. 195, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1646), notwithstanding the fact that whitewood, sycamore, and basswood planks are provided for *eo nomine* in the last-named paragraph. Many other illustrations could be cited, but they are deemed unnecessary.

Both paragraphs 115 and 193 are catch-all provisions designed to cover manufactures not provided for either denominatively or descriptively in some other paragraph of the act. Parts of jewelry composed of gold are more specifically provided for in paragraph 434 than in paragraph 193; and by a parity of reasoning agates and other precious stones prepared by the lapidary to be set as jewelry are more specifically provided for in paragraph 435 than in paragraph 115. Indeed, we do not think the agate and other stones in question would be included in the provision of paragraph 115 for manufactures of agate, etc., even were they not provided for descriptively in paragraph 435. The evidence shows conclusively that these stones have undergone no process other than to be cut and polished, and that they are still known commercially as precious stones—specifically as agates, garnets, etc. They have not undergone a process of manufacture whereby their name and intended purpose of use has been changed into articles known as knife handles, penholders, scale bearings, etc. Precious stones cut are provided for in paragraph 434, and until they have been cut for some other purpose than to be set as jewelry they do not become manufactures of the minerals enumerated in paragraph 115. In *Hartrauft v. Wiegmann*, 121 U. S. 615, 7 Sup. Ct. 1240, 30 L. Ed. 1012, the United States Supreme Court said in part: "In Schedule M, § 2504, of the Revised Statutes (page 475, 2d Ed.), a duty of 30 per cent. *ad valorem* is imposed on 'coral, cut or manufactured'; and in section 2505 (page 484) 'coral marine manufactured' is made exempt from duty. These provisions clearly imply that, but for the special provision imposing a duty on cut coral, it would not be regarded as a manufactured article."

In the case at bar the agates and other precious stones have been subjected to no process other than cutting, polishing, or a similar process. Hence, under the explicit language of the Supreme Court, they are not manufactures of agate, garnet, etc.; nor can we discover in any instance where the courts have departed from the rule laid down by the Supreme Court in *Hartrauft v. Wiegmann*, *supra*. In *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99, the United States Circuit Court of Appeals, Second Circuit, in passing upon handles for knives, penholders, glove hooks, shoe hooks, etc., composed of agate and tiger eye, held that, having been advanced through one or more processes into commercial articles known and recognized in trade by specific and distinctive names other than the name of the material, and put into completed shapes designed and adapted for a particular use, were manufactures. But the following dictum of the court shows how rigidly it adhered to the decision of the Supreme Court in the case cited: "If it could be shown that these articles at the date of the tariff act were bought and sold as precious stones, or were commercially known as such, then, no doubt, they would have to fall under that classification for duty. Not only had these articles (handles, paper weights, etc.) no such commercial designation, but the stones themselves (cut for jewelry purposes), when imported in the form of stones, were bought and sold, as were rubies, diamonds, and other precious stones, by their respective distinctive names. We think the term as used in Schedule N applies to all stones known as 'precious,' whether in their original condition or advanced beyond it by cutting, polishing, etc., so long as they remain 'stones' in the commercial sense of the word."

In *Hahn v. U. S.*, 100 Fed. 635, 40 C. C. A. 622, his honor, Judge Lacombe, speaking for the court, said in part: "This court further held in *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99, *supra*, that the term 'precious stones' applied only to the mineral substances embraced within it while they remained stones, and that articles like those in suit (handles, rollers, and slabs) had been advanced beyond that condition, and had become completed commercial articles, known and recognized in trade by specific and distinctive names other than

the name of the material, and had been put into a completed shape designed and adapted for particular uses."

The government's contention that the stones in the case now pending are dutiable at 50 per cent. ad valorem under paragraph 115 is based on the decision of the Circuit Court of Appeals, Second Circuit, in the case of *U. S. v. Lorsch*, 158 Fed. 398, 86 C. C. A. 34, T. D. 28,513. We do not find anything in that decision, however, which justified such a classification. It must be borne in mind that the court in the *Lorsch* Case was dealing with agate bearings for scales—articles having a distinctive name and intended for utilitarian purposes, and not with articles still commercially known as stones intended exclusively to be set as jewelry. The Board, in passing upon the case, had expressed the opinion that, inasmuch as paragraph 434, unlike paragraph 115, did not contain the qualifying words "not specifically provided for," the agate bearings in question were more specifically provided for in paragraph 434 than as manufactures of agate under paragraph 115. His honor, Judge Lacombe, who reviewed the Board's decision said: "We do not concur in this conclusion. The group of articles known as diamonds and other precious stones includes many different species. When Congress selects by name one of those species, and provides that *manufactures* of that particular stone should be dutiable at a different rate, it so clearly indicates its intention to withdraw the article from the general group *as soon as it becomes* a completed manufacture that the absence of the words 'not specially provided for' in the paragraph covering the group is not particularly significant. Indeed, importers' counsel concedes that agate paper weights, blotters, paper cutters, seals, and the like would be properly classified under paragraph 115. These agate bearings, *which have become completed manufactures, salable as such in trade*, are plainly susceptible of a similar classification." The italics are our own, and are inserted to emphasize the point that the court drew a distinction between stones cut to be set as jewelry and agate made into completed articles for industrial uses.

This difference is further emphasized by the court's reference to the lower court having affirmed the Board in the agate bearings case on the authority of *U. S. v. Benedict*, 145 Fed. 914, 76 C. C. A. 446, T. D. 27,032, and by the statement that the *Benedict* Case related to precious stones cut cabochon, intaglio, cameo, and other well-recognized cuts, mainly used for jewelry, while in the *Lorsch* Case the court said: "We are clearly of the opinion that these agate bearings have become a manufacture separate and distinct from the 'precious stones advanced' of paragraph 435." In all of the decisions cited it is manifest that industrial articles manufactured from agate or the other minerals enumerated in paragraph 115 are dutiable thereunder at 50 per cent. ad valorem, while precious stones, including the species named in paragraph 115, advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set, if known commercially as precious stones and designed for use in the manufacture of jewelry, are dutiable at 10 per cent. ad valorem under paragraph 435.

In consonance with the views herein expressed, and on the authority of the decisions cited, we sustain the protests and reverse the collector's decision.

Addison S. Pratt, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

PLATT, District Judge. Decision affirmed, on the opinion of the Board.

BENZIGER BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1909.)

No. 5,272.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—ROSARIES—EJUSDEM GENERIS.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), rosaries are not subject to duty as "articles * * * in part of beads," because not ejusdem generis with the other goods (ornaments, trimmings, etc.) there enumerated.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, reported as G. A. 6,739 (T. D. 28,883), affirmed the assessment of duty by the collector of customs at the port of New York on imported rosaries. The collector classified the rosaries under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), for "articles * * * in part of beads." The pertinent part of this paragraph is as follows:

"408. * * * Fabrics, nets, or nettings, laces, embroideries, galloons, wearing apparel, ornaments, trimmings, and other articles not specially provided for in this act, composed wholly or in part of beads, * * * sixty per centum ad valorem."

The majority and dissenting opinions of the Board of General Appraisers read in part as follows:

MCCLELLAND, General Appraiser. The merchandise involved is returned by the appraiser as "rosaries," and duty was assessed thereon at the rate of 60 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673). The protest is against such assessment, and it is claimed alternatively that duty should have been assessed thereon according to the component material of chief value. * * * When the protest was called for hearing, it was submitted for decision on an affidavit of Issa Batarsee, made before the American consul at Jerusalem, in the province of Palestine, empire of Turkey, in which it is set forth that in each of the grades of rosaries involved the beads are the component material of chief value. It is not the practice of the Board to accept such affidavits, in the absence of corroborative proof, as conclusive. But, since the Board has passed upon a similar question, we deem it unnecessary to make any finding as to the component material of chief value.

In Abstract 16,039 (T. D. 28,300) the Board passed upon the classification of rosaries, which, from the records in that case and the one at bar, we believe to be similar to those we are now called to pass upon; and, as in that case it was held that the merchandise was subject to a duty at the rate of 60 per cent. ad valorem under the provisions of paragraph 408 of said tariff act as here assessed, we follow the Board's conclusions and overrule the protest, affirming the action of the collector.

SHARRETTS, General Appraiser. I do not concur in the conclusions reached by my colleagues in this case. Rosaries, although composed principally of beads, are neither ornaments nor ornamental in character. They are carried in the pocket and are used exclusively for devotional purposes. In this respect they differ, as far as I am aware, from any other known article composed of beads; and I can think of no more appropriate appli-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cation of the principle of ejusdem generis than that the provision in paragraph 408 for all other articles composed wholly or in part of beads relates only to articles similar to those specified therein, all of which, without exception, are ornaments, or articles ornamented, and beads are applied thereto. To include rosaries in paragraph 408 would be to make a single exception that would destroy the symmetry of the whole paragraph. The tariff act of 1883 (Act March 3, 1883, c. 121, 22 Stat. 488) and prior acts associated beads with ornamented articles. Turning to the act of 1883, we find: "396. Beads and bead ornaments of all kinds, except amber, fifty per centum ad valorem." The act of 1890 (Act Oct. 1, 1890, c. 1243, 26 Stat. 564) made no separate provision for bead ornaments; but under the act of 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509) there were two paragraphs relating to beaded goods, namely: "301. Laces and articles made wholly or in part of lace * * * and beaded silk goods." And: "354. Manufactures known commercially as beads, beaded or jet trimmings and bead ornaments, thirty-five per centum ad valorem."

As bearing upon what Congress had in mind in framing these paragraphs, it is instructive to note that in volume 6, pages 52 and 53, of the hearings before the finance committee of the United States Senate, it was recommended that fabrics or articles ornamented with beads should be classified with laces, edgings, embroideries, etc. Paragraph 408 of the tariff act of 1897, in the light of the provisions of former acts, extending back for a period of more than 50 years, would seem to include only beads and bead ornaments, or articles ornamented with beads. Such an interpretation of the statutes would and should exclude from paragraph 408 articles used solely for devotional purposes.

Paragraph 179, Schedule C, of the present tariff act (30 Stat. 166 [U. S. Comp. St. 1901, p. 1644]), enumerates laces, embroideries, braids, galloons, trimmings, or other articles made wholly or in chief value of tinsel wire, lame or lahn, bullions, or metal threads, and it will be observed that the foregoing enumerated articles are identical with those specified in paragraph 408. Merchandise known as metallics, consisting of lame, was returned for duty by the collector at the port of New York at 60 per cent. ad valorem under paragraph 179 as articles composed wholly of lame. An appeal having been taken, Judge Coxe, in passing upon the question, said in part: "It is entirely clear, within the recognized doctrine of '*noscitur a sociis*', that it [metallics] cannot be classed among the articles made of lame, which Congress intended to cover by the last clause in question, for that clause relates to laces, embroideries, braids, and similar articles." *Marsching v. U. S.* (C. C.) 113 Fed. 1006.

Paragraph 339, Schedule J, of the present tariff act (30 Stat. [U. S. Comp. St. 1901, p. 1662]), also contains a provision very similar to that in paragraph 408, covering laces, embroideries, nets, and nettings and other articles. The Circuit Court for the Northern District of Illinois upheld the contention of the importer that this did not cover fish netting, but was limited by the rule of "*ejusdem generis*" to articles of the general character therein specified. *Ederer v. U. S.* (C. C.) T. D. 25,111. See, also, *Wiebusch et al. v. U. S.*, 84 Fed. 451, 28 C. C. A. 154, regarding the rule of "*ejusdem generis*" or "*noscitur a sociis*."

Great stress has been laid upon the decision of the Supreme Court in *Benziger v. Robertson*, 122 U. S. 211, 7 Sup. Ct. 1169, 30 L. Ed. 1149, where it was held that rosaries, not being enumerated, were dutiable at 50 per cent. ad valorem under Schedule M, § 2504, Rev. St. p. 473 (2d Ed.) the rate applicable to beads in accordance with the provisions of section 2499, Rev. St., which enacted that on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable. Rosaries, although not provided for *eo nomine* in the present act, are provided for according to material. Were such not the case, however, inasmuch as beads unstrung constitute the component material of chief value in the rosaries in question, under the *Benziger* Case they would be dutiable at 35 per cent. ad valorem as beads, under paragraph 408, in accordance with the provisions of section 7 of the present act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1694]), and as 35 per cent. would be the mini-

imum rate now claimed by the importers, I do not deem it necessary to further discuss this phase of the case.

In my opinion the importers' contention is well founded and the protest should be sustained.

Everit Brown, for importers.

Addison S. Pratt, Asst. U. S. Atty.

PLATT, District Judge. Decision reversed, on the dissenting opinion of General Appraiser Sharretts, which thoroughly expresses my view that the rosaries in question are excluded from paragraph 408 of the tariff act by the principle of ejusdem generis.

LORD & TAYLOR v. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,466.

CUSTOMS DUTIES (§ 32*)—CLASSIFICATION—"COTTON CLOTH"—FABRICS IN PART OF JUTE.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 310, 30 Stat. 178 (U. S. Comp. St. 1901, p. 1659), the definition of "cotton cloth" as being "all woven fabrics of cotton" refers to goods composed entirely of cotton, or containing at most but a small percentage of some other fiber; and cloth which, though composed chiefly of cotton, yet contains a large minority of jute, is not within the definition.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 2, p. 1642.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, G. A. 6,875 (T. D. 29,596), affirmed the assessment of duty by the collector of customs at the port of New York on cloth composed in chief value of cotton, but of which 37 per cent. was jute.

The importers had protested against the action of the collector in classifying the goods under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 322, 30 Stat. 179 (U. S. Comp. St. 1901, p. 1661), and contended for classification under the provisions in said schedule for "cotton cloth." The Board overruled this contention on the authority of a former ruling. G. A. 5,018 (T. D. 23,348), which had related to cloth chiefly of cotton, but containing, respectively, 44 per cent. of flax and 45 per cent. of jute. The pertinent portion of the opinion of the Board in the case last cited is as follows:

"Somerville, General Appraiser. * * * Schedule I, 'Cotton Manufactures,' of Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 175 (U. S. Comp. St. 1901, p. 1655), embraces various kinds of cotton cloth, and among other things fixes a duty upon the basis of the quality of the cloth, regulated by the count of threads to the square inch and the weight of goods to the square yard. Paragraph 310, 30 Stat. 178 (U. S. Comp. St. 1901, p. 1659), defining the term 'cotton cloth,' reads as follows:

"'310. The term 'cotton cloth' or 'cloth,' wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or otherwise, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practicable means.'

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The main question for decision is whether the goods under consideration are to be treated as falling within the term 'cotton cloth,' notwithstanding the fact that such cloth contains in one case over 45 per cent. of jute and in the other more than 44 per cent. of flax. This paragraph is a substantial reproduction of paragraph 257 of the tariff act of 1897 (Act Aug. 27, 1894, c. 349, Schedule I, 28 Stat. 529), with some slight amendments not necessary to be considered. The term 'cotton cloth' appears not to have been used in the tariff acts in force prior to that of March 3, 1883, and it has been construed to have no peculiar commercial meaning different from its popular meaning. *Greenleaf v. Goodrich*, 101 U. S. 278, 25 L. Ed. 845; *Ullman v. Hedden* (C. C.) 38 Fed. 95. The 'countable clauses' of the tariff act of 1874 as set out in section 2504 of the Revised Statutes, Schedule A, relating to 'manufactures of cotton' and 'plain woven cotton goods,' were the subject of construction by the Supreme Court in *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, 27 L. Ed. 883, where it was held that the thread count contemplated by Congress was such a count as could be made by inspection by means of a glass, and was not confined to those cases where the counting was a matter of commercial usage.

"In the case of *Schmieder v. Arthur*, decided by the Circuit Court for the Southern District of New York in 1880, not reported, but referred to in T. D. 4,565, it was held by Judge Shipman that certain cloths composed of cotton and silk, and other woven fabrics composed in part of cotton and in part of flax, cotton being the component of chief value in each instance, were not dutiable, under the countable clauses of Schedule A of the tariff act of 1874 (Rev. St. § 2504), as cotton fabrics of the kind there described, but were subject to duty under the last clause of said schedule, as manufactures of cotton not otherwise provided for, at 35 per cent. ad valorem, less a 10 per cent. deduction authorized by section 2503 of the Revised Statutes. It nowhere appears what percentage of material other than cotton the goods contained; but it seems probable that it was substantial to an extent that placed the matter beyond dispute.

"We have examined the record in this case, as it is filed in the Circuit Court, and the fact is disclosed through the bill of exceptions that the portion of the merchandise containing silk had been assessed for duty at 50 per cent. ad valorem as manufactures of silk, under Schedule H of the act of 1874 (Rev. St. § 2504), and that the portion of the merchandise composed in chief value of cotton was assessed for duty according to weight and count of threads under said Schedule A. The importers claim that all of the goods were dutiable as manufactures of cotton not otherwise provided for, pursuant to the provisions of the last clause of Schedule A. It was admitted, as shown by the bill of exceptions, that the importations were in fact textile fabrics, and were plain woven goods, and were generally known in trade and commerce as 'Saxony dress goods,' and that the component materials were as above stated; cotton in every instance being of chief value, but not being the only component material.

"There were no disputed facts in the case, and the court directed a verdict in favor of the plaintiff, upon the ground that the goods in question were not composed wholly of cotton, but of mixed materials. The opinion of Judge Shipman in this case is not now accessible, but we are kindly favored by the present Attorney General of the United States with an unpublished copy of the opinion of Solicitor General Phillips, approved by Attorney General Devens under date of June 1, 1880, addressed to the Secretary of the Treasury, bearing on this case of *Schmieder v. Arthur*, and advising the department that the decision of the court was correct statement of the law. From the opinion we quote as follows:

"There are reasons for excluding goods of mixed materials from the first paragraph of section 2504 that do not apply to the last paragraph. In each of the former there is a context, wanting in the latter, that fixes the term 'manufactures of cotton' as applying to manufactures of cotton only. That context is the reference to the number of 'threads to the square inch' as establishing the duty; the latter becoming progressively higher as the number increases. This implies that the goods have a thread of uniform size throughout the piece, and does not permit that in some square inches

they shall have fine silk threads and in others coarse cotton threads; nor is it intended thereby to impose the same duty upon goods which, because of an average of coarse cotton with fine silk threads, have as many countable threads to the square inch as are to be found in other pieces of very fine uniform cotton thread; nor, again, is it meant, because of such average, to levy (as I am informed by the chief of the customs division is sometimes the case) a higher duty upon goods of mixed silk and cotton than by other provisions of the tariff is leviable upon goods entirely of silk.

"Upon consideration, therefore, there are reasons for believing that the former paragraphs of section 2504 apply only to goods exclusively of cotton that do not exist as to the last paragraph. It follows that the presumption that goods of mixed materials are provided for somewhere in that section applies most naturally to such last paragraph, and, in conclusion, that such goods do not fall under the operation of any one of the former paragraphs."

"Since the rendition of this decision (more than 20 years ago), the practice at the various ports of this country seems to have been uniform in applying the countable clauses to goods made wholly or substantially of cotton, and to such goods only; mixed goods being placed under other provisions. In the report of this case by the Treasury Department, in T. D. 4,565, wherein the department states its intention to take no appeal to the Supreme Court, the following observation is made: 'In order, however, to come within such classification, the goods must contain a substantial admixture of silk or flax; and cotton goods, which may have a few threads of silk or flax, which do not practically change the character or value of the goods, will not be considered as affected thereby.'

"We are entirely satisfied that the goods now under consideration, containing so large a percentage of other materials than cotton, cannot be held to be cotton cloth within the meaning of that term as defined by Congress in said paragraph 310. We are not to be understood, however, as deciding that the term may not be held to embrace cloth which is commercially and commonly known as cotton and is substantially such in fact, although it may contain a small percentage of other materials, where no special provision is made for such manufactures in the tariff act. The following adjudged cases seem to sustain this view and to be in harmony with the suggestion of the department above stated: *Chapon v. Smythe*, 11 Blatchf. 120, Fed. Cas. No. 2,611, where it was held by the Circuit Court for the Southern District of New York, construing the eighth section of the act of June 30, 1864 (13 Stat. 210, c. 171), that the words 'silk ribbons' would include ribbons made of silk and cotton, silk being the component material of chief value, provided it was shown to the satisfaction of the jury that the merchandise was bought and sold in trade and commercially known as silk ribbons, notwithstanding the percentage of cotton contained in the articles. Note, also, *Lane v. Russell*, 4 Cliff. 122, Fed. Cas. No. 8,053, 14 Opinions of Attorney General, 130; *Thorpe v. Lawrence*, 1 Blatchf. 351, Fed. Cas. No. 14,005; *Sill v. Lawrence*, 1 Blatchf. 605, Fed. Cas. No. 12,850. In *Robertson v. Edelhoff*, 91 Fed. 642, 34 C. C. A. 34, it was held by the Circuit Court of Appeals for the Second Circuit, per Lacombe, J., that an article of silk and cotton, of which cotton constituted more than 25 per cent. of value, could not be classified as 'silk' goods of the kind described in a certain paragraph of the tariff act of 1874 (Rev. St. § 2504), in the absence of any commercial designation covering such goods.

"How far commercial designation is to govern the classification of merchandise composed of mixed materials is further illustrated in the case of *Drew v. Grinnell*, 115 U. S. 477, 6 Sup. Ct. 117, 29 L. Ed. 453, and in *Arthur v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643. The present decision must therefore be qualified, so as not to conflict with the principles announced in the foregoing decisions, so far as they may be applicable. It follows from what we have said that the goods under consideration are not 'cotton cloth,' within the meaning of paragraph 310 and of the 'countable clauses' of the cotton schedule, and that the claim of the importers was erroneous. We think they are properly provided for as manufactures of cotton under paragraph 322, where the collector classified them; and, being enumerated in said paragraph, there was no room for the operation of the

similitude clause, which the importers have invoked in their alternative claim. *Wolff v. U. S.*, 71 Fed. 291, 18 C. C. A. 41; *Arthur v. Butterfield*, 125 U. S. 70, 77, 8 Sup. Ct. 714, 31 L. Ed. 643.

"The protests are overruled, and the decision of the collector affirmed in each case."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

WINTER et al. v. BOSTWICK et al.

(Circuit Court, W. D. Wisconsin. August 26, 1909.)

No. 11.

1. MINES AND MINERALS (§ 53*)—CONTRACTS FOR SALE OF MINING PROPERTY—RIGHT TO CANCELLATION FOR FRAUD.

A contract giving an option to purchase mining property cannot be rescinded for fraud because of erroneous statements made by the sellers as to the quantity of ore on the property, or the title, where the purchasers were to take possession of and operate the property for several months before the option expired, and the statements were made in good faith and expressed the honest opinions of the sellers, who were not lawyers and had little knowledge of practical mining.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 53.*]

2. MINES AND MINERALS (§ 53*)—OPTION TO PURCHASE MINING PROPERTY—RIGHT TO RESCIND CONTRACT—DEFECTIVE TITLE.

Where complainants by a contract with defendants and on making a cash payment were given an option to purchase mining property until a given date, they were not entitled to rescind the contract on the ground that the title to the property was unmarketable prior to the expiration of such time, and without offering to make the payments to complete the purchase.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 53.*]

In Equity.

Young & Bell and William P. Belden, for complainants.

George G. Sutherland and Olin & Butler, for defendants.

SANBORN, District Judge. Final hearing on bill to rescind contract of sale of mining stock of the Baxter Mining Company filed December 30, 1907. It is alleged as follows: Before the contract was made, defendants were asked for the abstract of title to the mining property, and defendants stated they could not find it, but that they owned a lease of the property, made by the fee owners, that they knew all about the title, knew that it was perfect, had had it examined by attorneys who had pronounced it perfect and unincumbered, and they would warrant such title. Complainants believed and relied on these statements, and would not otherwise have made the contract without examining the title, there being no means at hand available for such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

examination. The contract contains the following covenant by defendants:

"That the property to be transferred hereunder (certain corporate stock) is unincumbered, and that the title of said Baxter Mining Company to said leases is clear and unimpaired."

That, by said covenants and warranties, it was understood between the contracting parties, as the basis of the entire transaction, that the corporation had a clear and unimpaired title to the leases, and the absolute right to mine and remove the ore. That, while the contract purports to be an option on the stock, it was in fact understood to be a method by which the absolute and beneficial control of the leasehold should be transferred, and that the stock transfer was only incidental to securing such control, it being understood that, upon acceptance of the option, the existence of the Baxter Mining Company would be terminated, and a new corporation created. The bill also states with much particularity many representations made by James Bunt, defendants' mining superintendent, as to the depth, extent, and character of the ore in the mine. The contract price for the stock was \$100,000, \$10,000 of which was paid down. Complainants were given the option to purchase all said stock at any time prior to April 1, 1908, on paying the \$10,000 down, \$40,000 January 1, 1908, and \$50,000 on or before April 1, 1908. They were to take possession of the mine, operate it, pay expenses and royalties, market the ore, deposit the net proceeds in escrow, and if they did not exercise the option, or forfeited their rights, the deposit was to be paid to defendants, otherwise to a corporation to be formed by complainants. They further agreed to lay out at least \$10,000 in exploration and development, and might surrender their option on 10 days' written notice, forfeiting all sums paid or laid out under the contract, all net earnings, machinery, etc. Complainants took possession of the mining property, and operated it until the latter part of December, 1907, the net receipts being about \$5,000, not being deposited, but used to pay expenses and royalties. They explored the mining property, but found that the representations as to the extent of the ore were materially false, and that a certain part of the property represented to be the most valuable part of the mine contained no merchantable ore at all. The representations are alleged to have been false and fraudulent, and relied on by complainants. It became necessary to make certain improvements on the property in order to properly carry on the contracted work, consisting of an addition to the mine office, a bunkhouse, boarding house, boiler plant, pumps, shafting, machinery, and repairs, and ponds for washing ore. The amount expended therefor, and in development, was \$20,000.

It is further alleged that the title to the mine on examination proved unmerchantable, and that in the fall of 1907 a suit to quiet title to the property was commenced by Frank, Patrick, and Peter Whaley against the company, claiming three-tenths of the title, with damages for waste in taking out ore. On learning of the falsity of the representations as to title and quantity of ore, complainants attempted to procure a modification of the contract, but were unable to agree with

defendants thereon. Thereupon they brought this suit for the rescission of the contract on the ground of such fraudulent representations, praying for cancellation of the contract, an accounting and repayment of the moneys paid out for exploration, improvements, expenses, and royalties, for the first payment of \$10,000, and for an equitable lien therefor on the property. About the time of filing the bill, and on December 31, 1907, complainants served on defendants a notice that they elected to rescind the contract, and had brought suit therefor by reason of the false and fraudulent representations inducing the contract as set forth in the bill, and demanding the return of the \$10,000 and of some \$23,000 expended in development and improvement; and offering to restore possession, subject to an equitable lien for such moneys. On January 10, 1908, defendants gave notice to complainants declaring their default in not paying the \$10,000 due January 1, 1908, and that their rights were forfeited, and defendants thereupon resumed possession of the property. They answered denying all charges of fraudulent representations, and all the equity of the bill, and also filed a cross-bill asking an account of the ore sold by complainants, and for a decree that they have no right or lien in or to the property.

I find from the evidence taken in court, and from reading the depositions, that no fraudulent representations were made by defendants, either as to the quantity of ore or the title. The statements which Bunt may have made were without any authority from defendants. As to the title, defendants were not lawyers, and what they said was only their opinion. The whole record most clearly shows that the parties dealt with one another in the most fair and considerate way. Defendants never had the slightest intention to misrepresent or defraud, nor did they make reckless statements of fact not known to them to be true in order to induce the contract. They had little or no technical knowledge of mining. Complainants were simply taking an option, and were to find out for themselves whether the mine was valuable. The case shows no actionable fraud whatever. A considerable part of the argument proceeded upon the theory that complainants were entitled to a rescission for a breach of the contract in not furnishing a marketable title by reason of the claim made in the Whaley suit. As I construe the bill and notice of rescission, no claim is made on this ground. But even assuming that such a claim was actually made, and that the Whaleys owned an undivided three-tenths of the Baxter mine, I think that complainants had no right to rescind for that reason at the time they attempted to do so on the ground of fraud. They still had until April 1, 1908, to declare their option. Meanwhile the title might have become perfect. Defendants might have acquired the Whaley title by that date, and then have been in a position to assign the stock entirely unincumbered. Had they been unable to do so, a different question would arise, but they had until April 1, 1908, to perfect the title, assuming it to have been unmarketable. There would be no breach of the contract by defendants until this time arrived; hence complainants have no ground of rescission. *Green v. Green*, 9 Cow. (N. Y.) 47, 51; *Bannister v. Read*, 1 Gilman (Ill.) 99; *Higgins v. Eagle-ton*, 155 N. Y. 466, 473, 50 N. E. 287; *Annis v. Burnham*, 15 N. D. 577,

108 N. W. 549; Clements v. Loggins, 2 Ala. 514; Hanna v. Harper, 3 Smedes & M. (Miss.) 793, 803; Denman v. Mentz, 63 N. J. Eq. 613, 52 Atl. 1117.

The bill is dismissed, and the cross-bill sustained at complainants' costs.

In re THAW.

(District Court, W. D. Pennsylvania. October 20, 1908.)

No. 4,290.

BANKRUPTCY (§ 237*)—EXAMINATION OF BANKRUPT PRISONER—HABEAS CORPUS TO REQUIRE PRODUCTION FOR EXAMINERS.

While Rev. St. § 753 (U. S. Comp. St. 1901, p. 592), authorizes a federal court to issue a writ of habeas corpus for a prisoner when "necessary to bring the prisoner into court to testify," such power will not be exercised except in case of necessity, especially where the prisoner is confined by authority of a state court; and such writ will not be granted to require the production of a bankrupt for examination under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), where he is confined in a hospital for the criminal insane in another state under a judgment of a court of such state, the taking of his testimony by deposition being also authorized by such section.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 237.*]

In Bankruptcy.

See, also, 166 Fed. 71.

Stone & Stone and Albert P. Meyer, for plaintiff.

Asa Bird Gardiner, for defendant.

YOUNG, District Judge. This is a writ of habeas corpus ad testificandum. The respondent moves the court to quash the writ and dismiss the proceeding.

The writ was granted upon the petition of the relator, setting out that the evidence of Henry Kendall Thaw was necessary in a certain proceeding in bankruptcy, pending in this district. As is customary in such proceedings, it not appearing from the petition that the writ ought not to issue, the usual order was made, allowing the writ, and the case now comes before us to determine the whole matter. It is not in the nature of an appeal from the order of the court granting the writ, but is the proper and orderly consideration of the whole matter after the service of the writ and the return of the respondent.

It appears from the record that, Thaw having filed his petition in bankruptcy, it became necessary to subject him to the usual examination provided by the act of Congress (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The referee, having made an order for his examination, it was found that he was beyond the jurisdiction of the court, and in the custody of Dr. Lamb, superintendent of the Matteawan State Hospital for the Criminal Insane in the state of New York, where he had been committed by the Supreme Court of the state of New York as an insane criminal. This writ was then al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowed, directed to Dr. Lamb, to produce the body of the prisoner to testify in the bankruptcy matter now pending in this court.

Section 753 of the Revised Statutes (U. S. Comp. St. 1901, p. 592) provides that:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless," among other things, "it is necessary to bring the prisoner into court to testify."

We have, then, in this section the authority to grant the writ to bring a prisoner from his place of confinement to testify; but the power should only be exercised when there is necessity of having the evidence of the prisoner. Unless the necessity is so great that the ends of justice may be defeated if the evidence were not produced, the court of the jurisdiction where the evidence is needed will be slow to grant a writ which will remove a person confined by the court of another jurisdiction from his place of confinement. The comity that exists between courts, the reluctance of federal courts to interfere with the jurisdiction of state courts, will and ought to restrain us from interfering with the orderly and effective administration and execution of the law in sister courts.

After a careful examination of this record, in the light of the law and practice, as we understand it and have indicated, we have concluded that no necessity has arisen for the bringing of the prisoner away from his proper place of confinement into this district. If his evidence is necessary, his deposition can be taken. Section 21, cls. "a" and "b," of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), provide all the means for a thorough examination of the bankrupt.

The writ must therefore be quashed, and the petition dismissed, with costs.

HARPER & BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1909.)

No. 5,247.

CUSTOMS DUTIES (§ 38*) — CLASSIFICATION — FASHION-PLATE DRAWINGS — "WORKS OF ART."

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 203 (U. S. Comp. St. 1901, p. 1690), for "works of art," does not include fashion-plate drawings, which, though possessing artistic merit, are for purely practical and utilitarian purposes.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 8, p. 7524.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York as to fashion-plate drawings intended for publication in the fashion department of Harper's Bazar, which the importers contended should have been classified as "works of art." The Board overruled this contention, on the authority of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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previous decision (*In re Vandiver*, G. A. 6,542 [T. D. 27,913]), in which the following observations were made:

"While some of these pictures include landscape, most of them are drawings of persons and garments or parts of garments intended to illustrate the modes and fashions in France or Paris, where they are drawn. It might be claimed that they are artistic in design or appearance, so far as the landscape is portrayed or in the faces of the figures; but these, in our view, are merely incidental to the main thought and purpose of the sketches, which is to show to the readers of the periodical the styles of garments worn in France. We do not think this is a purpose which, when carried out, would characterize the commodity as 'works of art'; and, aside from this, the works in themselves are not of such merit, we think, as would warrant us in finding that they are works of art, if we could disabuse our minds and thoughts of the idea that they are for purely practical and utilitarian purposes."

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

Addison S. Pratt, Asst. U. S. Atty.

PLATT, District Judge. The importations in question, consisting of fashion-plate drawings, were classified for duty under the provisions of paragraph 454 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678]). The importers claim free entry under the provisions of paragraph 703 of said act as "works of art, the production of American artists residing temporarily abroad." The Board sustained the collector's classification, and from that decision the importers appealed to this court.

While these drawings may have been the production of American artists residing temporarily abroad, and while they may have some artistic merit, I do not think Congress, in enacting paragraph 703, had in contemplation productions of this character. As stated by the Board, their use is "for purely practical and utilitarian purposes." *In re Vandiver*, G. A. 6,542 (T. D. 27,913). This conclusion makes it unnecessary to discuss the question of jurisdiction respecting certain of the protests involved herein.

Decision affirmed.

DEUTSCH et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 14, 1909.)

Nos. 5,432-5,436.

CUSTOMS DUTIES (§ 36*)—CLASSIFICATION—"PRINTED MATTER"—POST CARDS.

Post cards, with the inscription "Post card" printed thereon in several languages, are "printed matter," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), because such printing has a useful and valuable connection with the article itself.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5563, 5564; vol. 8, p. 7763.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Application for Review of a Decision by the Board of United States General Appraisers.

These proceedings are also entitled in the names of Hensel, Bruckmann & Lorbacher (three cases), and A. H. Ringk. The decision below affirmed the assessment of duty by the collector of customs at the port of New York on articles described in the opinion of the Board of General Appraisers as consisting of "a variety of elaborately made private mailing or souvenir post cards, made either wholly of paper of more than one thickness or of paper in single thickness combined with silk, wood, celluloid," etc. The Board added that in most of the exhibits the printing consisted of the inscription "Post card" in different languages.

Comstock & Washburn (George J. Puckhafer, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The articles in question consist of post cards of paper and other materials, and were classified variously under the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]), as celluloid articles (paragraph 17), manufactures of wood (paragraph 208), manufactures of silk (paragraph 391), printed matter (paragraph 403), and manufactures of paper (paragraph 407). The importers' protests set forth various claims, but upon the argument counsel for importers insisted upon a classification under the provision in paragraph 403 for "printed matter."

In *Ringk v. United States* (C. C.) 164 Fed. 1021, T. D. 29,037, I held that souvenir post cards composed of paper and feathers, feathers being the component material of chief value, were not, because of the presence of said component material, thereby removed from the provision for printed matter in said paragraph 403. I hold that the articles now before me are also properly dutiable under said paragraph as printed matter. This is also in line with the decision of the Circuit Court of Appeals in *Hamilton v. United States* (C. C. A.) 167 Fed. 796, T. D. 29,519, citing *Arthur v. Moller*, 97 U. S. 365, 24 L. Ed. 1046. There is actually printed matter on the articles before me. Such printing has a valuable and useful connection with the article itself. I think it may fairly be called printed matter, even though the main element composing the article may be some valuable material. If imported merchandise is ever brought before me in which the printed matter shall be purely incidental, and the merchandise itself shows upon its face that an attempt is being made on the part of an importer to introduce into the commerce of the country by subterfuge a valuable thing which ought to be classified at a high rate of duty, it will be my purpose to block the attempt so far as in my power to do so. I do not find in the samples before me any evidence of such a purpose.

Counsel for the government cites as an authority in favor of this contention the case of *Kraut v. United States* (C. C.) 130 Fed. 392, T. D. 25,178, affirmed 142 Fed. 1037, 71 C. C. A. 684, T. D. 26,946. I think, however, that case is easily distinguished from the present case. The paper bag in question there was concededly a utilitarian

article, and found its use as such in the commerce of the country. Following my previous decision in *Ringk v. United States*, supra, I hold that the post cards in controversy herein should be classified for duty as "printed matter" under the provision contained in said paragraph 403.

Decision reversed.

JAECKEL & SONS v. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,377.

CUSTOMS DUTIES (§ 33*)—CLASSIFICATION—EMBROIDERED FURS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), provides "that no wearing apparel, * * * when embroidered, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed." *Held*, that under this provision valuable fur garments, to which embroidered silk adornments have been attached are subject to the duty provided for silk embroideries.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 33.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below (G. A. 6,818, T. D. 29,297) affirmed the assessment of duty by the collector of customs at the port of New York. The case depends upon the construction to be given the embroidery proviso in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), which reads as follows:

"Provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed."

The importers contended that this proviso was not applicable to embroidered fur garments, and that the assessment should have been under the provision in paragraph 450 for manufactures in chief value of fur.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise at issue is a manufacture of fur, plus a silk-embroidered collar, and is wearing apparel. The silk-embroidered collar is an incidental, although a component, part of the importation; its value being almost infinitesimal by comparison with the rest of the garment. This merchandise can only come within the proviso of Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), by holding that Congress intended to gather within that proviso all kinds of wearing apparel, without thought as to whether or not it is composed wholly or in chief value of flax, cotton, or other vegetable fiber. To reach this conclusion we must be satisfied that the thought of the proviso is a new

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and independent thought, in no sense a continuation of the thoughts expressed above the proviso; in other words, that it is separate and independent legislation, as completely divorced from the rest of the paragraphs as if it were placed in a paragraph by itself. I do not think that a valuable fur garment like this is taken out of its natural classification as a manufacture of fur because a trivial adornment of embroidered silk has been attached thereto. I can find no case of the higher court of this circuit which constrains me to so hold. I do not think that *Carter, Webster & Co. v. United States*, 143 Fed. 256, 74 C. C. A. 394, T. D. 27,135, goes to the extent demanded by the government in the case at bar. The *Carter Case* only decides that cotton hose, although specifically provided for in paragraph 318, must, when embroidered, pay, because of the proviso of paragraph 339, the rate provided for the silk-embroidered wearing apparel of paragraph 390.

If this were an original question I should consider it my duty to decide it in accordance with the foregoing suggestion. But it seems clear that substantially the same issue was before Judge Hazel in *Lichtenstein v. United States* (C. C.) 154 Fed. 736, T. D. 27,919. He decided there that a three-panel folding screen 5 feet 10 inches high, with a frame of wood about 6 inches wide and carved and gilded, the panels being of embroidered silk, but the wood being chief value, should be assessed for duty as a silk-embroidered article under paragraph 390, to which he was led by this same proviso of paragraph 339. The only difference between the cases is that he found that the silk embroidery of the panels in the screen which he was considering "enhanced the value of the article to an appreciable extent." But the fact still remains that the merchandise which he was considering was in chief value of wood. It seems better for all parties interested that the decisions of the court should be harmonious. The *Lichtenstein* decision seems to have been accepted by the importers for about two years, and it would be unfortunate to create confusion by a different interpretation of the proviso now.

For these reasons, the decision of the Board of Appraisers is reluctantly affirmed.

RICH V. UNITED STATES.

(Circuit Court, S. D. New York. May 17, 1909.)

No. 5,243.

1. CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—CONCENTRATED FRUIT JUICE.

Concentrated fruit juice is dutiable by similitude at the rate provided for fruit juice in Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 299, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.*]

2. CUSTOMS DUTIES (§ 44*)—SIMILITUDE—SUBSTANTIAL RESEMBLANCE—INEQUALITY IN RATES.

Where an unenumerated article resembles an enumerated one, in any of the respects named in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), it cannot be removed from the opera-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of that provision, even though great inequality in tariff treatment results, as where a very valuable article is subjected to the same specific duty that is prescribed for a far cheaper article.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question, described on the invoices as raspberry, strawberry, and pineapple "pure fruit juice free from alcohol," was assessed for duty by the collector of customs under section 6, tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), at 20 per cent. ad valorem, as an unenumerated manufactured article. The importer claims that it is dutiable, either directly or by similitude, as fruit juice at 60 cents per gallon, under paragraph 299 of said act (Schedule H, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1655]). Alternative claims were also set forth in the protests, but were not pressed upon the argument. The General Appraiser, in his decision, says:

"The article here involved, the evidence shows, is produced by subjecting fruit juice to a process of evaporation and pasteurization, which extracts the water and results in a preparation of greatly increased strength; the evidence showing that 1 gallon of the imported product is as strong as 20 gallons of the juice from which it is derived. It also appears from the testimony that the value of a gallon of the ordinary raspberry or strawberry juice is worth from \$1 to \$5, while 1 gallon of the concentrated juice is worth \$30."

I do not hold that the merchandise in question is dutiable directly under paragraph 299. It is sufficient to inquire whether the court is not bound to place it under that provision by virtue of the similitude clause. In *Hahn v. United States*, 100 Fed. 635, 40 C. C. A. 622, it was held that:

"A nonenumerated article is to be classified for duty under the similitude clause of a tariff act, where the required similitude exists, rather than under the general residuary clause."

While the evidence in this case may not show sufficiently the elements of similitude in material or quality, it does in fact unmistakably show similitude in use. In fact, it appears that the use of this product is identical with that which the government concedes to be the fruit juice of paragraph 299.

It is not necessary that the resemblance in all the statutory particulars, material, quality, texture, and use shall be established. It is sufficient merely that the similitude shall be a substantial one, "importing not merely adaptability to sale as a substitute, but referring rather to the employment of the article or its effect in producing results." *Weilbacher v. Merritt* (C. C.) 37 Fed. 85; *Sykes v. Magone* (C. C.) 38 Fed. 494. In my opinion, such a substantial resemblance exists in this case.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Counsel for the government insists that, if the similitude provision is to be applied, then paragraph 21 (Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]), providing for "fruit ethers, oils, or essences, two dollars per pound," should be considered in that connection. The case was apparently tried before the Board without any reference to this provision. The evidence does not disclose what "fruit ethers, oils, or essences" are. There is nothing in the record to justify the court in applying this provision to the merchandise in question.

Counsel for the government also calls attention to the inconsistency of permitting a highly concentrated and valuable article like that in the present case entry at only 60 cents per gallon, while fruit juice of only one-thirtieth to one-sixth in value of the former must also pay the same rate of duty. This inequality of treatment under the tariff is unfortunate, and the court would, if in its power, seek to remedy it. That is a question, however, for the Legislature, and not for the court.

The decision of the Board of General Appraisers is reversed.

STROHMEYER & ARPE CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,393.

CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—FISH IN LARGE TINS—"FISH IN OTHER PACKAGES."

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), provides for anchovies, etc., in tins of various sizes, but not larger than 70 cubic inches, with a further provision for (1) such fish "in other packages," (2) "all other fish * * * in tin packages," and (3) "fish in packages containing less than one-half barrel." *Held*, that anchovies in tins containing more than 70 cubic inches and less than half a barrel are subject to the provision for fish "in other packages."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The case involves the construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), reading as follows:

"258. Fish known or labeled as anchovies, sardines, sprats, brislings, sardels or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, box or can; if in other packages, forty per centum ad valorem. All other fish (except shellfish), in tin packages, thirty per centum ad valorem; fish in packages containing less than one-half barrel, and not specially provided for in this act, thirty per centum ad valorem."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Brown & Gerry (Everit Brown, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise imported is salted anchovies and sardines, brought over in tin packages containing over 70 cubic inches. The collector and the board agree that they should be classified under the language "if in other packages, forty per centum ad valorem," contained in paragraph 258 of the tariff act of 1897. The importers insist that they should be classified under the phrase "all other fish (except shellfish) in tin packages," or under the last phrase of said paragraph, "fish in packages, containing less than one-half barrel, and not specially provided for in this act."

It is too clear for discussion that the fish in these packages are of the kinds of fish specially mentioned in the early part of paragraph 258. They cannot, therefore, be covered by the expression "all other fish." When Congress said "if in other packages," it undoubtedly meant other packages than those just immediately before described; and the tin package in which the imported fish come is certainly another package from those. Being specially provided for in the phrase under which they were assessed, they cannot be placed under the final phrase.

Decision affirmed.

B. F. DRAKENFELD & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1909.)

No. 5,282.

1. CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—COPPER PLATES.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 176, 30 Stat. 165 (U. S. Comp. St. 1901, p. 1644), for "copper in rolled plates, called braziers' copper, sheets," etc., covers planished copper plates.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

2. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—PLANISHING.

Copper in the form of planished plates has been manufactured enough to be taken out of the provision for "copper in plates * * * not manufactured," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 532, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682).

Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,748 (T. D. 28,920).

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The importations in question, consisting of planished copper plates, were classified by the collector as manufactures of metal under Tariff Act July 24, 1897, c. 11, § 1, Schedule C,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645). The importers claim primarily that said importations are free of duty under section 2, Free List, par. 532, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), as "copper in plates * * * not manufactured." The protests also set forth alternative claims under section 1, Schedule C, pars. 166 and 176, 30 Stat. 165 (U. S. Comp. St. 1901, pp. 1643, 1644).

I agree with the board that this merchandise has been manufactured enough to take it out of paragraph 532; but it ought not to go in the catch-all provision for manufactures of metal (paragraph 193) if it can be properly placed elsewhere. The relevant portions of paragraphs 166 and 176 are as follows:

"166. Steel plates engraved, stereotype plates, electrotypes plates, and plates of other materials, engraved or lithographed, for printing, twenty-five per centum ad valorem."

"176. Copper in rolled plates, called braziers' copper, sheets, * * * two and one-half cents per pound. * * *"

The article in question, if it had been engraved, would undoubtedly be classifiable under paragraph 166. Copper in rolled plates or sheets would seem to have been provided for by Congress in paragraph 176. If the collector and the Board of General Appraisers were right in their reasoning, they would seem to be charging Congress with the intention of classifying this article at a 45 per cent. rate before it is engraved and at a 25 per cent. rate after engraving. If the courts accepted such an interpretation, the importer would be apt to have his plates engraved on the other side of the water, to the detriment of the American engraver, as well as the finisher. I think the goods at issue ought to be classified under paragraph 176.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. LA FETRA (two cases). SAME v. PASSAVANT & CO.

SAME v. TREFOUSSE, GOGUENHEIM & CO.

(Circuit Court, S. D. New York. May 19, 1909.)

Nos. 5,287-5,289, 5,295.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—LEATHER GLOVES—"SINGLE STRANDS OR CORDS."

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 445, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1677), relating to gloves stitched with more than "three single strands or cords," does not include gloves having but three points each, each point having three distinct rows of stitching, though the stitching shows nine chains of embroidery on the outside of the backs of the gloves and nine single rows of stitching on the inside.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

One of the decisions below is reported as G. A. 6,757 (T. D. 28,-966). The property in controversy consists of embroidered gloves, which are described as follows by the board:

"The style of embroidery in issue is illustrated by Exhibits A, B, and C, which show three points each; each point having three distinct rows of stitching. Such stitching shows nine easily distinguishable chains of embroidery on the outside of the backs of the gloves, and nine single rows of stitching on the inside of the backs thereof."

Addison S. Pratt, Asst. U. S. Atty.

Brooks & Brooks (Frederick W. Brooks, Jr., of counsel), for importers.

PLATT, District Judge. Gloves exactly like those covered by these protests have been passed upon by this court in *Trefousse et al. v. United States* (C. C.) 144 Fed. 708, T. D. 27,023, and were found not to be subject to the cumulative duty of 40 cents per dozen pairs provided for in the latter part of paragraph 445 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 193, [U. S. Comp. St. 1901, p. 1677]). That decision should stand unless the government has succeeded in showing that such gloves as these were uniformly, commonly, and generally known in the trade of the country as being "stitched or embroidered with more than three single strands or cords." The government's own witness, Bolles, who appears to have been competent to testify, says very plainly, and repeats it again and again, that in the trade and commerce of this country prior to 1897 these goods would have been known as "three-strand embroidered gloves." The other witnesses for the government are of more or less competency and have all kinds of ideas about the matter. I am bound to say, after a careful examination of the record, that the government has not sustained the contention upon which it embarked. This being so, the former decision, which seems to have been based upon a common-sense interpretation of the latter portion of paragraph 445, ought to prevail.

The decision of the board is affirmed.

DAVIES, TURNER & CO. v. UNITED STATES.

(Circuit Court, D. Massachusetts. July 7, 1909.)

No. 556 (2,053).

CUSTOMS DUTIES (§ 36*) — CLASSIFICATION — "PRINTING PAPER SUITABLE FOR BOOKS AND NEWSPAPERS"—"HANDMADE PAPER."

Handmade paper suitable for printing books and newspapers is dutiable as "printing paper * * * suitable for books and newspapers," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1671), rather than as "handmade * * * paper," under par. 401, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1672).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn and Searle & Pillsbury (Albert H. Washburn, of counsel), for importers.

William H. Garland, Asst. U. S. Atty.

LOWELL, Circuit Judge. This is an appeal from the decision of the Board of General Appraisers holding a certain importation of paper dutiable under paragraph 401 of the Dingley act (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672]), rather than under paragraph 396, as contended by the importers. The paragraphs are as follows:

"396. Printing paper, unsized, sized or glued, suitable for books and newspapers, valued at not above two cents per pound, three-tenths of one cent per pound; valued above two cents and not above two and one-half cents per pound, four-tenths of one cent per pound; valued above two and one-half cents per pound and not above three cents per pound, five-tenths of one cent per pound; valued above three cents and not above four cents per pound, six-tenths of one cent per pound; valued above four cents and not above five cents per pound, eight-tenths of one cent per pound; valued above five cents per pound, fifteen per centum ad valorem. * * *

"401. Writing, letter, note, handmade, drawing, ledger, bond, record, tablet and typewriter paper, weighing not less than ten pounds and not more than fifteen pounds to the ream, two cents per pound and ten per centum ad valorem; weighing more than fifteen pounds to the ream, three and one-half cents per pound and fifteen per centum ad valorem; but if any such paper is ruled, bordered, embossed, printed or decorated in any manner, it shall pay ten per centum ad valorem in addition to the foregoing rates: Provided, that in computing the duty on such paper every one hundred and eighty thousand square inches shall be taken to be a ream."

The importation was handmade printing paper, suitable for books and newspapers. It was thus within the terms of both paragraphs. Both parties agree that an importation of this sort was held dutiable under paragraph 396 by Judge Wheeler in *Miller v. United States* (C. C.) 128 Fed. 469. Judge Wheeler's decision was affirmed by the Circuit Court of Appeals for the Second Circuit without an opinion in 135 Fed. 349, 68 C. C. A. 131. The United States contends that the latter court has, in effect, overruled the *Miller* Case in *United States v. Benneche*, 153 Fed. 861, 83 C. C. A. 43, and *United States v. Seyd*, 158 Fed. 408, 85 C. C. A. 518.

But in the *Benneche* Case, the importation was "handmade India transfer paper imported from China, * * * used for making lithographic transfers, and is sold to dealers in lithographic supplies." Certainly it was not printing paper suitable for books and newspapers, and in the *Benneche* Case the question was not between paragraphs 396 and 401, but between 401 and 402. The importation was correctly described under 401. Therefore it did not fall into the catch-all of paragraph 402. In the opinions of Judge Wheeler and Judge Lacombe disapproval was expressed of a dictum in the opinion of the former in the *Miller* Case; but Judge Wheeler implied that he still held by the decision in the *Miller* Case, and Judge Lacombe implied nothing to the contrary. The *Benneche* Case did not overrule the *Miller* Case.

In the *Seyd* Case the importation was of handmade surface-coated

paper. As handmade paper was specifically provided for in paragraph 401, the importation did not fall into the minor catch-all of paragraph 398, "surface-coated papers not specially provided for in this act." So far as I can perceive, this decision had nothing to do with the Miller Case, except that disapproval of the unnecessary dictum contained therein was reiterated.

It follows that, in a decision not overruled, the Circuit Court of Appeals for the Second Circuit has held the importation here in question to be dutiable under paragraph 396. Further discussion is unnecessary in the case at bar. I may add that I find nothing in the Miller Case which leads me to believe it intrinsically erroneous.

Judgment of Board of General Appraisers to be reversed.

UNITED STATES v. TIFFANY & CO.

(Circuit Court, S. D. New York. May 14, 1909.)

No. 5,454.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—DRILLED PEARLS—INCOMPLETE NECKLACE—"JEWELRY"—"PEARLS IN THEIR NATURAL STATE."

Drilled pearls, which had been assembled and matched abroad and were ordered to be made into a necklace in New York, but had never been strung as a necklace, except temporarily, for purposes of display, are not "jewelry" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), but are dutiable either directly or by similitude as "pearls in their natural state," under paragraph 436, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 4, pp. 3811, 3812; vol. 8, p. 7694.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,864 (T. D. 29,542), reversed the assessment of duty by the collector of customs at the port of New York. The opinion filed by the Board reads as follows:

SHARRETT, General Appraiser. The protestants in this case, Messrs. Tiffany & Co., imported into the United States 59 pearls, valued at \$16,244.47, divided into four packages, containing, respectively, 13, 21, 15, and 10 pearls. These pearls were all loose and all drilled. The appraiser returned them as "pearls," with the advisory rate of 10 per cent. ad valorem. The collector, however, disregarded the appraiser's report and made the following return on the invoice: "Classified as jewelry, dutiable at 60 per cent. ad valorem by similitude under section 7, Act July 24, 1897, by order of department."

It appears from the testimony adduced at the several hearings in the case that Mr. M. Guggenheim, the ultimate purchaser of these pearls, visited the Paris establishment of Tiffany & Co. for the purpose of purchasing a necklace for his wife; but, finding nothing suitable in stock, he requested the salesman to get a number of pearls together to make the desired necklace. Mr. Guggenheim visited Tiffany & Co.'s establishment daily for probably a week, and inspected the loose drilled pearls as they were procured. At the expiration of that time the assortment was completed, and a final sketch made of the necklace as it would appear when finished. Then an order was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

given for a necklace to be made by Tiffany at New York from the pearls selected, at a cost not exceeding \$25,000. These loose drilled pearls may have been and probably were temporarily strung in the Paris establishment one or more times, to show how the string of pearls would appear as a necklace; but at no time were the pearls made into a completed necklace before importation. Nor were they even worn abroad, as far as the testimony discloses.

The relevant facts in the case at bar are substantially the same as those found by the Board in the *Bernard Citroen Case*. G. A. 6,617 (T. D. 28,246). Evidence taken before a referee, for the court, subsequently to the Board's decision, however, showed that the Citroen pearls had been made into a necklace in Paris and there worn on several occasions, after which they were removed from the string and shipped loose, in separate packages, to Mr. Leeds, the purchaser abroad, who had made a part payment thereon in Paris. The essential difference between the Citroen Case and the one here presented is that in the one the pearls were assembled in the form of a necklace and worn as such before importation, while in the other the pearls were never advanced beyond the condition of a collection of pearls for a necklace, probably temporarily strung for display. G. A. 6,617, *supra*, upon review, was reversed by the Circuit Court for the Southern District of New York; the court holding that the pearls there in question were dutiable by similitude at 60 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676). *U. S. v. Citroen (C. C.)* T. D. 29,124. The case having been appealed to the Circuit Court of Appeals, Second Circuit, that tribunal held that the pearls in question were dutiable by similitude to "pearls in their natural state," at 10 per cent. ad valorem under paragraph 436, 30 Stat. 192 (U. S. Comp. St. 1901, p. 676), reversing the lower court and affirming the Board's decision. *Citroen v. U. S. (C. C. A.)* 166 Fed. 693, T. D. 29,502.

The opinion of the appellate court in the Citroen Case, *supra*, conclusively shows that the pearls now in question are dutiable at 10 per cent. ad valorem under paragraph 436, either directly or by similitude. The protest now before us is therefore sustained, and the collector's decision in assessing duty on the merchandise at 60 per cent. ad valorem under paragraph 434 is reversed.

D. Frank Lloyd, Asst. U. S. Atty.
Arthur M. King, for importers.

PLATT, District Judge. Decision affirmed, on the opinion of the Board.

SIMPSON-CRAWFORD CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 22, 1909.)

No. 5,115.

1. CUSTOMS DUTIES (§ 35*)—CLASSIFICATION—ARTICLES OF SILK AND RUBBER.

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), relating to articles of silk, or in chief value of silk, with a proviso that "the articles provided for in this paragraph. * * * when composed in part of india rubber, shall be subject to the same duty," *held*, that the proviso does not cover articles not in chief value of silk.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 35.*]

2. CUSTOMS DUTIES (§ 17*)—SIGNIFICANT COMPONENT.

Metal, consisting of steel-point ornamentation and of buckles, was the component of chief value in certain belts, and the buckles were an essential part of the construction of the articles. *Held*, that the metal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could not be considered as immaterial and incidental to the belts, but must be considered in determining the tariff classification of the goods.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 13; Dec. Dig. § 17.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, reported as G. A. 6,675 (T. D. 28,480), affirmed the assessment of duty by the collector of customs at the port of New York. The nature of the questions in the case appears from the following statement in the Board's opinion of the character of the goods and the tariff provisions that are involved:

HOWELL, General Appraiser. The merchandise in question consists of silk elastic belts, with fancy metal buckles, and more or less elaborately ornamented with steel points or studding. The webbing from which the belts are made is composed of silk, cotton, and india rubber, silk being the component material of chief value; but in the completed belts metal is the component material of chief value, as the value of the steel points or studding and the buckles is greater than the value of any other single component material. The articles were assessed with duty at the rate of 60 per cent. ad valorem under Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), the pertinent provision of which is as follows: "Articles of wearing apparel of every description, * * * made of silk, or of which silk is the component material of chief value, not specially provided for in this act, * * * sixty per centum ad valorem: Provided, that any wearing apparel or other articles provided for in this paragraph (except gloves), when composed in part of india rubber, shall be subject to a duty of sixty per centum ad valorem." The importers contend that, inasmuch as metal is the component material of chief value in the belts, they are excluded from paragraph 390, and are properly dutiable at 45 per cent. ad valorem under the provision in paragraph 193 for "articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, * * * or other metal."

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The Board has found as a fact that the articles in question are completed belts and that metal is the component material of chief value. It is only as a belt that they can be considered as wearing apparel. So that to be wearing apparel at all the buckle is an essential part of the entity. The Board seems to think that the buckles are as immaterial and incidental to the belt as the screws on a door are to the door. But, on the contrary, the belt is not a belt without the buckle. Take away the buckle, and you have only a piece of belting, which is provided for eo nomine in paragraph 389. The reasoning of the Circuit Court of Appeals in *Horrox v. United States* (C. C. A.) 167 Fed. 526, T. D. 29,505, and *Rheims Company v. United States*, 160 Fed. 925, 88 C. C. A. 107, T. D. 28,783, seems to be absolutely decisive of the issue in the case at bar.

The decision of the Board of General Appraisers is reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ACKERSON v. UNITED STATES.

(Circuit Court, S. D. New York. May 22, 1909.)

No. 5,362.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"STRUCTURAL SHAPES"—"FITTED FOR USE"—WINDOW SASHES.

Where steel parts have been assembled and united into complete window sashes, they have been too far advanced in manufacture to permit their inclusion within Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 125, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), relating to "structural shapes of iron or steel * * * fitted for use."

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 54; Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below (G. A. 6,810, T. D. 29,276) affirmed the assessment of duty by the collector of customs at the port of New York on an importation classified by the collector under paragraph 193, tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), as manufactures of metal. The importer's contention is set forth as follows in his assignments of error:

"Said merchandise consisting of steel window casements with the hardware attached, said merchandise should have been separated or segregated, and the steel window casements assessed at five-tenths of 1 cent per pound under paragraph 125 of said act, and the hardware attached assessed under paragraph 193 of said act."

The pertinent portion of said paragraph 125, Schedule C, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), is as follows:

"Building forms, together with all other structural shapes of iron or steel, whether plain or punched, or fitted for use, five-tenths of one cent per pound."

Hiram A. Odell, for importer.

Addison S. Pratt, Asst. U. S. Atty.

PLATT, District Judge. The articles imported were found by the Board to be "complete steel window sashes with steel sides, fitted with gun-metal stays and gun-metal handles or hinges, all fastened together." I cannot find from the record that a claim for segregation of the gun-metal attachments was made, and I understand the importer to admit that all that portion of the invoice ought to be classified under paragraph 193, tariff act of 1897. I do not consider the question of segregation important, however, because I think the merchandise imported without the attachments has been too far advanced in manufacture to permit its inclusion within the provisions of paragraph 125 of said act. The steel parts out of which the sashes have been manufactured might very well come within the description "shapes of iron or steel, punched and fitted for use"; but after they have been assembled and united into the complete window sashes which we have before us I think they should be treated as manufactured.

The decision of the Board of General Appraisers is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

G. CUCCIO DI G. & CO. v. UNITED STATES.
(Circuit Court, S. D. New York. May 21, 1909.)

No. 5,319.

1. CUSTOMS DUTIES (§ 78*)—ROTTEN FRUIT—TIME OF EXAMINATION.

An importation of lemons was not entered until six days after arrival, and was not examined until they had lain on the dock for a week. *Held* that, as much loss probably occurred by rotting during that period, the loss discovered at such examination is not a sufficient basis for determining the condition of the fruit at the time of importation.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 78.*]

2. CUSTOMS DUTIES (§ 15*)—WHEN DUTIES ATTACH.

The general principle of law is that duty attaches to imports immediately after their arrival within the limits of our ports, and while to ascertain the condition of perishable merchandise we may perhaps go beyond the date when the vessel containing the goods drops anchor, it would be going very far to go beyond the date of actual entry of the goods.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 12; Dec. Dig. § 15.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,777 (T. D. 29,094), affirmed the assessment of duty by the collector of customs at the port of New York, on the authority of *Denunzie v. U. S.* (C. C.) 164 Fed. 909.

Walden & Webster (Howard T. Walden, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The importers were successful in the protests which are grouped in Schedule B (Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632]). They failed in those contained in Schedule A. The general principle of law is that the duty attaches to the goods immediately upon their arrival within the limits of our ports. To save the importers in their contention here, we must stretch that principle, and hold that the duty does not attach until the importer has the absolute control of his goods. We may, perhaps, go beyond the date when the vessel containing the goods drops anchor; but it would be going very far to go beyond the date of actual entry of the goods.

The facts about protest 203,186 are typical of all the protests in Schedule A. The vessel arrived December 22, 1905. Entry was made December 28, 1905. Examination took place January 4, 1906. The lemons of these protests then lay upon the dock about a week after entry had been made and before examination. Much loss by rotting probably occurred during that week, and it would be a dangerous precedent to say that the loss discovered at the examination should serve as a basis for determining the condition of the fruit a week earlier. I agree with the Board that the importer has not given us sufficient evidence upon which to base the percentage of nonimportation.

The decision of the Board of General Appraisers is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

OAKES et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1909.)

No. 2,797.

1. INDIANS (§ 13*)—RIGHT TO SHARE IN TRIBAL PROPERTY.

Originally the test of the right of individual Indians to share in tribal lands and other tribal property was existing membership in the tribe; but this rule has been so broadened by Act March 3, 1875, c. 131, § 15, 18 Stat. 420 (U. S. Comp. St. 1901, p. 1419), and Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, and other acts, as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing in respect of this right as though they had maintained their tribal relations.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

2. INDIANS (§ 13*)—ACT JANUARY 14, 1889, RELATING TO CHIPPEWAS IN MINNESOTA—INTERPRETATION.

Act Jan. 14, 1889, c. 24, 25 Stat. 642, relating to the cession of part of the Chippewa reservations in Minnesota and to the allotment in severalty of the remainder, does not expressly or by necessary implication displace the saving provisions of the acts of 1875 and 1887, above named, whereby individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, are accorded the same right to share in tribal property as though they had maintained their tribal relations; nor does it render those provisions less applicable to the Chippewas in Minnesota than to other Indians.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

3. INDIANS (§ 13*)—ACT JUNE 7, 1897, RELATING TO RIGHTS OF CHILDREN OF MIXED BLOOD.

Act June 7, 1897, c. 3, 30 Stat. 62, relating to the rights of children of a white man and an Indian woman in tribal property, does not embrace the children of a mother who was living at the time of its passage and was not then recognized by the tribe as one of its members.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

4. SUIT TO ENFORCE RIGHT TO ALLOTMENT—PARTIES.

Quære: Whether in a suit against the United States under Act Feb. 6, 1901, c. 217, 31 Stat. 760, to enforce a right to an allotment of specified land, which has been allotted to another Indian, a decree displacing or annulling the existing allotment lawfully can be rendered without making the allottee a party and giving him an opportunity to defend.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

Harvey S. Clapp (C. B. Miller, on the brief), for appellants.
Charles C. Houpt, U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

VAN DEVANTER, Circuit Judge. By their suit commenced and prosecuted under Act Feb. 6, 1901, c. 217, 31 Stat. 760, the appellants asserted that they were entitled to have allotted to them in severalty, under Act Jan. 14, 1889, c. 24, 25 Stat. 642, certain specified lands in the White Earth Indian reservation in Minnesota, that their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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applications for such allotments had been unlawfully denied by the officers charged with the allotment of the lands in that reservation, and therefore that they were entitled to a decree recognizing and enforcing their rights to such allotments. Upon the final hearing the Circuit Court, being of opinion that none of the appellants came within the terms of the act of 1889, entered a decree dismissing the bill, and an appeal has brought the case here. The facts established by the proofs are as follows:

The appellants are descendants of Margaret Beaulieu, a full-blood Mississippi Chippewa, who was enrolled and recognized during all her life as a member of that tribe and was living upon the tribal reservation at White Earth at the time of her death in 1877. Jane B. Oakes, one of the appellants, is a daughter of Margaret Beaulieu, was by birth a member of the same tribe, and was enrolled and recognized as such from the time of her birth until 1849. In 1829, while she was attending a mission school, she married a Mr. Oakes, a white man, and they lived at a trading post in the Chippewa country until 1849. In that year they moved to Ft. Ripley on the Mississippi, and the next year to St. Paul, where Mr. Oakes engaged in the banking business until the time of his death in 1879. Jane B. Jones, another of the appellants, is a daughter of Mrs. Oakes, was born in the Chippewa country in 1841, and was enrolled and recognized as a member of the Mississippi Chippewa tribe until 1849, when her parents took her to Ft. Ripley and then to St. Paul. She grew to womanhood in the latter place and has been married twice, each time to a white man. Jane Andrews and Cornelia Van Etten Bent, the remaining appellants, are daughters of Mrs. Jones by her first husband. They were born and reared in St. Paul, never were enrolled or recognized as members of the tribe, and are married to white men. After the Oakes family moved to St. Paul, Mrs. Oakes and Mrs. Jones abandoned their former tribal relations, adopted the customs, habits, and manners of civilized life, and ceased to be recognized as members of the tribe. Sometimes they exchanged visits with members of the tribe; but these visits did not occur often, and were confined to relatives. The appellants were all residents of St. Paul when the act of 1889 was passed, and shortly thereafter they asserted that they were entitled to allotments thereunder. In 1894 the names of Mrs. Oakes and Mrs. Jones were placed upon a supplemental census of White Earth Mississippi Chippewas by the chairman of the commission charged with making a census and allotments under the act of 1889, and the next year their names were dropped from the census; but the circumstances in which these acts were done are not disclosed. In 1905, before applying for allotments of specific lands, Mrs. Oakes and Mrs. Jones removed to and took up their residence upon the White Earth Reservation. Whether or not Mrs. Andrews and Mrs. Bent did likewise may be left undetermined, because, if they did, it would not help them, as will be seen presently.

The White Earth reservation was set apart as a tribal reservation for the use and occupancy of the Mississippi Chippewas under the treaty of March 19, 1867 (16 Stat. 719), and was being allotted in severalty under the act of 1889 when the appellants applied for allot-

ments therein and when this suit was commenced. That act is entitled "An act for the relief and civilization of the Chippewa Indians in the state of Minnesota," and provides for obtaining a cession and relinquishment by "all the different bands or tribes of Chippewa Indians in the state of Minnesota," of all their tribal reservations in that state, excepting so much of the Red Lake reservation and of the White Earth reservation as shall be deemed necessary "to make and fill the allotments required by this and existing acts." It further provides: That the cession and relinquishment shall be deemed sufficient as to each reservation, other than the Red Lake reservation, if made and assented to in writing by a designated portion of "the band or tribe of Indians occupying and belonging to" such reservation, and shall be sufficient as to the Red Lake reservation if made and assented to in like manner by a like portion of "all the Chippewa Indians in Minnesota"; that, for the purpose of determining whether the requisite number of Indians participate in the cession and relinquishment and of making the allotments and payments mentioned in the act, an accurate census of "each tribe or band" shall be made; that as soon as the census shall be taken, and the cession and relinquishment shall be obtained and be approved by the President, "all of said Chippewa Indians in the state of Minnesota, except those on the Red Lake reservation, shall * * * be removed to and take up their residence on the White Earth reservation," and thereupon allotments in severalty shall be made to the Red Lake Indians from the unceded part of the Red Lake reservation and to "all the other of said Indians" from the lands in the unceded part of the White Earth reservation, such allotments to be made "in conformity with" the general allotment act of February 8, 1887 (24 Stat. 388, c. 119); that any of said Indians "residing on" any of said ceded reservations may, in his discretion, take his allotment on such reservation; and that all money accruing from the disposal of the ceded lands, after deducting expenses, shall be placed in the treasury of the United States to the credit of "all the Chippewa Indians in Minnesota" and be used for their benefit or paid out to them in the manner and at the times stated in the act. The cession and relinquishment so provided for were obtained in the manner prescribed and were approved by the President March 4, 1890. House Ex. Doc. No. 247 (1st Sess. 51st Cong.).

Originally, the test of the right of individual Indians to share in tribal lands, like the Chippewa reservations in Minnesota, was existing membership in the tribe, and this was true of all tribal property. The question therefore arises: Is there any provision of law which broadens this original rule in a manner which is helpful to the appellants or any of them? If not, their effort to obtain allotments from tribal lands must fail, because it is a necessary conclusion from the facts before recited that Mrs. Oakes and Mrs. Jones, although once members of the Mississippi Chippewa tribe, long since ceased to be such, and that Mrs. Andrews and Mrs. Bent, although possessing some Mississippi Chippewa blood, never were members of the tribe; and, if there be such a provision of law, it must be found elsewhere than in the act of 1889, for that act does not in itself alter the original rule in a manner which is helpful to any of the appellants, but

contains provisions which, in the absence of some provision of law to the contrary, probably would require that the allotments mentioned therein be confined to tribal Indians.

For many years the treaties and legislation relating to the Indians proceeded largely upon the theory that the welfare of both the Indians and the whites required that the former be kept in tribal communities separated from the latter, and, while that policy prevailed, effect was given to the original rule respecting the right to share in tribal property; but Congress later adopted the policy of encouraging individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life, and, as an incident to this change in policy, statutes were enacted declaring that the right to share in tribal property should not be impaired or affected by such a severance of tribal relations, whether occurring theretofore or thereafter. One of the earlier acts upon the subject was that of March 3, 1865 (13 Stat. 562, c. 127, § 4), which gave to certain chiefs, warriors, and heads of families of the Stockbridge Munsee tribe the right to become citizens of the United States, upon their dissolving all tribal relations, adopting the habits of civilized life, becoming self-supporting, and learning to read and speak the English language, and then declared that they should not be deprived thereby of the annuities to which they were or might be entitled. That act and others of its kind marked the beginning of the change and were followed by the act of March 3, 1875 (18 Stat. 420, c. 131, § 15 [U. S. Comp. St. 1901, p. 1419]), which extends the benefits of the homestead law to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon his tribal relations," and then declares that:

"Any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands and other property, the same as though he had maintained his tribal relations."

And next came Act Feb. 8, 1887, c. 119, 24 Stat. 388, which, in its sixth section, provides:

"And every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens; whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Another cognate provision is found in Act Aug. 9, 1888, c. 818, 25 Stat. 392, which declares that a tribal Indian woman "hereafter" marrying a citizen of the United States shall become thereby a citizen of the United States, with all the rights, privileges, and immunities of such a citizen, without impairing or in any way affecting her right to any tribal property or any interest therein.

These acts disclose a settled and persistent purpose on the part of Congress so to broaden the original rule respecting the right to share in tribal property as to place individual Indians who have abandoned

tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations. Not only this, but these acts, omitting that of 1865, are general and continuing in their nature, and therefore are as applicable to the Chippewas in Minnesota as to other Indians, unless the act of 1889 discloses, either expressly or by necessary implication, that Congress intended otherwise. In our opinion that act does not thus disclose such an intention. True, it speaks of the Indians concerned as "bands or tribes," provides that all, save those on the Red Lake reservation, "shall * * * be removed" to the White Earth reservation, and is entitled "An act for the relief and civilization of the Chippewa Indians in the state of Minnesota"; but the inference sought to be drawn therefrom, namely, that only tribal and uncivilized Indians are to have the benefits of the act, is materially weakened when we turn to other provisions, such as those directing that enough lands be withheld from the contemplated cession "to make and fill the allotments required by this and existing acts," and that the allotments be made "in conformity with" the act of February 8, 1887, which expressly recognizes the right of individual Indians, who have abandoned their tribal relations and have adopted the customs, habits, and manners of civilized life, to share in tribal property. An inference of such uncertain strength is not enough to overcome the general aversion to repeals by implication, especially where a settled policy in legislation is involved and no reason for disturbing it is apparent. *United States v. Gear*, 3 How. 120, 130, 11 L. Ed. 523; *Frost v. Wenie*, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 146, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States v. Greathouse*, 166 U. S. 601, 605, 17 Sup. Ct. 701, 41 L. Ed. 1130; *McChord v. Louisville, etc., Co.*, 183 U. S. 483, 500, 22 Sup. Ct. 165, 46 L. Ed. 289; *Great Northern Ry. Co. v. United States*, 84 C. C. A. 93, 109, 155 Fed. 945, 961.

We conclude that Mrs. Oakes and Mrs. Jones, who formerly were members of the tribe, are within the saving provisions of the acts of March 3, 1875, and February 8, 1887, and so are entitled to share in the allotment and distribution of the tribal property, the same as though they had maintained their tribal relations, but that Mrs. Andrews and Mrs. Bent, who never were members of the tribe, cannot derive any benefit from any of the acts mentioned; and we reach this conclusion with greater satisfaction, because it is in accord with rulings of the Secretary of the Interior in cases which are not distinguishable from this. *William Banks*, 26 Land Dec. Dep. Int. 71; *Minnie H. Sparks*, 36 Land Dec. Dep. Int. 234.

In support of the claims of Mrs. Andrews and Mrs. Bent, our attention is invited to the still later act of June 7, 1897 (30 Stat. 90, c. 3, § 1), which reads as follows:

"All children born of a marriage heretofore solemnized between a white man and an Indian woman, by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by

blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

But of this act it is enough to say that its terms are such that it does not embrace the children of a mother, such as Mrs. Jones, who was living at the time of its passage and was not then recognized by the tribe as one of its members.

As a defense to the claims of Mrs. Oakes and Mrs. Jones, it is alleged that all of the land selected by the former and a part of that selected by the latter has been "duly allotted" to other Indians; but, as this defense was not passed upon by the Circuit Court, and as the record indicates that the evidence bearing thereon is not as full and clear as it might be, we deem it the better course to leave the matter open to further consideration in the Circuit Court. And it is suggested, without indicating any conclusion thereon, that a question has arisen as to whether a decree displacing or annulling the existing allotments to other Indians lawfully can be rendered, unless the allottees be made parties and be given an opportunity to defend. *United States v. Fairbanks* (decided by this court June 3, 1909) 171 Fed. 337; *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 22 Sup. Ct. 650, 46 L. Ed. 954.

In the answer it is also alleged that part of the land selected by Mrs. Jones has been specially set apart for allotment to Indians who may be removed from the Mille Lac reservation; but no proof of any such setting apart or of any authority therefor is contained in the record, and no mention thereof is made in the government's brief, so this defense must be regarded as abandoned.

Following what has been said, the decree of the Circuit Court is affirmed in so far as it dismisses the bill as to Mrs. Andrews and Mrs. Bent, and in other respects it is reversed, with directions for further proceedings not inconsistent with the views expressed herein.

COLONIAL TRUST CO. v. MONTELLO BRICK WORKS.

(Circuit Court of Appeals, Third Circuit. August 2, 1909.)

No. 32.

CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—"DOING BUSINESS IN STATE."

A corporation organized under the laws of Delaware by residents of Pennsylvania for the purpose of owning the stock of and financing certain Pennsylvania corporations having the same officers and substantially the same stockholders and which in fact did nothing else, but maintained its office, held its directors' meetings, registered its bonds, and made the loans to the other corporations in Pennsylvania, was doing business in that state within the meaning of Act Pa. April 22, 1874 (P. L. 108), and its failure to file its statement and otherwise comply with the requirements of that act rendered its contracts made within the state void and unenforceable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 163 Fed. 621.

Richmond L. Jones, Charles Henry Jones, and John G. Johnson, for appellant.

Harry F. Kantner, for appellee.

Wellington M. Bertolet, J. Howard Reber, Arthur G. Dickson, and Duane, Morris & Heckscher, on brief of objecting creditors.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below the claim of the Colonial Trust Company, trustee for bondholders of the United States Brick Company, against the Montello Brick Works, a bankrupt, was denied. Thereupon the trust company appealed. The claim in question consisted of promissory notes given by the bankrupt company to the United States Brick Company for borrowed money, and assigned as additional security for its bonds, to the Colonial Trust Company, trustee. The United States Brick Company was a corporation of the state of Delaware, and never registered as directed by the Pennsylvania act of 22 April, 1874 (P. L. 108), which provides:

"It shall not be lawful for any corporation to do any business in this commonwealth, until it shall have filed in the office of the secretary of the commonwealth, a statement under the seal of said corporation and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein. * * * Any person or persons, agent, officer or employé of any such foreign corporation, who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

If the Delaware Company in the advance of this money and the taking of these notes was doing business in the state of Pennsylvania, the claim was rightly refused. *Delaware Co. v. Passenger Ry. Co.*, 204 Pa. 25, 53 Atl. 533; *Pittsburgh Construction Co. v. West Side Belt Ry. Co.*, 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145. We turn then to the question whether it was so doing business.

Now, it may be conceded that, if the transaction here in question consisted simply of the loan of money made in Pennsylvania by a foreign corporation to a company in business in that state, we would under *Construction Co. v. Winton*, 208 Pa. 469, 57 Atl. 955, hold it was not doing business in that state. Moreover, if the alleged doing of business by a foreign corporation in Pennsylvania consisted simply in its purchase of stock in a corporation of that state, we would under *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, also hold this did not constitute doing business within the state. And it has been contended this was all that was done in this case. Regarded from mere surface view that may be the case, but when the transaction is judged by what was intended and done by all parties, including the Delaware

Company, we think it clear the latter was doing business in the state of Pennsylvania. This requires a due appreciation of the relation between the United States Brick Company and the Montello Brick Works. The Montello Brick Company, a Pennsylvania corporation chartered December 8, 1899, owned brick plants in that state. It leased its plants to the Montello Brick Works, the present bankrupt, a Pennsylvania corporation chartered December 4, 1902. The board of directors of the two companies at that time and during the transactions here detailed consisted of the same persons. On November 18, 1904, the same persons who were interested in both the Montello companies, with a view to financing a number of brick plants in Pennsylvania, in addition to the Montello plants, joined in the organization of a holding and promoting company under the laws of Delaware, and of which the directors in the two Montello companies became directors also. This Delaware Company took over the patents of one Gery covering a process for making brick, subject to a license held by the Montello Brick Works, paying therefor its entire capital stock to Gery. This stock was distributed in part to the stockholders of the two Montello companies, a part used as a bonus to accompany a proposed bond issue of the United States Brick Company and a part retained as treasury stock. The object of the creation of the Delaware Company was to develop these patents, and this was to be done by its financing of the Montello Brick Works, which company was to operate and develop the same at its plants. The loans in question were accordingly made to that company under arrangements made prior to the organization of the Delaware Company and to effectuate which purpose it was chartered. In pursuance of these financing plans the Delaware Company on December 24, 1904, executed a deed of trust to the Colonial Trust Company as trustee, whereby it conveyed to the latter 20,000 shares, being a majority it had acquired of the capital stock of the Montello Brick Company as security for an issue of 1,000,000 of its bonds. These bonds were made payable at Reading, Pa. The United States Brick Company covenanted to pay all taxes assessed by the state of Pennsylvania upon them, covenanted it would suffer no lien or incumbrance to be placed on the pledged stock of the Montello Brick Works or dispose of it; that it would permit no increase thereof; that on default of the Montello Brick Works it would pay all taxes upon its property. The trust then provided:

"Sec. 7. United States Brick Company shall from time to time make advances of moneys to Montello Brick Works to such extent as shall be necessary to insure sufficient and proper betterments, maintenances, extensions, improvements, equipments and alterations of its respective properties, and also to such extent as shall be necessary to pay all operating expenses and fixed charges, including interest, taxes and rentals, whenever the earnings of said Montello Brick Works shall be insufficient for the purpose; and to prevent an indebtedness of the said Montello Brick Works, resulting from said advances, in such way and manner as will injure the value as collateral of the shares of stock of Montello Brick Works held under this trust agreement, United States Brick Company agrees that it will take and will assign to trustee evidences of indebtedness resulting from all such advances, from time to time as the latter shall be made, and trustee shall hold the same as collateral security for the carrying out of the covenants of this collateral indenture. There shall be no duty upon trustee to collect such indebtedness,

and it shall not in any way be responsible for its failure so to do. The trust deed shall operate to vest in trustee an equitable title in and to said indebtedness for advances as the same from time to time shall arise. Interest on the said indebtedness until default under trust deed shall be collectible by United States Brick Company and shall not be payable to the trustee. Whenever said indebtedness shall be paid to United States Brick Company, the obligations or evidences of indebtedness shall be cancelled by the trustee and returned to Montello Brick Works."

In accordance with this covenant the money here involved was advanced by the United States Brick Company to the Montello Brick Works, the notes in question given, and subsequently assigned by it to the Colonial Trust Company as trustee. The proofs show the office of the company was in Reading, Pa. All of its directors, with the exception of a formal Delaware man, were residents of Pennsylvania. Its officers all resided at Reading, and did their official acts there; its books and bank accounts were kept there; its bonds were registered at Reading, and were payable there; the money in question was paid at Reading, and the notes executed there. Out of \$300,000 of available funds the Delaware Company had about \$267,000 were thus advanced by it in Pennsylvania to the Montello Brick Works and by that company used in Pennsylvania in accordance with the wishes of the Delaware Company. It will thus appear this company was called into being to do local Pennsylvania work. It had no purpose to exercise its charter power elsewhere than in that state, and it made no effort or pretense so to do. Everything it did was a local act and in fulfillment of the local purpose for which it was created. Manifestly its sole purpose was to avoid the requirements of the Pennsylvania laws in the issue of bonds and doing the financing necessary to enable the local company to carry on the local operations. Indeed, it is clear it was a mere extra-Pennsylvania agency called into being and locally utilized by a local company for the purpose of doing local work. On the part of the Montello Brick Works, while it was a case of *facit per alium*, it was none the less a case of *facit per se*. And viewed from the latter standpoint it is clear that all its operations were, as they were at all times intended they should be, a doing of business in Pennsylvania. Judged from the intent of all parties concerned and finding such intent emphasized by every proven act, we are clear the undoubted purpose of every one concerned was to have this company do business in Pennsylvania. Whatever its powers were to act elsewhere is quite apart from the present inquiry as to what it actually did in Pennsylvania. It is to be judged by the things it has done here, and not by those it has left undone elsewhere. While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation (*Monongahela Co. v. Pittsburgh Co.*, 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685), yet it is equally well settled courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms (*Penna. Knitting Mills v. Bibb Co.*, 12 Pa. Super. Ct. 346; *Montgomery Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; *Kendall v. Klappenthal*, 202 Pa. 596, 52 Atl. 92; *Gas Co. v. West*,

50 Iowa, 16). Indeed, we think the entire controversy was in terse terms summarized by the court below in saying:

"The brick company has an omnibus charter, under which it can do many things, but for present purposes it is enough to note that it was undoubtedly organized for doing just what it proceeded to do, namely, to acquire the stock of the bankrupt and to lend it money to carry on the operation of brick making under certain patents. This in a few words is the essential fact of the present controversy, and to state it is equivalent to drawing the conclusion."

Finding no error in the ruling of the court below, its order respecting the appellant's claim must be affirmed, and the present appeal dismissed.

LANCASTER ELECTRIC LIGHT, HEAT & POWER CO. v. PLATT
IRON WORKS CO.

(Circuit Court of Appeals, Third Circuit. June 8, 1909.)

No. 33.

SALES (§ 176*)—CONSTRUCTION OF CONTRACT—WAIVER OF DELAY BY "ACCEPTANCE" OF MACHINERY.

A contract to furnish certain machinery, to be subject to tests after its shipment and installation to determine whether it met the warranties on which it was sold before it was to be fully paid for, which installation and tests would necessarily require a considerable time, provided that "the acceptance of the machinery upon arrival shall constitute a waiver of all damages for delays." *Held* that, construing the entire contract together, the word "acceptance" in such provision was used in the sense only of "receipt," meaning that the voluntary receipt of the machinery on its shipment, notwithstanding delays, should be a waiver of the same, although still subject to the tests as to its efficiency and final acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 436; Dec. Dig. § 176.*

For other definitions, see Words and Phrases, vol. 1, pp. 53-57.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson, for plaintiff in error.

R. Stuart Smith, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The Platt Iron Works Company, the defendant in error, hereinafter referred to as the plaintiff, brought an action of assumpsit in the Circuit Court of the United States for the Eastern District of Pennsylvania against the Lancaster Electric Light, Heat and Power Company, the plaintiff in error, hereinafter referred to as the defendant, and recovered judgment against the defendant for \$6,541.68 damages, beside costs. For the reversal of this judgment this writ of error is prosecuted. It appears from the evidence and is not disputed that the plaintiff in 1907 was a manufacturer, among other things, of turbine machinery for use in connection with water power at Dayton, Ohio; that the defendant in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same year was engaged in the manufacture of electricity by water power at Lancaster, Pennsylvania; and that on or about February 20, 1907, the plaintiff and defendant entered into a written contract as follows:

"Proposal-Contract
Victor Turbine Machinery
Made by
The Platt Iron Works Company,
Dayton, Ohio, U. S. A.

Dayton, O., February 20, 1907.

The Platt Iron Works Company, hereinafter called the 'Company,' proposes to furnish to The Lancaster Electric Light, Heat & Power Company, Lancaster, Penna., hereinafter called the 'Purchaser,' the following Victor Turbine Machinery and Apparatus, according to the accompanying specifications and the following express terms and conditions:

Apparatus:

Two pairs of 42" Turbines, quarter turn discharge, draft-tubes, bulk-head thimbles, complete with Draw Rod Gate work, shaft extension, face couplings and sleeve jaw couplings, with Generator type bearings; also shaft extensions one 21" Vertical R. H. Wheel, with shaft extension and draft-tube.

Shipment:

One pair of the 42" wheels specified above with connecting shaft and coupling, including the Exciter wheel complete will be shipped on June 1st. The balance of the shipment will go forward 30 days thereafter. The half of couplings that go on Generator shafts bit up, and will be rough board, then shipped to Makers of the Generators.

Prices & Terms:

The 'Company' will furnish the above specified apparatus to the 'Purchaser' for the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars F. O. B. cars at Lancaster, Penna., to be paid in funds at par in Dayton, Ohio, in the following manner, that is to say: 33½ per cent. on receipt of bill of lading; 33½ per cent. thirty days from date of bill of lading; and balance when the machinery is put in operation and tested as per guarantee. In any event, the time of last payment is not to exceed Four Months from date of bill of lading.

Erecting Superintendent:

The 'Company' will supply a competent man to superintend the erection of said machinery for the sum of \$5.00 per day, plus expenses from date of his leaving the factory until his return; and in case the services of said man are not desired by the 'Purchaser,' the 'Company' shall not be held responsible for faulty or defective erection of this apparatus, or trouble arising therefrom.

General Guarantee:

The machinery covered by this agreement, is guaranteed to operate and fill the requirements of this agreement, when used and operated under the conditions specified herein. The machinery is further guaranteed against mechanical defects due either to faulty design or workmanship, and the 'Company' will furnish without charge, any part or parts thereof, which may prove defective under such conditions, during a period of six months from date of putting machinery in operation.

Guarantee:

Each pair of 42" Wheels, when working under 15' effective head, to develop 462 HP. at Generator Coupling, less 15% for friction on bearings, running at 125 revolutions, using the water at 80% efficiency, and that the 21" wheel will develop 57 Horsepower under the same head, running between 240 and 260 revolutions, with the same efficiency.

Specifications.

Each pair of 42" Turbines will be mounted on Horizontal Shafts, and each wheel will discharge into a separate quarter turn, 6' 6" in diameter. The wheel shafts will be made of the best mild forged steel, 7½" in diameter, coupled between the necks of quarter-turn, by means of forged flange coupling,

and this section of shaft, carrying the load of the backwheel, to be 6 $\frac{3}{8}$ " in diameter, the head end extended through bulk-head and cover plate a distance of 6' 3 $\frac{1}{2}$ " from face of wall to center of wheel coupling, and the distance from the face of the same wall to the center of Generator is 29' 4 $\frac{1}{2}$ ". The two extensions of shaft, connecting the water wheel coupling to the Generator coupling, will also be made of mild forged steel, 7 $\frac{7}{8}$ " in diameter, and made the necessary length, provided with one extra heavy face coupling, to connect to Generator for each side. The two shaft extensions will also be provided with a sleeve jaw cut-off coupling, for the means of disconnecting either pair of wheels, as desired. Said couplings will be operated by a lever, which will be attached to one of the stands; also said shafts will be supported by two Generator type bearings, having a base of 5' long, and a vertical height of 60" from the center of the shaft to the bottom of base. Each pair of wheels will be provided with steel thimble, made out of quarter-inch plate 7' in diameter at the front end enlarged to 8' diameter where passing through the wall; the wall being 40" thick, provided with one steel angle; also one cast iron angle, and riveted to same, and bulk-head cover plate bolted on to the cast iron angle. In connection with this bulk-head cover plate the dome of each 42" wheel at the head end, will be connected by a flange to said plate, thereby, removing the water pressure from the stuffing boxes. On each cover plate will be mounted all gate mechanism, which will be of our patent Draw Rod Type, removing all gears out of the water. All Gears and Pinions, for operating said gates, will be cut gears. The cross shaft on each pair of wheels, for connecting governor, will be extended 8" outside of bearing. One end keyseated only, and the other end provided with a hand-wheel. The draw rods where passing through bearings will be covered with brass; also all bushings connected with same will be of brass. All adjusting screws used in connecting with adjusting boxes, that are under the water, will also be made of brass. At the head end of each pair of wheels, there will be provided an end thrust bearing of the Marine type. Said bearing will consist of a sleeve slipped on over the shaft, provided with necessary rings or collars, and is also to act as end thrust bearing and shaft bearing, having a water jacket and base under same to conform in design to the Generator stands. The distance from tail water to the center of the shaft will be 6' 4" and the vertical distance from center of the shaft to head water, 9' 8". The length of the draft-tube will be 8' 4" from the center of wheel shaft.

The 21" Right Hand Vertical Turbine will have a draft-tube extended the necessary length, provided with face coupling and the vertical shaft extended the necessary distance for making connection to the Exciter; also the gate shaft on said wheel will be extended through the wall, and provided with stuffing box; all stuffing boxes throughout, glands of same being made of brass, and all bearings that are babbit lined, the babbit will be first poured into the box and then afterwards hammered well, then bored out and scraped.

All the above to be in strict accordance with our detail drawing 17101 and General outline 17102. We also agree to furnish drawings of the 15" 'I' beams, showing the necessary openings for the draft tubes; said beams we do not furnish, but will be furnished by the 'Purchaser' and put in position, ready to receive the Turbines on arrival.

It is further understood and agreed that all previous communications, either verbal or written, with reference to the subject matter of this agreement, are hereby withdrawn and annulled, and this contract shall be modified only by a duly approved supplementary agreement signed by both parties.

The 'Company' shall not be held liable for delays caused by fires, strikes, riots, or by any other causes beyond its control, and it is agreed that the time of shipment herein specified shall be contingent upon the furnishing of plans, drawings or other apparatus to be furnished to the 'Company' and to operate in conjunction with the apparatus herein specified and that the acceptance of the machinery upon arrival shall constitute a waiver of all damages for delays.

The foregoing proposal, made in duplicate, is subject to the approval of an executive officer of the 'Company' and shall not be binding upon the 'Com-

pany' until so approved, nor, unless accepted by the 'Purchaser' within ten days from date hereof.

Signed in duplicate.

The Platt Iron Works Company,

Per T. R. Van Degrift.

Approved by

R. S. Fowler, Asst. Secty. & Treas.

Accepted by Purchaser:

Lancaster E. L. Ht. & Pr. Co.,

Edw. D. Ruth, Supt.

Approved by

Lancaster Electric Light, Heat & Power Co.,

G. Searing Wilson, President."

By the foregoing contract the plaintiff undertook to furnish and sell to the defendant two pairs of 42" turbine wheels with shafts and coupling as therein described for the sum of \$9,900 f. o. b. cars at Lancaster, one pair of wheels with shaft and coupling to be shipped on or before June 1, 1907, and the other pair of wheels with shaft and coupling to be forwarded within thirty days thereafter, and the purchase price to be paid as follows: 33 $\frac{1}{3}$ per cent. on receipt of bill of lading; 33 $\frac{1}{3}$ per cent. at the expiration of thirty days from date of bill of lading, and the balance "when the machinery is put in operation and tested as per guarantee." It is not altogether clear, in view of the fact that the total purchase price of \$9,900 was not apportioned between the two shipments provided for, at what times the partial payments were to be made on account of those shipments respectively. Nor is it necessary under the circumstances disclosed in the case to decide this point. It safely may be concluded that under the contract 33 $\frac{1}{3}$ per cent., or \$3,300 of the purchase price was to become due not later than the date of the receipt of the bill of lading for the second shipment; the additional sum of \$3,300 not later than the time of expiration of thirty days from the date of the second shipment; and the balance of the total purchase price immediately after the operation and testing of the machinery for the purpose of ascertaining its conformity or non-conformity to the requirements of the "guarantee"; the time limited for testing and the making of the last payment not to exceed four months "from date of bill of lading," which certainly cannot be later than the date of the bill of lading for the second shipment. It appears from the record that no portion of the machinery contracted for was shipped by June 1, 1907, or at or before the time of the expiration of thirty days thereafter, or, indeed, until July 29, 1907, when the plaintiff commenced making shipments of various parts of the machinery. The shipment of the first pair of turbine wheels with their shafting and coupling was not completed until August 19, 1907, nor was the machinery so shipped received by the defendant until seven days later. The shipment of the second set of wheels, shafting and coupling was not completed until on or about September 5, 1907. There was testimony to the effect that the defendant in anticipation of the receipt within the stipulated time of the machinery contracted for had torn out certain machinery of its own and had seasonably made preparations for the installation of the machinery to be furnished by the plaintiff. It further appears that prior to the bringing of suit the plaintiff had received from the defendant \$3,300 on account of the total purchase price and that the plaintiff sued for the unpaid balance.

At the trial the defendant, for the purpose of establishing a counterclaim against the plaintiff for damages for delay in shipping the machinery contracted for, made two offers of proof which were denied by the court below. The denial of these offers furnishes the ground for two of the assignments of error. The third and remaining assignment of error is based upon a portion of the charge delivered to the jury. The several assignments of error are as follows:

"1. The court erred in refusing defendant's offer of proof, which was as follows:

'Mr. Johnson: I offer to prove that the works of the defendant are works engaged exclusively in the manufacture of electric power; that they had a contract for the supply of kilowatt power not to exceed 750 kilowatts per hour to a responsible company, the Edison Electric Company, which wanted the whole of that power; that their old works were insufficient to furnish that power and that they desired, therefore, to have these new wheels for the supply of the 750 kilowatts power per hour; that it was necessary that the wheels be installed before October, owing to the fact that high water would then prevent their installation until the succeeding year; that all these facts, including the fact of the contract with the Edison Company and that it would affect the kilowatt power, were explained to the plaintiff company before the contract was made, and it was told the plaintiff company that if the wheels were not furnished within the time, they would be unable to be installed until the following year, and that the defendant would lose the ability to furnish this kilowatt power; that the loss to the defendant company by reason of the delivery of the wheels too late to enable the installation at the time, extending the installation into the next year before it could be made, was the loss on the second set of wheels alone of over seventy-five hundred dollars, being the loss of the net amount which would have been received from the kilowatt power which they had contracted for and which they were unable to furnish. This in connection with the testimony already in the case in the correspondence and as to what was done when the machinery was received; and also to prove that when the shipments came they came in detached pieces; that the second set of wheels was never put together, and that the plaintiff was notified that the defendant would not accept these machines until there had been a test to show that the machines were within the power, and that the test could not be made until the spring of 1908.'"

"2. The court erred in refusing defendant's further offer of testimony. Said offer and the ruling of the court thereon were as follows:

'Mr. Johnson: Then I offer so much of the testimony as shows the explanation to the parties before the contract was entered into, of the condition of affairs and the necessity of time, of the contract which had been made, and the necessity to perform it, and of the loss which would occur in case the delivery was not made in time.'"

"3. The learned judge erred in charging the jury as follows:

'Perhaps I may say at this point, with regard to both machines, that although the jury has heard something in the case with regard to the possible loss of profits upon the part of the purchaser, owing to the delay in furnishing the machines beyond the time fixed in the contract, and beyond the time fixed by the extension of the contract. I instruct you that you are to pay no attention to that matter at all; that the defendant is not entitled to set up a defense based upon asserted loss of profits. That is all I need say, because I am sure the jury will accept the instructions of the court on that subject and lay that matter entirely aside, even if you have it in your minds at all.'

To said charge defendant's exception was as follows:

'Defendant's counsel excepted to so much of the charge of the learned judge as instructed the jury that they could not take into consideration any damages for delay.'"

It is admitted that the verdict for the plaintiff negated all charge of breach of warranty; and the substantial question before us is whether the defendant had a right to introduce evidence, as proposed

in the rejected offers of proof referred to in the first and second assignments of error, to establish a counter-claim against the plaintiff for damages for delay in shipping the machinery to the former. The portion of the charge to the jury referred to in the third assignment, in so far as excepted to by the defendant, also relates to the subject of damages for the defendant for delay.

The plaintiff contests on three grounds the asserted right of the defendant to establish a claim to such damages: first, that the contract expressly provides that "the acceptance of the machinery upon arrival shall constitute a waiver of all damages for delays"; secondly, that the amount of such profits as the defendant might have made under its alleged contract with the Edison Electric Illuminating Company, even aside from the above quoted provision of the contract, was not recoverable; and, thirdly, that no sufficient notice of such alleged counter-claim had been given by the defendant to the plaintiff. We shall consider at this point the first ground. What the parties to the contract intended by the words "the acceptance of the machinery upon arrival" must control the construction to be placed by this court upon those words, and in order to ascertain the intent of the parties in their use they must be read in the light of other provisions in the contract. Considered in and by themselves they doubtless would import a voluntary acceptance of the machinery upon arrival as satisfactory or in substantial conformity to the contractual requirements. But on an examination of the contract as a whole we are unable to attach to the word "acceptance" its usual meaning. The elementary rule, applicable as well to contracts as to statutes, that the various provisions should, as far as may be reasonable, be so read as to avoid repugnancy and to give to each term its appropriate effect, to the end that the instrument may be sustained in all its parts, requires, we think, that the word "acceptance" must be treated as equivalent only to "receipt" in the sense of a voluntary receipt, in contradistinction to a rejection of the machinery upon arrival. Unless the word "acceptance" be so read an irreconcilable inconsistency will be disclosed on the face of the contract. The balance of the purchase price was not to be due until "the machinery is put in operation and tested as per guarantee," a provision qualified only by the words "in any event the time of last payment is not to exceed four months from date of bill of lading." The warranties, referred to as guarantees, contemplated that the ascertainment of the conformity or non-conformity of the machinery to their requirements might extend over a considerable period. It is provided not only that the machinery should "operate and fill the requirements of this agreement, when used and operated under the conditions specified herein," but that if there were in the machinery "mechanical defects due either to faulty design or workmanship" the plaintiff would "furnish without charge any part or parts thereof, which may prove defective under such conditions, during a period of six months from date of putting machinery in operation." These provisions are palpably of such a nature as to render an acceptance by the defendant of the machinery upon arrival within the usual signification of that term unreasonable and practically impossible. For if there should be an acceptance upon arrival the defendant thereby would

wholly waive and discharge the plaintiff from all damages for non-conformity of the machinery to the requirements of the warranties. It is evident that the word "acceptance" must not be so read as to produce such a result, no opportunity having been afforded to the defendant to test the machinery. If, on the other hand, that word be held to mean a voluntary receipt of the machinery upon its arrival, the same to be held subject to testing, as provided for in the contract, all difficulty will disappear. Such receipt of the machinery could not under the terms of the contract discharge the plaintiff from the usual consequences of its non-conformity to the warranted excellence; but it well might discharge the plaintiff from "all damages for delays" and the waiver provided for extends no farther than to such damages. This construction of the contract cannot in any wise impose hardship upon the defendant. While the defendant upon the arrival of the machinery would not be competent to pass upon its conformity or nonconformity to the warranties, it would certainly know whether delay in its arrival beyond the time stipulated for its delivery would or would not defeat in whole or in part the purpose for which it had been ordered. The defendant had an election in view of the belated delivery either to refuse to receive the machinery and hold the plaintiff liable for all damages sustained through breach of contract, or in the exercise of its judgment, having knowledge of its own needs and purposes, to receive the machinery, thereby foregoing damages for delay, but retaining a right to hold the plaintiff in damages for non-conformity to the requirements of the warranties. Unless the defendant had at the time of contracting with the plaintiff a contract with the Edison Electric Illuminating Company it could not maintain a claim against the plaintiff for loss of profits on the contract with that company, there being nothing in the contract between the plaintiff and defendant authorizing generally the recovery of profits. The defendant better than anyone else could judge whether, under the circumstances and for the protection of its interests, it would be wise or unwise to receive the machinery, notwithstanding the delay. Having received and retained it, as appears in the record, the defendant is precluded from the recovery of damages for the delay. There is nothing in the correspondence between the parties to modify or affect the force of the provision relating to waiver of damages for delay. In view of the conclusion reached it is unnecessary to consider the other two grounds of contention on the part of the plaintiff. For the above reasons the judgment below must be affirmed with costs, and it is so ordered.

PETERSBURG, N. N. & N. STEAMBOAT LINE v. NORFOLK-VIRGINIA
PEANUT CO.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1909.)

No. 853.

SHIPPING (§ 105*)—CARRIAGE OF GOODS—LOSS OR INJURY—LIEN.

The claimant owned the steamer Pokanoket, which it operated between Petersburg and Norfolk, Va. Claimant's agent at Petersburg solicited cargo and signed bills of lading; the master being a pilot, charged only with the navigation of the vessel. The agent received from libellant, at claimant's wharf in Petersburg, 275 bags of peanuts for carriage to Norfolk on the steamer, and issued a bill of lading therefor. Owing to a freshet, causing an obstruction in the river, the steamer could not reach the wharf, and the agent employed a lighter, which came into collision with an obstruction, and a part of the peanuts were lost and damaged before the lighter reached the steamer. *Held*, that the reception of the goods at the wharf was a delivery to the vessel, and that she was liable in rem for any loss recoverable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 411; Dec. Dig. § 105.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

For opinion below, see 161 Fed. 383.

Henry Bowden (Thorp & Bowden, on the brief), for appellant.

Thomas H. Willcox and B. H. Marks, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The facts in this case, which are not disputed, are thus stated in the opinion of the court below:

"The Petersburg, Newport News & Norfolk Steamboat Company were the owners and operators of the respondents' steamer, the Pokanoket, engaged in the carriage of passengers and freight upon the waters of the Appomattox and James rivers between Petersburg and Norfolk, and, having duly solicited, through George B. Townsend, general freight and passenger agent of said company and of said steamer, for the freight in question, on the 5th day of September, 1906, the 275 bags of peanuts were delivered at the wharf of said company and of said steamer in Petersburg, for shipment to Norfolk on the Pokanoket, and the bill of lading was issued therefor. On the evening of the delivery of the peanuts the steamer Pokanoket could not reach the harbor of Petersburg by reason of a freshet, which caused a sand bar to form some quarter of a mile below the city. Whereupon a lighter was engaged by the steamboat company to place the steamer's freight, including the 275 bags of peanuts, on the Pokanoket, and the general manager of the company and others of its employes were engaged in the navigation of the lighter, when it collided with an obstruction in the river, causing it to partially sink, damaging the peanuts, to recover for which this suit was instituted; the peanuts being injured to such an extent that most of them were not placed on board the Pokanoket."

A decree for the libellant in the sum of \$1,295.76 was entered. No question is made by the appeal as to the amount of the loss, and it is not denied that the steamboat company is liable for the damage suffered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and, while there are numerous assignments of error, the point involved in the argument before us is thus stated on page 3 of appellants' brief:

"Is there any maritime lien on the steamer Pokanoket, under the facts in this case, where the damage, if any, was suffered by peanuts which had never been delivered to the steamer by being placed on board, or in the custody and control of the master and crew, and without any bill of lading having been issued by the steamer therefor? Should not this proceeding have been in personam against the company, instead of in rem against the steamer? This is practically the only question involved."

The bill of lading is signed by the agent of the steamboat line, and it appears from the testimony that the master of the Pokanoket was by occupation a pilot, that his duties were confined to the navigation of the boat, that he never issued any bills of lading, and that all of that business was attended to by the agents at Petersburg. The general law as to what constitutes the delivery to the vessel is thus stated in 1 Parsons on Shipping and Admiralty, p. 183:

"The reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship for the safe carriage and delivery of the goods."

The leading case in this country on the point involved in this controversy is *The Edwin v. Naumkeag Steam Cotton Company*, 1 Cliff. 322, Fed. Cas. No. 4,301, decided by Clifford, Circuit Justice, affirming the decree of Sprague, District Judge, affirmed by the Supreme Court sub nom. *Bulkley v. Cotton Company*, 24 How. 386, 16 L. Ed. 599. In that case the master of the bark Edwin, then lying at Mobile, agreed through a ship broker to transport for the libellant 707 bales of cotton to Boston. A part of the cargo was loaded on the vessel in the city; but, as she drew too much water to pass the bar fully loaded, she went down the harbor and crossed the bar, where the residue of the cargo was taken to her in lighters. The broker through whom the freight was engaged employed a steam lighter for that purpose, and the steamer Streck was loaded with 100 bales of cotton. After she had arrived at the side of the Edwin, and before any part of the 100 bales was taken out, her boiler exploded, by which all the cotton was thrown into the water. Fourteen bales were picked up by the crew of the Edwin, a few bales were lost, and some were picked up by other parties in damaged condition, and were surveyed and sold. The master signed the bills of lading, including said 100 bales, being advised that he was bound to do so, and that if he refused his vessel would be arrested and detained. On its arrival in Boston the master delivered 607 bales and tendered 14, which the consignees refused to accept on account of their being damaged. Justice Clifford thus states the case:

"It is insisted by the libellant that the liability of the vessel is commensurate with that of the owners, and that the extent of it in regard to both must be ascertained and measured by the terms of the contract made by the master. On the part of the respondent it is insisted that the ship is not bound to the merchandise or the merchandise to the ship, until it is actually placed on board, and that the liability both of the ship and the owner, notwithstanding the terms of the contract, must be narrowed to the service actually performed by the vessel."

The case is fully considered, and the decree of the District Court in favor of the libelants was affirmed; Justice Clifford saying, in the course of his opinion:

"All the cases agree that so soon as a sufficient delivery of the goods is made to an authorized person for the purpose of transportation, in pursuance of a lawful contract, the vessel is liable. * * * As a general rule, whenever the owners are liable the ship is liable, and to such an extent has the rule been carried in some of the cases that it is said that the liability of the ship, and the responsibility of the owners are convertible terms."

Mr. Justice Nelson delivered the opinion of the Supreme Court, affirming the decree below, and says:

"The delivery of the 100 bales to the lighterman was the delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in the execution of the contract, the same, in the judgment of the law, as if the 100 bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the bark for this portion of the service. * * * The argument urged against this lien of the shipper seems to go the length of maintaining that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and is applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo; but this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability."

The cargo of peanuts in this case was delivered to the owners of the steamboat at the place designated by them for the reception of freight, and the bill of lading was signed by the agent of the owners, in accordance with the custom; for it appears from the testimony that the master of the steamboat never issued bills of lading. The contract of affreightment was for the employment of the steamboat; and the use of the lighter was subsidiary to and in execution of that contract. The shipper fully parted with the possession of his goods when he delivered them at the wharf, and had no longer any control or right of control over them, and the employment of the lighter to transport them from the wharf to the steamboat in no sense emanated from the shipper. The president of the Norfolk-Virginia Peanut Company testifies that:

"Either on the 5th, 6th, or 7th of September the captain, or some one down at the boat line, phoned me that they had 275 bags of Spanish peanuts, * * * and they sent the freight bill for 275 bags, which I paid."

Only 138 bags were accepted. On November 9th the general freight agent of the line acknowledged the receipt of the claim for shortage, and said that it would probably be paid before or about the 12th of that month.

In *The Oregon*, Fed. Cas. No. 10,553, the steamship was engaged in carrying passengers and freight between Portland and San Francisco. On her arrival at Portland, being unable to get up the river on account of the ice, the resident agent of the steamship employed a river steamboat, the *Cascades*, to transport passengers and freight to the steamship. The libelant shipped aboard the *Cascades* certain packages of merchandise, taking a receipt from the purser of the river boat. No receipt was given by the *Oregon* to the agent of the libelant, but one

receipt was given to the Cascades for the whole number of packages, according to the freight list of the latter. One of the packages was lost, and for the claimant it was insisted that it was lost before it came to the Oregon. The court held the Oregon responsible, saying that:

"The receipt of the goods by the Cascades was the receipt of them by the vessel, so as to bind her for their safe carriage and timely delivery. McCracken was the agent of the owners, and, having chartered the Cascades as a lighter to take the freight to and from the Oregon, that in legal effect that was the same as the master's sending his boat for the goods. In that respect the owner, represented by McCracken, had as much authority in the premises as the master."

—citing Conklin on Admiralty, 151:

"The manner of taking the goods on board and the commencement of the master's duty in this respect depend on the custom of the particular place. More or less is done by the wharfingers or lightermen, according to the usage. If the master receive the goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt."

In *Insurance Company v. North German Lloyd* (D. C.) 106 Fed. 973, a lighter was sent by the steamship company to the elevator to bring the corn across the harbor to the steamship, where she was lying at her dock. On the way one of the lighters was upset, and her load was lost. The answer of the steamship company averred that it employed lighters owned by others to convey grain from elevators to its ships when it was not convenient to load directly into the ship itself, and that it had agreed to transport the corn from Baltimore to Bremen; that the corn was not received on board the steamship, but was lost by the upsetting of the lighter, through no default or negligence of the steamship or its agents or servants. Judge Morris held the company liable, saying:

"Since the case of *Bulkley v. Cotton Company*, 24 How. 386, 16 L. Ed. 599, it has been conceded under circumstances such as are presented in this case—that is to say, where the contract is to carry goods from one port to another, and they cannot be loaded immediately on the vessel which is preparing for the voyage, and lighters are sent by the vessel to bring the goods from the warehouse to the ship—that for the purpose of that service the lighter is the substitute of the ship, and that the goods are in fact therefore delivered into the custody and care of the ship and her owners from the time that they are placed on the lighter, and for the purpose of this case I shall take it that the bill of lading, which was intended to be the contract for the carriage, was applicable to these goods, and determined the rights of the parties from the time that the corn was put upon the lighter."

It would serve no good purpose to multiply authorities on this point, for nothing is better settled than that if a ship enters upon the performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the contract, and may be proceeded against in rem for a nonperformance. In the very elaborate brief submitted by the appellant there are a number of citations which may appear to establish a different rule; but examination of the cases cited will show that they relate to contracts of affreightment purely executory, or are mere dicta, not decisions upon cases calling for such. The first case cited is *Vandewater v. Mills*, 19 How. 82, 15 L. Ed. 554, where the citation is:

"If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery in good order of goods never received on board."

That was a libel against the steamship *Yankee Blade* for the violation of an agreement. There was no contract of affreightment involved, the master or owners had not covenanted to convey any merchandise for the libelant, nor had he agreed to furnish them any, and, as the court says, on page 92 of 19 How. (15 L. Ed. 554):

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco. * * * It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application."

The next case cited is *The Lady Franklin*, 8 Wall. 325, 19 L. Ed. 455. In that case the bill of lading was given by mistake by one who was the agent of several vessels, all alike engaged in transporting goods, but not connected by any joint undertaking to be responsible for one another's breaches of contract. The bill of lading, through a mistake of the agent, acknowledged that certain goods had been shipped by the *Lady Franklin*, when in fact the goods had been shipped on another vessel, and the only question was whether the bill of lading could be explained by oral testimony, and the court held that, being a receipt as well as a contract, it may in that regard be so explained, especially when it was used as the foundation of a suit between the original parties; the case not being embarrassed by any question of a bona fide purchase on the strength of the bill of lading.

The next case cited is *The Keokuk*, 9 Wall. 519, 19 L. Ed. 744. There one Robson, a shipper at Winona, took a barge belonging to the packet company, the owners of the steamer *Keokuk*, without asking permission of the master of the *Keokuk*, or informing him or any other person of his intention to load her, took her to the elevator near by with his own men, and loaded her with wheat to be shipped to La Crosse. The *Keokuk* arrived at Winona after dark of a stormy night. Robson's bookkeeper went to the second clerk of the *Keokuk*, in the dark, in the storm, and handed him two papers, saying, "Here are the bills of that barge." There was no explanation of what the bills were. The clerk did not sign for them, and no receipts were asked. The barge was not watched by Robson, and in the morning it was found sunk at the dock, where he had left it. The court says:

"Neither the master nor any person on the steamer or in the employment of the company had notice that he had taken the barge and loaded it with grain, or that he contemplated doing so. If it be conceded the course of business between the two parties justified him in taking possession of the barge and loading it without the direct permission of the master, yet it falls far short of showing that the barge, when loaded, was considered in the custody of the steamer, without notice to any of her officers. * * * The case of *Bulkley v. Naumkeag Cotton Company* is cited in opposition to the views here presented, but it is not applicable. There the goods were delivered to a lighter in the control of the ship. Here the shipper took control of the barge and did not deliver either barge or cargo to the steamer."

The *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341, is the next case cited. In that case one Holmes, who had a special

ownership in the schooner, had induced the master to sign the bills of lading, by fraud and imposition, for flour which was not shipped; the pretended flour being consigned to the libelants as factors of Holmes & Co. The main question in the case was whether or not the general owner was estopped from proving that no property was shipped. It was held that he was not estopped, although the special owner, who was the perpetrator of the fraud, would be estopped in favor of the bona fide holder of the bill of lading.

The next case cited, *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, was also a case of fraud. A bill of lading in the usual form, signed by the general agents of the steamboat, for 150 bales of cotton at Memphis, was delivered to Dickinson & Co., who attached it to a sight draft on plaintiffs in New York, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents. The question in the case was as to the legal character and effect of the bill of lading in reference to its negotiable quality, and upon the facts it was held that Cobb & Co. were the agents of the steamboat company, with power to solicit freight and to execute bills of lading for freight shipped; that they had no authority to sell bills of lading, or to execute those instruments and go out and sell them to purchasers; and that no man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

The *Scott v. The Ira Chaffee* (D. C.) 2 Fed. 401, is also relied on by appellants. That was a libel against the Chaffee for breach of contract in the carriage of a boiler. The boiler was never put on board the tug, nor delivered to her master as master, although he received it on behalf of the schooner *Louisa*, on which it was laden. The *Louisa* was caught in the ice and detained, and the libel was for damages for detention, which was dismissed. The learned counsel for appellants says this case "squarely decides the principle of law involved." So it does, but the principle of law involved in that case has no relation whatever to this. The citation in appellants' argument is taken from the rubric, and is:

"The owner of the cargo has no lien upon the vessel for the breach of the contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master."

The following extract from the opinion more fully states the view of the learned judge:

"There is an abundance of dicta to the effect that the obligation of the cargo to the ship and of the ship to the cargo does not arise until the cargo, or some portion of it, has been laden on board, or at least legally delivered to the vessel; but no case directly in point has yet been decided by the court of last resort. Whatever be the rule with regard to contracts of affreightment which are purely executory, it must now be considered as settled that if a ship enters upon the performance of its work, or any step has been taken towards such performance, the ship becomes pledged to the complete execution of the contract, and may be proceeded against in rem for a nonperformance."

The case before us might well rest upon this statement of the law, for the receipt of the goods by the owners of the boat at the wharf where freight was ordinarily delivered, the issue of a bill of lading therefor, the loading of the goods upon the lighter, under the control

of the owners of the boat, and the moving of the same towards the boat, were each and all steps taken in the performance of a contract of affreightment.

The *Caroline Miller* (D. C.) 53 Fed. 136, is also cited as a case "exactly in point." This was a libel to recover the value of 11 bales of cotton, an undelivered part of 200 bales, alleged to have been shipped on board the steamship *Caroline Miller* by Coles, Simpkins & Co. The *Caroline Miller* had previously been chartered by the claimant to Coles, Simpkins & Co., and was run by the latter as a part of the New York & Brunswick Steamship Line from Brunswick to New York. Judge Brown said in his opinion:

"The evidence leaves no doubt that she delivered to the connecting steamship in New York all the bales that were laden on board of her, and all that were delivered to her master at Brunswick. It also showed that the master had nothing to do with the loading of the steamer, or with the appointment of the stevedore. The bill of lading was not signed by the master, but by the agent of the New York & Brunswick Line, and it is not recited or stated that the cotton had been received on board. It was in part as follows: 'Received on dock in apparent good order and condition by the New York & Brunswick Steamship Line, from Coles, Simpkins & Co., to be transported by the New York & Brunswick S. S. Line steamer called the *Caroline Miller*, now lying in the port of Brunswick, 200 bales of cotton, etc., to be conveyed in and upon said steamship, or in and upon any other steamship of the line.'"

It appeared that there were other steamers of the line lying at the dock where the *Miller* lay, and that various lots of cotton were from time to time brought down and placed upon the dock. Judge Brown held that this so-called bill of lading was not properly a bill of lading at all, but only an executory contract to ship in futuro; that the agent of the New York & Brunswick Steamship Line was not the agent of the shipowner, nor of the master, and that the delivery of the goods to that agent was therefore neither a delivery to the master nor a delivery to the ship; in fact, that the delivery of the cotton at the dock worked no change in its legal possession, because the cotton belonged to Coles, Simpkins & Co., who were themselves the charterers, and the agent who signed the so-called bill of lading was their own agent, and the cotton, until it was laden on board, remained as completely under the shippers' control as before. It further appeared in that case that the *Caroline Miller* had probably left the port before the so-called bill of lading was signed.

The *Vigilancia* (D. C.) 58 Fed. 698, is another case cited in behalf of appellants. That was a libel in rem for the value of supplies furnished. It appears that the laws of New York prohibited the sale of oleomargarine. The libelants, doing business at Jersey City, N. J., undertook to supply oleomargarine for the steamers which lay at Roberts' Stores, Brooklyn, within the port of New York, their home port. They hired truckmen for the purpose of transporting the goods from New Jersey to Brooklyn. The sole question in the case was whether there was a maritime lien. There could be no maritime lien for supplies in the home port, and it was held that the place where the ships lay was the test of the place of supply, and that the supply was not complete until the delivery to the ships where they lay, and, as this was in their home port, no maritime lien was created thereby.

A number of other cases are cited in the argument for the appellant, all of which have received our careful attention; but it would be unprofitable to state the result of our analysis of them. They are decisions of the lower federal courts, and, while some of them contain general expressions which seem to support the contention of the appellant, those expressions must be taken in connection with the facts in which they are used, and in none of them are the facts analogous to those in the case now under consideration. Even if they were, such dicta would not be binding upon us, and the case is controlled by the principles announced by the Supreme Court in *Bulkley v. Cotton Company*, 24 How. 386, 16 L. Ed. 599.

The decree of the court below is affirmed.

Affirmed.

DELAWARE & H. CO. v. FLANNELLY et ux.†

(Circuit Court of Appeals, Third Circuit. May 19, 1909.)

No. 29.

RAILROADS (§ 348*)—INJURY TO PERSON ON CROSSING—CONTRIBUTORY NEGLIGENCE.

Evidence held to establish contributory negligence of a plaintiff, who was struck and injured by a fast train while driving over a dangerous crossing on defendant's railroad, where there were a number of tracks, with which she was familiar, where by her own testimony, after having stopped to look and listen at the usual place, some 40 feet before reaching the first track, and waiting for a freight train on such track to pass, which train, owing to a curve in the track, obstructed the view of any train approaching from the opposite direction, she at once drove on the crossing behind such train, without waiting until she could see whether the other tracks were clear, and was struck while crossing the second track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1144-1150; Dec. Dig. § 348.*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 164 Fed. 303. See, also, 165 Fed. 350.

James H. Torrey, for plaintiff in error.

Paul J. Sherwood, for defendants in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. John Flannelly and Mary Ellen Flannelly, his wife, the defendants in error, brought an action of trespass in the Circuit Court of the United States for the Middle District of Pennsylvania, against the Delaware and Hudson Company, the plaintiff in error, hereinafter called the defendant, to recover damages for bodily injuries to Mrs. Flannelly, the loss to her husband of her services, and the injury and destruction of certain personal property through the negligence, as alleged, of the defendant. It is alleged in substance in the statement of claim, among other things,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied September 4, 1909.

that while the plaintiff, Mrs. Flannelly, was with due care attempting to drive a horse and wagon across the railroad tracks of the defendant at a point where they cross at grade a public highway on which she had been travelling, leading from Scranton to Pittston, Pennsylvania, the defendant

"so negligently operated its freight trains upon said tracks as to destroy the usual opportunity at said crossing, to see or hear approaching trains and then did negligently and unlawfully run her down by a rapidly propelled passenger train, commonly called the 'Flyer,' which train was behind time and was being run at said time at great and unreasonable speed, and negligently approached said crossing without due and timely warning of its approach."

The case was tried before a jury and a verdict was found as follows:

"The jury do find in the above case in favor of the plaintiff, Mary Flannelly in the sum of \$2,000, and in favor of John Flannelly in the sum of \$500.00. Defendant company was negligent in failing to sound the blast of a whistle at the proper place and at the proper time at the crossing of the defendant where the plaintiff Mary Flannelly received her injuries."

A motion for judgment non obstante veredicto was denied and judgment in favor of the plaintiffs was entered on the verdict. The assignments of error though six in number raise in substance only the two following questions: First, was there or not sufficient evidence of actionable negligence on the part of the defendant to justify the jury in finding its existence? And, secondly, if the defendant was guilty of such negligence, did or not contributory negligence on the part of the plaintiff so clearly appear that the court below was bound to render judgment for the defendant non obstante veredicto? The counsel for the defendant at the hearing virtually abandoned, and, we think, properly, the contention that it had not been culpably negligent, and treat as "the real and vital point in the case" the question of contributory negligence. There is evidence in the case to the effect that Mrs. Flannelly on the morning of July 30, 1907, was driving a horse attached to a light lumber wagon, in which she and two small boys were riding, on her way from her home in Pittston township, Luzerne county, Pennsylvania, to the city of Pittston, about five miles distant; that to reach her destination she proceeded on a public highway which ran through the village of Dupont or Smithville; that in pursuing this route it was necessary to cross at grade the railway tracks of the defendant from east to west and, in approaching those tracks, to cross at grade the double tracks of the Lehigh Valley Railroad "cut-off" distant from the defendant's tracks several hundred feet; that the defendant's tracks were three in number and at the crossing parallel to each other and running in a generally northerly and southerly direction; that on the westerly side of the defendant's tracks and in close proximity to them there was a switch or branch track of the Lehigh Valley Railroad extending to a coal breaker about half a mile north of the crossing; that between the Lehigh Valley Railroad "cut-off" and the defendant's tracks and at the distance of between 20 and 50 feet from the latter there was a place where persons, driving such a conveyance as that occupied by Mrs. Flannelly, usually stopped to look and listen before undertaking

to cross the defendant's tracks; that Mrs. Flannelly after crossing the "cut-off" stopped at the usual place, she then being from 40 to 50 feet from the defendant's tracks, and looked and listened for approaching trains before undertaking to cross those tracks; that when she reached that place she saw a long freight train of high box-cars coming round a curve in the track from the north on its way southwardly towards Pittston; that it was moving slowly and she waited for it to pass; that it passed over the crossing on the track of the defendant nearest to her; that while thus waiting two trains, one moving north and the other south, passed behind her on the tracks of the Lehigh Valley Railroad "cut-off," and still another train passed to the north over the crossing on the switch or branch track of the Lehigh Valley Railroad which was the fourth track from her; that she did not see any train passing on the third or westerly track of the defendant; that after the freight train on the first or nearest track had moved to the south and cleared the crossing some distance and she had looked and listened in vain for an approaching train or a danger signal, she drove to and upon the first track so far that the head and front feet of the horse were on the second track, and there again stopped and looked and listened without seeing or hearing any approaching train; that she then drove on until the horse was over the middle of the second track when she first saw the train, the locomotive of which struck the wagon; that at this juncture the horse reared and pranced and delayed her several seconds notwithstanding her application of the whip to him several times; and that she drove across the second track but not far enough to clear the locomotive which struck the hind wheel of the wagon throwing its occupants out.

Whether Mrs. Flannelly was delayed on the second track by unmanageable behavior on the part of the horse she was driving was a question for the jury. It is to be assumed that the jury believed she was. Had it not been for that delay the accident undoubtedly would not have happened. But this circumstance does not necessarily negative the existence of contributory negligence on her part operating as a proximate cause of the accident. She had, it is true, a right in the pursuit of her lawful journey to Pittston to use the public highway notwithstanding the fact that in so doing she would cross the defendant's tracks. It was expected and intended that the public using that highway should pass over the crossing. Otherwise the crossing would not have been placed there. But she was bound under existing conditions to exercise due care and circumspection in attempting to pass over the defendant's second track. There is uncontradicted testimony to the effect that while Mrs. Flannelly was accustomed to driving horses, the horse driven by her at the time of the accident was "kinder skittish sometimes." If, however, she in all respects observed reasonable care and caution in attempting to cross the tracks, we should not be prepared to hold that unmanageable behavior on the part of the horse, whether attributable to a restive or excitable nature or to the noise of passing trains, should be imputed to her as a fault. But from a careful examination of the evidence before us it is clear beyond all reasonable doubt that Mrs. Flannelly did not observe such care and circumspection as the law required

of her, and that there was nothing before the jury to justify a verdict importing that she had exercised such care and circumspection. The uncontradicted evidence shows that the Dupont or Smithville crossing was considered and was a dangerous one to any person negligently passing over it; that Mrs. Flannelly lived in the neighborhood and was familiar with the crossing; that at the "usual stopping place" a person at a distance of 40 feet from the first or easterly track of the defendant could, unless his view was obstructed by a passing train or other object, see a train approaching from the south at the distance of 2,300 feet; that about 700 or 800 feet to the south of the crossing the defendant's tracks curved to the west passing under the viaduct of a traction company situated about 1,950 feet below the crossing; and that owing to such curvature trains on any of the defendant's tracks below the crossing and above the curve would be calculated to conceal an approaching train whether below or above the viaduct. There is testimony to the effect that the train which struck the wagon was a fast passenger express known as the "Flyer"; that it was behind time; and that it was moving at a high rate of speed as it came northwardly round the curve to the south of the crossing and while approaching the point of collision. Mrs. Flannelly's own statements condemn her as negligent. Her testimony relative to the freight train of box-cars is in part as follows:

"Q. You say while you were stopped there before you went on the track, that a train passed on the D. & H. on the nearest track to you? A. Yes, sir. Q. You are very sure about that? A. I know the train passed on that track. Q. It was going towards Pittston? A. Yes, sir. Q. That is, going southerly? A. Yes, it was going towards Pittston. * * * Q. How far had the train that was on the track nearest to you gone over the crossing, before you started to go over? A. Towards the shanty. Q. What did you say? A. Towards the shanty—the flag shanty, some kind of a shanty was there—there was a little shanty there. Q. Would you say it was a hundred feet? A. I could not say that, it might have been more than a hundred feet; I couldn't say that for certain. Q. Would you say it was as much as two hundred feet? A. I might if I was there and took an interest; I haven't been there and took an interest of it since. Q. You started to go across that track? A. Yes, sir. Q. This train which was going down on the track nearest to you cut off your view way down the road, did it not? A. Yes, sir, cut off my view until I got on the second track—when the horse was on, and the engine pushing right towards me from up the valley—I couldn't make escape."

Here, then, was a woman of maturity, of sound mind, familiar with the crossing, knowing that from the usual stopping place she could see, in the absence of any obstruction, a train approaching from the south as far away as the viaduct or even further, who waited until the train of box-cars shut off her view to the south, and did not wait, notwithstanding the manifest danger of such an omission, until the defendant's tracks were sufficiently clear to enable her to cross them in safety. It is hard to conceive of a more negligent or reckless disregard of one's safety than was displayed by her in attempting to cross the defendant's tracks at the particular time she did and under the then existing conditions. Further, on her own showing, uncontradicted in the case, she failed to observe due care not only in undertaking to cross the tracks before she had an unobstructed view of them to the south, but in starting as she did from her first stop

on the tracks when she was behind the rear end of the receding train of box-cars. She testified as follows:

"Q. How far could you see down the second track, when you stopped the second time with your horse's feet about the first track? A. To the nearest of my judgment, I should think about three hundred feet."

With this limited scope of vision it was perilous to the last degree to attempt to cross the second track as she did. She states that at the point of her second stop where she had only this limited view of the track to the south she "looked and listened up and down the track" before starting. That this was an utterly inadequate precaution is palpable in view of the fact that a train coming up the second track at the rate of 50 or 60 miles an hour would cover from 73 to 88 feet each second. But we do not attach so much importance to what Mrs. Flannelly did after reaching the first track as to what she did before. The horse she was driving may have become excited by the noise of passing trains and unmanageable, and she may have lost her presence of mind and resorted to mistaken tactics. The fatal error she committed was in leaving the "usual place" and getting on the tracks before she had an unobstructed view. Her uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence, and as there was nothing to warrant such a verdict the motion for judgment non obstante veredicto should have been granted.

The judgment below must be reversed, with costs, and it is so ordered.

SKUBINSKY v. BODEK et al.

(Circuit Court of Appeals, Third Circuit. May 28, 1909.)

No. 16.

BANKRUPTCY (§ 236*)—EXAMINATION OF BANKRUPT—RIGHT TO EXAMINE BEFORE ADJUDICATION.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), which empowers a court of bankruptcy to require a bankrupt to appear before a referee "to be examined concerning the acts, conduct or property of a bankrupt, whose estate is in process of administration under this act," does not authorize a reference for the examination of an alleged bankrupt before his adjudication and before the time has arrived when he is required to answer the petition, on motion of a receiver appointed for his property, which cannot be said to be "in process of administration" under the act; the function of the receivership being solely preservative of the estate, and not administrative.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 236.*]

Buffington, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Petition for review of order granting special reference.

Clinton O. Mayer, for appellant.

Alfred Aarons and Henry N. Wessel, for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is a petition for the review of an order of the District Court of the United States for the Eastern District of Pennsylvania, made November 12, 1908, granting a special reference with power to the referee "to take testimony, summon and require the attendance of witnesses, and demand the production of such books, papers, documents and other articles as may be required in the investigation of the matters pertaining to the business and conduct of the alleged bankrupt aforesaid, and all other persons with whom he may have transacted business, or in connection with whom he may have committed unlawful acts." The respondents in the petition for review filed a petition in involuntary bankruptcy against Fritz Skubinsky November 3, 1908, alleging, among other things, that he was insolvent; that he had transferred, concealed and removed, and permitted to be concealed and removed a large portion of his personal property with intent to hinder, delay and defraud his creditors; and that while insolvent he had transferred a sum of money to certain of his creditors, named in the petition, with the intent to prefer them over his other creditors. On the filing of the petition in bankruptcy it was ordered that Skubinsky should appear in the court below November 18, 1908, and show cause why the prayer of the petition should not be granted, and further that a copy of the petition together with a subpoena should be served on him. A subpoena, returnable November 18, 1908, together with a copy of the petition, was duly served November 6, 1908. W. Bodek was on the day of filing the petition appointed receiver of the assets and effects of Skubinsky and authorized and directed to cause an inventory and appraisal of such assets and effects as may come into his possession to be made and to apply to the court "for leave to take such action as to the administration of the estate as may seem meet and proper," and it was ordered that the alleged bankrupt should "forthwith turn over and deliver to the said receiver all books, papers, deeds and documents bearing upon or relating to his business and affairs." The receiver presented November 12, 1908, a petition on which the order complained of was granted, setting forth:

"That he is the receiver in the above entitled case, and has duly qualified. That your petitioner is informed, believes and expects to be able to prove that within the last week preceding the filing of the petition in bankruptcy in this matter, the alleged bankrupt above named and numerous other persons acting in collusion with him, were guilty of removing and concealing property and assets of the said alleged bankrupt. That it is essential for the interests of this estate that an investigation be commenced immediately for the purpose of discovering what disposition has been made of the assets which were in the possession of the alleged bankrupt immediately before the filing of the petition in bankruptcy, and of attempting to regain for the interest of this estate assets which have been unlawfully and fraudulently concealed and removed. Petitioner represents that the delay incident to an adjudication and the calling of a meeting of creditors before a referee upon the usual notice would render practically impossible the proper investigation of the fraudulent acts which have been committed in and about the various attempts which have been made to remove and conceal the assets which lawfully belong to this estate."

It appears from the record that the order complained of was granted before Skubinsky made answer to the petition in involuntary bankruptcy, or in any manner raised an issue, either of law or of fact, with respect to its averments, and six days before the time fixed for the showing of cause why the prayer of that petition should not be granted, and thirteen days before Skubinsky was adjudicated a bankrupt. There are three assignments of error, each of them challenging the legality of the order of special reference. The last reads as follows:

"That the learned judge of the District Court erred in granting the special reference before the adjudication of the alleged bankrupt and before his estate was in process of administration."

Section 21a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), as amended February 5, 1903 (Act Feb. 5, 1903, c. 487, § 7, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1028]), provides, among other things, as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct or property of the bankrupt whose estate is in process of administration under this act."

The authority conferred by this section to grant a reference for the purpose of throwing light on "the acts, conduct or property of the bankrupt" is limited to the case of one "whose estate is in process of administration under this act." While by virtue of section 1 of the act the term "bankrupt" may include a person against whom an involuntary petition has been filed as well as one who has been adjudged a bankrupt, section 21 contains the significant and unambiguous words "bankrupt whose estate is in process of administration under this act." We do not think that the appointment and qualification of the receiver and his exercise of official functions before the adjudication of Skubinsky as a bankrupt and, indeed, before the return of the rule to show cause or the presentation of any issue of law or fact in the case, can be tortured into process of administration of his estate under the act. It did not appear when the order of special reference was made that he ever would be adjudged a bankrupt. The appointment of receivers in bankruptcy can be justified only where it shall be found "absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Such a receivership certainly up to the time of an adjudication is purely a precautionary measure. Until after an adjudication the function of a receivership is not administrative of the estate in bankruptcy, but solely preservative. And this is equally true whether receivers in bankruptcy are or are not authorized by the court to conduct the business of alleged bankrupts for limited periods. While such authority can be conferred upon receivers only "if necessary in the best interests of the estates," the granting of such authority and action thereunder prior to an adjudication of bankruptcy can in no legitimate sense be deemed process of administration of the estate under the act.

It doubtless is true that a receiver may be authorized by the court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt; but such action on the part of the receiver before an adjudication does not constitute or involve "process of administration under this act." It is simply gaining control of the estate which is to be subjected to the process of administration if an adjudication of bankruptcy shall be made. If the appointment of a receiver before adjudication per se constitutes process of administration and no adjudication be made the remarkable result is presented of a process of administration, and consequently a partial administration, in bankruptcy, of the estate of the alleged bankrupt where absolutely no beneficial object or purpose of the bankruptcy act can by any possibility be effected. The special reference before adjudication to inquire into "matters pertaining to the business and conduct of the alleged bankrupt," was premature, inquisitorial and not to be tolerated. Common fairness requires that the alleged bankrupt before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt. We are not aware of any provision in the bankruptcy act when fairly construed which justifies the order of special reference now before us.

The order must, therefore, be reversed, with costs, and it is so ordered.

BUFFINGTON, Circuit Judge (dissenting). I dissent from the construction placed by the majority opinion on section 21, cl. "a," of the bankrupt act, which provides:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee of the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

By that construction a court of bankruptcy is powerless, until adjudication of an alleged bankrupt, to examine him thereunder. As this construction is based on the ground that until that time there is no "bankrupt whose estate is in process of administration," it follows that no other person can be examined until after adjudication, for such inquiry being limited to "the acts, conduct or property of a bankrupt whose estate is in process of administration," and prior to adjudication there being no such person, it follows that no witness can be called under this section until after adjudication. Now, as 20 days must elapse, whether the bankruptcy is contested or conceded, before adjudication, during this time the court is powerless to act under this section. Of this period Judge Hough, of the Southern District of New York, has, in *Re Fleischer*, 18 Am. Bankr. Rep. 197, 151 Fed. 81, well said:

"The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves is in many cases

giving to those guilty of fraud the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

And in the case now before us such construction made a court powerless to act, although the facts are as stated by the untraversed petition of the court's receiver that—

"the alleged bankrupt" was "guilty of removing property and assets, * * * that it is essential for the interests of this estate that an investigation be commenced immediately for the purpose of discovering what disposition has been made of the assets which were in the possession of the alleged bankrupt immediately before the filing of the petition in bankruptcy," and "that the delay incident to an adjudication * * * would render practically impossible the proper investigation of the fraudulent acts which have been committed."

The bankrupt law has two objects: One to collect all the bankrupt's property and marshal it; the other to discharge him from all liabilities when he has surrendered all his property. To enable the court to accomplish this, the act makes different provisions. Thus it is made the duty of the bankrupt by section 7, cl. 1, "to attend the first meeting of his creditors, if directed by the court or a judge thereof to do so," and by clause 9, "when present at the first meeting of creditors and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration of his estate." Now it is clear that, while this section makes it the duty of the bankrupt to be examined at the first meeting of creditors and also "at such other times as the court shall order," it makes no provision when those other times are; but as the creditors' meeting can be adjourned and the bankrupt examined at such adjourned creditors' meeting—Collier on Bankruptcy (4th Ed.) p. 234—it is evident we must look elsewhere in the act for provisions for examinations "at such other times as the court shall order." And since provision was thus made for examinations first and subsequent before the referee, it would seem the act would naturally make the other examinations in advance of adjudication. Such we find to be the case. Thus by section 9, cl. "a," the court is authorized, "at any time after the filing of a petition by or against a person," on proof that "such bankrupt is about to leave the district * * * to avoid examination," to cause his arrest and to imprison him or commit him to bail "for his appearance for examination, from time to time, not exceeding in all ten days."

Now two things are to be here noted: First, that the person against whom a petition is filed is herein described as a bankrupt; and, secondly, that if such bankrupt is arrested within 10 days after the petition is filed against him, the examination ordered must necessarily take place before adjudication, since no adjudication can be made short of 20 days. So, also, section 3, cl. "d," compels a person against whom a petition is filed and who denies insolvency to appear in advance of adjudication and "submit to an examination and give testimony as to all matters tending to establish

solvency or insolvency." And section 2, cl. 3, authorizes the appointment of receivers, a power exercised without question in advance of adjudication, and authorizes them "to take charge of the bankrupt's property after the filing of the petition," thus recognizing both the court's administrative duty in advance of adjudication and the use of the word bankrupt to describe the debtor. Moreover, as by section 2, cl. 7, the court is authorized to cause the estates of bankrupts to be collected, reduced to money, and distributed, and by clause 15 "to make such orders, issue such process and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of this act," it would seem, if to collect the property of the bankrupt it became necessary to obtain from him information that would aid in its collection, that apart from any section specifically authorizing thereto this general power in clause 15 would warrant the court in taking effective summary proceedings. Indeed, the plain, direct, and simple agencies of the bankrupt court in its administrative capacity is recognized in *Mueller v. Nugent*, 184 U. S. 14, 22 Sup. Ct. 274, 46 L. Ed. 405, where the court says:

"In other words, the question reduces itself to this: Has the bankrupt court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

And there is no reason for withholding, and every reason for exercising, the power of the court to act by these "simpler methods of the bankrupt law" during these 20 days. True, the alleged bankrupt may not be adjudicated; true, his property, of which the court had taken constructive possession by the filing of the petition and actually by the appointment of its receiver, might subsequently be abandoned to him; but from the moment the petition was filed the jurisdiction of the court attached, and because jurisdiction had attached the administration of the trust and estate had begun. As was said in *Mueller v. Nugent*, supra:

"It is as true of the present law as of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction."

But, while all the provisions cited enable a court of bankruptcy to call before it the bankrupt for examination, section 21, cl. "a," provided for calling before it other designated persons, "including the bankrupt." Its purpose, so far as the bankrupt is concerned, is well stated in the referee's opinion in *Re Cobb*, 7 Am. Bankr. Rep. 104, which was adopted by Judge Lowell:

"It is to be noted in the first place that the examination of a witness summoned under section 21a, upon the application of the trustee, is an entirely

distinct and independent proceeding from the ordinary bankrupt's examination held at the first meeting of creditors or at some adjournment thereof. * * * The examination of a witness by the trustee under section 21a is taken solely for his information, to enable him to act intelligently in the premises and to take such steps as may be necessary for the protection and preservation of the estate."

That the examination of the bankrupt ordered under section 21a is different from the examination before the referee at creditors' meetings is also the view of the text-writers. Collier on Bankruptcy (4th Ed.) p. 234, says:

"It should be noted, however, that while this subsection (21a) makes the bankrupt a compulsory witness as to his own 'acts, conduct or property,' by section 7 (9) he must also be ready to testify concerning the same things at the first meeting of creditors. * * * In effect, the only difference, as far as the bankrupt goes, is one of practice. Where first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting had been adjourned, an examination can, under section 7 (9), still be had at such times as the court shall order, or it can be required under the section now discussed. Clearly, therefore, the main purpose of section 21a is to authorize and regulate the examination of third parties, rather than that of the bankrupt. * * * Without the power to so examine, the remedy of the statute against preferences and fraudulent transfers would often be unavailing."

So, also, in Loveland's Bankruptcy (2d Ed.) p. 615, it is said:

"The language of these provisions is very general. They give the referee power to summon any person who could give evidence in a court of law. They authorize the examination of them upon all matters which are likely to arise in respect to the bankrupt or his property. The only limitation as to time within which this power may be exercised is that the estate shall be in process of administration in bankruptcy. The judge or referee may therefore summon a witness at any time after the commencement of proceedings until the estate is closed by order of court. The referee, of course, can only summon witnesses while the case is pending before him upon reference."

The construction thus placed on this section makes a complete system of the bankrupt law, enables courts to thwart fraud and fulfill the purpose of the law, gives effect to this clause, and gives to its words the same meaning as in other parts of the act. The act clearly makes no provision that the court's jurisdiction shall be divided into two periods, viz., a nonadministrative period prior to adjudication, and an administrative one after adjudication. On the contrary, the whole tenor of the act is to regard the time from the filing of the petition to the close of the proceeding as an administrative whole. Thus section 1, cl. 4, provides that the word "bankrupt" shall "include a person against whom an involuntary petition * * * has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt"; clause 10, that the word "bankruptcy" "with reference to time, shall mean the date when the petition was filed." Moreover, the examination of the bankrupt in advance of adjudication is no new departure in bankruptcy administration. Act Aug. 19, 1841, c. 9, § 4, 5 Stat. 443, provided:

"And such bankrupt shall at all times be subject to examination, * * * and his acts and doings and his property and rights of property, which, in the judgment of such courts, are necessary and proper for the purposes of justice."

And in *Ex parte Lee*, Fed. Cas. No. 8,178 (a voluntary case), it was held by Judge Betts that both voluntary and involuntary bankrupts could be examined in advance of adjudication. He there says:

"It is said that Congress intended only that he should be subject to an examination after being declared a bankrupt. But in referring to another section of the act it will be found that he takes the name of bankrupt before he is pronounced so by the court. On filing their petitions they are deemed bankrupts, and that is the descriptio personarum."

Under Act March 2, 1867, c. 176, 14 Stat. 517, the examination was not deferred until after adjudication, but the court was authorized to "at all times require the examination of the bankrupt." And so, also, the word "administration" in the clause before us is in our judgment used in a broad sense as descriptive of the whole bankruptcy proceeding, rather than in the narrower, technical sense of that part of the administrative work which begins after adjudication. In other words, the administration which proceeds from adjudication is simply the continuation of that which preceded adjudication. This is most clearly implied in section 22, cl. "a," which provides:

"After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate or may refer it."

Proceeding with an administration implies that administration has already begun. Moreover, since by section 64, cl. "b," the first item paid out of a bankrupt's estate is "the actual and necessary cost of preserving the estate subsequent to filing the petition," it is hard to say that the court, which was preserving and keeping intact the property prior to the appointment of a trustee, was not administering. The word "administer" means literally to minister to, to serve, and surely preliminary preservation, getting trace of assets, preventing concealed goods from being spirited away, in other words, preventing the scattering and dissipating of property, so that there may be an estate to sell and distribute, is the very gist of administration. To say that administration, the duty of the court to administer by conservation, does not begin until after adjudication, is to lose sight of the most effective scope of the court's jurisdiction. With adjudication and the selection by the creditors of a trustee the creditors assume charge. But before adjudication, and when creditors have no representative, the court is their representative, and is either by its own process or its own receiver administering for their benefit. We may rightfully use, of the administration of a bankrupt court, *mutatis mutandis*, the language of the Supreme Court of Alabama, in *Martin v. Ellerbe's Adm'r*, 70 Ala. 326, and say:

"The term 'administration' includes more than the collection of assets and the payment of debts and legacies and distribution to the next of kin, and involves anything that may be done rightfully in the preservation of the assets of the estate and which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights."

Holding, then, that an estate in bankruptcy is aptly described as "in process of administration under this act" from the time the clerk files a petition in bankruptcy, which is "a caveat to all the world and in effect an attachment and injunction," I am of opinion the order of reference in this case was within the statutory powers of the court.

SKUBINSKY et al. v. BODEK.

(Circuit Court of Appeals, Third Circuit. May 24, 1909.)

No. 16.

BANKRUPTCY (§ 114*)—AUTHORITY OF RECEIVER—REFUSAL OF BANKRUPT TO SURRENDER PROPERTY TO AGENT—CONTEMPT.

It is at least doubtful whether a receiver appointed for the property of an alleged bankrupt on the filing of an involuntary petition against him, in the absence of an express provision to that effect, can delegate to another his authority originally to take possession of the property; and in any event the alleged bankrupt or members of his family cannot be held in contempt of court for a refusal to surrender property or books and papers to one claiming to represent the receiver, but who produces no written evidence of his authority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 166; Dec. Dig. § 114.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Appeal from order adjudging petitioners in contempt.

Clinton O. Mayer, for appellants.

Alfred Aarons and Henry N. Wessel, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This proceeding, although termed a petition for review, is in substance an appeal from an order of the District Court of the United States for the Eastern District of Pennsylvania, adjudging Fritz Skubinsky, an alleged bankrupt, and his wife, Fanny Skubinsky, in contempt, and imposing fines on them. For it not only appears that the petitioners prayed for and were allowed an appeal from the order in question, but the case as it is presented to us presents matter of fact as well as of law. A petition in involuntary bankruptcy was filed by Wolf Bodek and others against Fritz Skubinsky November 3, 1908, and on the same day Bodek was appointed receiver of the estate of the alleged bankrupt. The order of appointment authorized and directed the receiver to cause an inventory and appraisal of such assets and effects as should come into his possession to be made and directed the alleged bankrupt forthwith to turn over and deliver to the receiver all books, papers, deeds and documents bearing upon or relating to his business and affairs. After duly qualifying for the discharge of his duties as receiver Bodek presented November 6, 1908, a petition to the court below in which, among other things, it was in substance alleged that the petitioner in accordance with the directions contained in the order appointing him went to the former place of business of the alleged bankrupt at No. 703 South street, Philadelphia, for the purpose of performing his duty; that the alleged bankrupt and his wife and one Dubin, together with the children of the alleged bankrupt and his wife, interfered with the receiver "in the performance of his duties, concealing prop-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erty from him, interfering with his search for goods in the premises 703 South street, hindering him in his attempt to secure the papers which were at said premises," and further, that the receiver's "representatives and deputies were assaulted by the persons above mentioned"; that "large quantities of the papers bearing upon the business of the alleged bankrupt were unlawfully destroyed by the parties above mentioned"; and that "when your petitioner undertook to take possession of large quantities of goods which had been hidden in the dwelling portions of the premises aforesaid, the said alleged bankrupt, his wife and the said Dubin, attempted to prevent him from taking possession of said goods, and again assaulted his representatives and created great disturbance." The petition concluded with a prayer for an attachment returnable forthwith against the alleged bankrupt, his wife and Dubin for contempt. On the same day, November 6, 1908, the alleged bankrupt and his wife, not having been served with process, voluntarily appeared, and evidence having been adduced and heard they were adjudged guilty of contempt, and it was ordered that Skubinsky pay a fine of \$100 and "all costs of the proceedings on attachment, including stenographer's fees and charges," and his wife a fine of \$150.

It appears from the record, and is not denied, that the receiver was not personally present at the time and place of the commission of the alleged contempt. He had requested his partner in business, Joseph J. Rabinovitch, to act for him on the occasion by way of discharging his duties as receiver. Rabinovitch did not obtain from the receiver any written instrument authorizing or purporting to authorize him to act in the place and stead of the receiver; but he took with him and exhibited and explained to the alleged bankrupt and his wife on the premises a certified copy of the appointment of the receiver which he had procured from the clerk's office. The order of appointment of the receiver in the present instance did not in terms authorize him to constitute agents for the purpose of originally acquiring possession of the property and assets of the alleged bankrupt in the absence of their principal, and it is at least doubtful whether there was any authority on the part of Rabinovitch acting as the alleged agent or representative of the receiver to assert and enforce the authority conferred upon the latter under his appointment. Authority to appoint and act through agents or custodians for the preservation and management of the property of a bankrupt after the receiver has once taken possession seems quite distinguishable from authority to create an agency for the original taking of possession. Authority of the former kind in many instances, without express provision, may be implied from the fact of the constitution of the receivership. But we are not prepared, nor is it necessary, to hold that a receiver can in the absence of a provision to that effect, delegate to another his authority originally to acquire possession. Other considerations are decisive.

Contempt proceedings in such a case as the present are quasi criminal in their nature and it should be made clearly to appear that the persons charged knowingly and wilfully disregarded or set at defiance the order of the court. The order of appointment did not direct that

any portion of the estate of the alleged bankrupt should be turned over to Rabinovitch or to any alleged agent of the receiver. It provided that the alleged bankrupt should "forthwith turn over and deliver to the said receiver all books, papers, deeds and documents bearing upon or relating to his business and affairs." If it be assumed that the receiver had power to appoint and did appoint Rabinovitch to act for him on the occasion in question, Rabinovitch made no sufficient disclosure to the alleged bankrupt or his wife of the existence of such authority. He did not show them any instrument in writing purporting to confer it, and they were under no obligation to accept as true his mere oral assertion, or that of the witness Sternberger, that Rabinovitch had been authorized by the receiver. Indeed, the fact that a certified copy of the order appointing the receiver was exhibited and explained to them, justified them in refusing to turn over any portion of the estate of the alleged bankrupt to any other person than the receiver named in such order, in the absence of evidence satisfactory to them that such other person had authority to enter into possession in behalf of the receiver. It appears from the evidence that some bills or other papers presumably relating to the business and affairs of the alleged bankrupt were torn or destroyed at the time Rabinovitch undertook to enter into possession. If those bills or papers, after the certified order of appointment had been exhibited and explained, had been wilfully torn up by the alleged bankrupt and his wife, or either of them, for the purpose of destroying all evidence of their contents, the case would have presented a materially different aspect. This aspect, however, we are not called on to discuss or consider; for, notwithstanding some loose testimony given by Rabinovitch, we are, from the evidence, inclined to believe that whatever papers were torn or mutilated by the appellants or either of them were so torn or mutilated in a struggle with Rabinovitch, not for their destruction, but for their possession, to which they were entitled in the absence of a sufficient disclosure to them of authority on the part of Rabinovitch to demand and remove the same. The evidence falls short of the clear proof required to establish a wilful defiance by the alleged bankrupt and his wife, or either of them, of the authority of the court below.

The order appealed from, therefore, must be reversed, with costs, and it is so ordered.

BARUCH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 25, 1909.)

No. 245 (4,419).

CUSTOMS DUTIES (§ 32*)—CLASSIFICATION—"BINDINGS"—FEATHERSTITCH BRAIDS.

Braids used as bindings are specially provided for as "bindings" in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 (U. S. Comp. St. 1901, p. 1661), and, though commercially known as "featherstitch braids," are therefore removed from the provision for "braids

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

* * * not elsewhere specially provided for," in Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 32.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 159 Fed. 294.

This is an appeal taken by an importer from a decision of the Circuit Court, Southern District of New York (159 Fed. 294), affirming a decision of the Board of General Appraisers, which affirmed a decision of the collector that certain imported merchandise, consisting of various loom-woven fabrics, was dutiable as braids under paragraph 339 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]). The merchandise is of three classes, shown in Exhibits A, B, and C. The importer concedes that the broad articles, shown in Exhibit C, were properly assessed under paragraph 339, but contends that the narrow articles, illustrated in Exhibits A and B, should have been assessed as "bindings" under paragraph 320 of said tariff act.

The two paragraphs in question follow, and, as the development of the legislation is of importance, they are shown in parallel columns with the corresponding paragraphs of the tariff acts of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 567), and 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509):

Act of 1890.
354. Cotton cords, braids, boot, shoe, and corset lacings, thirty-five cents per pound; cotton gimps, galloons, webbing, goring, suspenders, and braces, and of the foregoing which are elastic or non-elastic, forty per centum ad valorem: Provided, that none of the articles included in this paragraph shall pay a less rate of duty than forty per centum ad valorem.

373. Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched

Act of 1894.
263. Cords, braids, boot, shoe and corset lacings, tapes, gimps, galloons, webbing, goring, suspenders and braces, woven, braided, or twisted lamp or candle wicking, lining for bicycle tires, spindle binding, any of the above made of cotton or other vegetable fiber and whether composed in part of India rubber or otherwise, forty-five per centum ad valorem.

276. Laces, edgings, nettings and veillings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, tamboured articles, and articles embroidered by hand or machinery, embroidered handkerchiefs, and ar-

Act of 1897.
320. Bandings, beltings, bindings, bone casings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, whether composed of in part of india-rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; spindle banding, woven, braided or twisted lamp, stove, or candle wicking made of cotton or other vegetable fiber, ten cents per pound and fifteen per centum ad valorem; loom harness or healds made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, fifty cents per pound and twenty-five per centum ad valorem; boot, shoe, and corset lacing made of cotton or other vegetable fiber, twenty-five cents per pound and fifteen per centum ad valorem; labels, for garments or other articles composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem.

339. Laces, lace window curtains, tidies, plow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or

handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings, or ruching, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them or a mixture of any of them is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: Provided, that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed.

articles made wholly or in part of lace, ruffings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem.

nettings, veils and veillings, etamines, vitrages, neck ruffings, ruchings, tuckings, flutings, and quiltings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter monogram or otherwise; tamboured or appliqued articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of ruffings, tuckings or ruchings, all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber and not elsewhere specially provided for in this act, whether composed in part of india-rubber or otherwise, sixty per centum ad valorem: Provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which embroidery is composed.

Bindings appeared for the first time in the act of 1897, when they were inserted in paragraph 320. Braids at the same time were inserted in paragraph 339. In the provisions of the acts of 1890 and 1894 the word "braid" appeared without words of limitation. In paragraph 339 it is followed by the restriction "not elsewhere specially provided for in this act." The articles in the paragraphs at the head of the parallel column (paragraph 354 of the act of 1890; paragraph 263 of the act of 1894, and paragraph 320 of the act of 1897) are primarily articles of utility, not inappropriately designated in the brief of the importer as "notions." The other paragraphs embrace articles which are primarily for the purpose of ornamentation.

Comstock & Washburn (Albert H. Washburn, of counsel, and J. Stuart Tompkins and George J. Puckhafer, on the brief), for importers.

J. Osgood Nichols, for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The merchandise in question consists of narrow woven strips bearing "featherstitch" or "herringbone" ornamentation. Their practical use is to cover seams. They are inexpensive, and are largely used in making infants' clothing and underwear. The featherstitch ornamentation improves the appearance of the garment, and is added for that purpose. But the primary purpose of the article is one of utility.

This article has borne various names, such as "seam binding," "featherstitch binding," "featherstitch tape," etc.; but the name by

which it has usually been called is "featherstitch braid." Indeed, while the article is not braided, but woven, we should have little difficulty in adopting the conclusion of the Circuit Court and of the Board of Appraisers that prior to 1897 it was generally commercially designated as "featherstitch braid." But this is not a case in which the finding of a commercial designation carries us far. The question is, not whether the articles are braids, but whether they are braids not elsewhere specially provided for in the act. Manifestly commercial designation can have no bearing upon the latter inquiry. It cannot be said that the phrase "braids not otherwise specially provided for" had any commercial meaning—different from the common understanding—including this merchandise. The articles may be called "featherstitch braids"; but, if some braids are bindings, it is not inconsistent with the commercial designation to assess them under the binding paragraph.

Had this question arisen under the tariff acts of 1890 or 1894, the situation would be entirely different. As we have seen, the word "braid" was used in those acts without words of limitation or qualification. If in a case under either of those acts it had been shown that an article was commercially known as a "braid," it would have necessarily brought it within the statute. But an article is not necessarily brought within paragraph 339 by showing that it is a braid. It may be a braid without question—may have been made upon a braiding machine; but, if it is more specially provided for elsewhere, it is not included. Accepting the commercial designation of these articles as featherstitch braids, we only reach the conclusion that they should be classified under paragraph 339 if they are not more specifically provided for elsewhere.

Now, the following definition of the word "binding" appears in the Standard Dictionary:

"A braid or strip folded and sewed on the edge of any fabric, or sewed over the place where two parts are joined, so as to protect and secure the parts covered by it."

It thus appears that a binding may be a braid used or adapted to be used for a particular useful purpose. Many kinds of braid are not adapted to this use. They are employed for ornamental purposes solely. Braids of this character should be classified under paragraph 339. And, as we have seen, this classification would be especially appropriate, as that paragraph and those corresponding to it in the earlier acts have always applied particularly to articles of ornamentation. But these featherstitch braids, being used for the purpose of binding seams, are, in our opinion, the kind of braids properly called bindings. And we think that it may fairly be assumed that, when Congress inserted the word "bindings" in the "notions" paragraph and transferred the word "braid" to the "trimmings" paragraph with words of qualification, it intended to embrace in the latter paragraph only such braids as were not bindings. If the articles are bindings, as well as braids, the provision in the "notions" paragraph is the more specific. Bindings are embraced without the words of restriction or qualification. These articles as bindings are necessarily included, and they are specially provided for elsewhere than in paragraph 339.

This discussion of the case upon principle leads us to the conclusion that the merchandise should have been assessed for duty as bindings under paragraph 320; and we reach no different result from an examination of other cases, although the question of the classification of this merchandise has been before the courts several times and conflicting decisions have been rendered. In the case of *In re Dieckerhoff* (C. C.) 54 Fed. 161, it was held that these articles were dutiable as cotton braids under the section of the act of 1890 first quoted, and not as cotton trimmings under the second section quoted. This decision, however, has no special bearing upon the question now under consideration because, as we have seen, bindings were not provided for in the act of 1890. Featherstitch braids may well not be trimmings within the ornamental article paragraph of the earlier act and yet be bindings within the useful article paragraph of the act of 1897.

The government, however, insists that in view of the *Dieckerhoff* decision it must be presumed that, when Congress used the word "braids" in the act of 1897, it intended that it should apply to featherstitch braids. As just pointed out, however, all that that case held was that the articles were braids and not trimmings. It did not hold that they were not bindings. And Congress used the word "braid" only with words of qualification. We see no force in the contention. Aside from the *Dieckerhoff* decision under the act of 1890 the question here presented has been decided both ways by the Circuit Court. In *Steinhart v. United States* (C. C.) 121 Fed. 442, it was held that the articles, if braids, were bindings also, and therefore dutiable under paragraph 320. This decision was followed in *The Hague Case* which does not appear in the *Federal Reporter*.¹ In the case of *Von Baur v. United States* (C. C.) 141 Fed. 439, the question was again presented and decided the other way. The opinion of the board holding that the articles were braids under paragraph 339 was affirmed without opinion by the Circuit Court. We find the reasoning in the *Steinhart* decision persuasive, and, for reasons already stated, fail to find that the additional evidence requires any different conclusion.

The decision of the Circuit Court is reversed.

CANADIAN NORTHERN RY. CO. v. WALKER.

(Circuit Court of Appeals, Eighth Circuit. July 12, 1900.)

No. 2,956.

1. MASTER AND SERVANT (§§ 135, 137*)—METHODS OF OPERATION DISCRETIONARY—REASONABLE SELECTION NOT NEGLIGENCE.

A railroad company, which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous, owes its servants no duty to adopt a different method, and it is not guilty of negligence for a failure to do so.

Its officers have and must exercise discretion and judgment in the selection of such methods, and their decisions of doubtful questions re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ No opinion filed.

garding such matters are presumptively right and may not be held to constitute actionable negligence, in the absence of clear proof to that effect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 271; Dec. Dig. §§ 135, 137.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

2. MASTER AND SERVANT (§ 111*)—RAILROAD COMPANIES NOT LIABLE FOR NEGLIGENCE OF SHIPPERS IN REMOVING MEANS OF LOADING.

A railroad company is not liable to its servants for the negligence of shippers in their use and removal of instrumentalities for loading and unloading cars which form temporary obstructions to the safe movement of the cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.*]

3. MASTER AND SERVANT (§ 111*)—LEAVING DUTY TO REMOVE MEANS OF LOADING TO SHIPPERS NOT NEGLIGENCE.

A railroad company is not guilty of negligence because it leaves to shippers who use them the duty of removing from its cars necessary instrumentalities for loading or unloading them which form temporary obstructions near them, and to its servants who move the cars the duty to see that loading or unloading is not in progress just before they start the cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.*]

4. MASTER AND SERVANT (§ 278*)—FACTS—CONCLUSION—SAFE PLACE TO WORK.

A railroad company provided a cattle pen, a platform, and means to form a temporary chute from the pen to the door of the car to enable shippers to load stock into the car. A gate which opened from the pen upon the platform formed, when open, one side of this chute and extended to within four or five inches of the car. The company left the duty of loading and unloading their stock and of closing this gate when they had completed their work to the shippers, and the duty to ascertain, just before the cars were started, whether or not any loading or unloading was in progress to the plaintiff. He could not have discharged that duty without learning that the gate was open. He did not discharge that duty. He knew the method of using the gate, and that if it was open it would strike one riding on the ladder on the side of one of the cars toward the gate; but he did not think of the gate, and when he had failed to make his inspection, and the cars started, he rode along on the side of the ladder of one of them until the open gate knocked him off.

Held, the company was not guilty of any lack of ordinary care to provide the plaintiff with a reasonably safe place in which to discharge the duties of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Pierce Butler (How, Butler & Mitchell and Clark, Sweatman & McIntyre, on the brief), for plaintiff in error.

Humphrey Barton, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and POLLOCK, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANBORN, Circuit Judge. At about 11 o'clock on the dark rainy night of August 15, 1907, the plaintiff below, a switchman in the employment of Canadian Northern Railway Company, the defendant below, was knocked off of a ladder on the side of a freight car by the end of an open gate which, when open, formed one of the sides of a cattle chute and when shut closed an opening in a cattle pen in the yards of the company at Winnipeg. He recovered a judgment against the defendant, which his counsel seeks to sustain on the ground that there was substantial evidence that the company failed to furnish a suitable fastening for the gate, and that it did not provide a gateman or make any other provision to close the gate and keep it closed when shippers were not loading or unloading stock, and that for these reasons it failed to exercise ordinary care to furnish the defendant in error with a reasonably safe place in which to work.

The only evidence concerning the fastening was testimony that the company had so placed a strand or hoop of wire upon the post against which the swinging end of the gate shut that this strand could be dropped over the post in that end of the gate in such a way that it would hold the gate closed, and the testimony of one witness who said that this wire would hold the gate when the wind was not blowing, that it was liable to work off the top of the gate post, but that he had never known it to do so. The legal presumption and the proof were therefore that the company provided a strand of wire that would hold the gate closed. The mere opinion of a single witness, who never saw the wire work off the top of the gate post and never knew that it ever did so, that it was liable to do so, constituted no substantial evidence that this fastening was not adequate, or that the company was guilty of any breach of duty here, and no judgment for its negligence can stand upon a foundation so flimsy.

Was the company guilty of any breach of duty to the plaintiff because it furnished no gateman and made no other provision to close the gate and keep it closed when shippers were not loading or unloading their stock? The true answer to this inquiry is conditioned by the facts of the case in hand, and, if we resolve all conflicts in the testimony and all doubtful inferences in favor of the plaintiff, those facts are these: On the north side of a spur track in the company's yard were two cattle chutes and platforms, and west of these a platform for loading general merchandise. Cars were usually placed on this track daily to be unloaded and loaded over these platforms. They were pulled out toward the east once every night between the hours of 10 p. m. and 1 a. m. that they might be attached to a train which departed at 1:15 a. m. Shippers were accustomed to load the cars as late in the night as they could do so and get through their work before the cars were taken away. Hence it became necessary for the servants of the company who took the cars out, and it was their duty, to inspect the cattle chutes and platforms just before they moved the cars in order that they might be certain that no loading or unloading was in progress and that the cars were clear. The accident occurred at the west cattle chute. This chute was upon a platform which extended from a cattle pen to about 10 inches from the car and was upon about the same plane as the floor of the car. Gang or toe planks

were provided to cover the space between the platform and the car which were placed for the cattle to walk upon and were subsequently removed by the shippers. A permanent fence about five feet high reached from the post against which the gate closed to a point about three feet distant from the car, and this fence and loose boards, which were placed by the shippers between it and the car before they loaded or unloaded cattle, formed the east side of the chute, while the gate, when open, extended to within four or five inches of the car and formed its west side. The shippers uniformly placed the loose boards and opened the gate to load and unload their stock and removed the boards and swung the gate out of the way of the cars and closed it after they had completed their work of loading or unloading.

The plaintiff entered the employment of the company as a member of a night crew in this yard on November 24, 1906, and worked there with the exception of four days until the accident on August 15, 1907. In order of their rank those connected with the work in which the plaintiff was engaged were the yardmaster, the foreman, the engineer, the man who followed and coupled and uncoupled the engine, and the fieldman, whose duty it was to inspect the platforms, cattle chutes, and cars just before the latter were taken off this spur track, and to see that no loading or unloading was in progress. At the time of the accident the plaintiff was this fieldman. He had followed the engine in this yard from November until July, had then been foreman, and on the day of the accident one Rice had been made the foreman and he had become the fieldman. He had frequently watched and waited for the shippers when they were loading cars and had seen them, after they finished their loading or unloading, remove the gang planks and the loose boards on the east side of the chute and swing the gate out of the way of the car and tip the toe planks toward it. He knew that different shippers used the gate and planks on different nights to guide stock into the cars, that if the gate was open it would strike one riding past it on the ladder upon the side of a car toward the gate, and that the only way to determine whether or not shippers were loading or unloading stock, and whether or not the side of the train was clear of temporary obstructions therefrom, was to inspect the platforms and the cars just before the latter were started. He testified that when he was foreman he directed some one of his crew, usually the fieldman, to make such an inspection to ascertain whether or not there was any loading or unloading in progress, to see that the car doors were shut, the gang planks out, and everything clear before they started the cars, but that he never instructed him to see whether or not the gate was closed.

On August 13, 1907, two days before this accident, he, then the foreman, and his crew injured a horse by taking the cars out while a shipper was loading them, and the yardmaster rebuked the plaintiff and instructed him to go personally thereafter and see if any stock was being loaded or unloaded before the cars were moved. On the night of the accident the yardmaster told him to help his new foreman as much as he could, and about an hour before the accident his foreman told him to be careful about this inspection. It was the custom for the fieldman to make the inspection, then to shout or sig-

nal to the foreman or some member of the crew to the effect that the train was clear, and for the engineer to start the cars easterly on the spur track upon the receipt of that signal, but not before. There were six or seven cars on the track when the foreman told the plaintiff that they would pull them out, and the plaintiff went to one of the cars near the cattle chute where the accident happened, mounted that car, released a brake, walked along the top of the train, and went down on the north side of one of the cars to the ground at a point west of the westerly cattle chute for the purpose of inspecting the platforms and the cattle chutes to learn whether or not there was any loading or unloading in progress. He testified at one time that the night was so dark that he could not see from the top of the train whether or not loading was proceeding, and at another time that he could have seen whether or not loading was going on, whether or not the car door was open, and whether or not the gate was open by bending down and swinging his lantern over the side of the car. He did not, however, endeavor to pursue the latter course and did not inspect the platforms or the chutes before he descended to the ground. He intended to walk over the platforms and to inspect them with his lantern so that he could be certain that no loading or unloading was proceeding, and after he had done this to give the signal for the engineer to pull the cars off of the spur track. Just as he stepped upon the ground the other members of his crew moved the cars east without waiting for his signal. He pulled himself up on the side ladder of one of the cars. At first he thought that his fellow servants were coupling the engine to the cars, and that they would not take the latter off the spur track; but, as they proceeded, he thought that the foreman must have made the inspection himself; but the thought never occurred to him that the gate might be open, and he rode along the side of the car until he came into collision with it and was knocked off.

The law imposed upon the railroad company the duty to receive and carry stock in its cars at reasonable rates and to furnish to shippers pens, platforms, and cattle chutes, by means of which they could load and unload their cattle with reasonable facility. It imposed upon the shippers the duty to exercise reasonable care to load and unload their stock in such a manner and to so use and leave the means furnished by the company for that purpose that no unnecessary injury would be inflicted upon the company or upon its servants thereby.

A "railroad," including in that term the tracks, platforms, instrumentalities, and equipment furnished by its owners to carry freight and passengers, is a vast machine, and it is at the same time a place for the servants of the company to work. It is the duty of a railroad company to exercise ordinary care to provide and to maintain a reasonably safe machine for this purpose; but the faithful discharge of this duty does not require it to protect its servants against the effects of their own negligence or against the negligence of third parties in the use of this machine and place. On the other hand, it is the duty of the servants to whom the use of such a machine and place is intrusted to exercise ordinary care to so use the machine and place that it may not be rendered dangerous to them, to the company, or to its

customers, by reason of its use. *American Bridge Company v. Seeds*, 144 Fed. 605, 611, 75 C. C. A. 407, 413, 11 L. R. A. (N. S.) 1041.

A railroad company is not liable to its servants for the negligence of its shippers or customers, because they are not its servants and it has no power to control or direct them in their acts of loading or unloading their property (*Brady v. Chicago Great Western Ry. Co.*, 52 C. C. A. 48, 55, 114 Fed. 100, 107, 57 L. R. A. 712; *Standard Oil Co. v. Parkinson*, 82 C. C. A. 29, 30, 152 Fed. 681, 682), because their negligence is not the natural and probable consequence of their use of the railroad or of the instrumentalities furnished to them to enable them to use it (*Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 247, 28 N. E. 1, 13 L. R. A. 97), and because the danger from their negligence is one of the ordinary risks of the operation of the railroad which the servants of the company assume.

A railroad company is not liable to its servants for their own negligence in the use and the operation of the railroad, because such negligence is a breach of their primary duty to the company and to its customers, the risk of which each employé by his acceptance of the service assumes.

The legal presumption is that this railroad company furnished a reasonably safe place for the defendant in error to work and reasonably safe instrumentalities with which the shippers might load and unload their stock. There is evidence which tends to prove that the injury in this case was caused either by the negligence of some shipper who left the gate open when he finished his work of loading or unloading stock, or by the act or negligence of some person unknown, or by the negligence of the fellow servants of the plaintiff who started the cars before he had made his inspection and had given them the signal to move them, or by the negligence of the plaintiff himself, who failed to discharge his specific duty to inspect the platforms and chutes before the cars started, and who rode along on the side ladder of one of the cars when he knew, but failed to think, that if the gate was open it would strike him and knock him from the car. The railroad company is not liable to the plaintiff for any of these breaches of duty. His counsel, however, argues that the company owed his client the duty to furnish a gateman or to make some other provision to close the gate and to keep it closed when stock was not being loaded or unloaded, and that its failure so to do constituted actionable negligence. It is common knowledge, however, that the loading and unloading of cars, the use of gang planks, cattle chutes, heavy wagons, and other instrumentalities for this purpose in or so near to freight cars that the movement of the latter during the process would be dangerous to all concerned and the subsequent removal of these instrumentalities after the work of loading or unloading is completed is usually intrusted to the shippers, and that the duty to see that cars thus loaded or unloaded are clear of these temporary but necessary obstructions before they are moved, is ordinarily imposed upon the servants of the railroad company who take the cars from the loading tracks. The swinging gate provided with a wire hoop to hold it closed away from the cars when shippers were not loading or unloading stock and capable of forming one side of the cattle chute during

the loading or unloading, and the loose boards to extend the permanent fence to the car on the other side of the chute were convenient and facile means of making the necessary temporary lane to guide the cattle from the pen to the car, and the gate was not more dangerous or less necessary than the loose boards and the gang planks.

Railroad companies have, and they must exercise, necessarily, judgment and discretion in determining the methods of the construction, use, and operation of their railroads, and there is a wide field here where their decisions of doubtful questions in the affirmative or negative cannot be and ought not to be held to disclose any want of ordinary care or any breach of duty. It was as reasonable to believe that ordinary care would be exercised to remove such temporary obstructions by shippers who were pecuniarily interested that their stock or property should not be derailed and injured by them, and that reasonable care would be exercised to see that the cars were clear of such obstructions before they were started by the servants of the company who moved them and were in danger of injury if such obstructions remained too near to the cars, as it was to suppose that such care would be exercised by a gateman or any other person specially assigned to that duty alone. It does not appear from the nature of these acts, and there is no substantial evidence, that the method of loading and unloading and of care for the removal of the accompanying temporary obstructions which this railroad company selected was either unreasonable or specially dangerous. Skilled and experienced railroad operators are more competent than jurors or judges to choose methods of operating railroads, and when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and of removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor clearly dangerous, it owes its servants no duty to adopt a different method, and it cannot be held guilty of negligence because it has not done so. *Little Rock & M. R. Co. v. Barry*, 28 C. C. A. 644, 648, 84 Fed. 944, 948, 43 L. R. A. 349; *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529, 531, 63 C. C. A. 27, 29.

There was no substantial evidence of any negligence of the railroad company in this case, and its request for an instructed verdict in its favor should have been granted.

The judgment below must be reversed, accordingly, and the case must be remanded to the court below, with instructions to grant a new trial, and it is so ordered.

VAN DEVANTER, Circuit Judge (concurring). Without assenting to all of the legal propositions set forth in the foregoing opinion, I concur in the judgment of reversal, and this for the reason that the personal testimony of the plaintiff, as also the evidence as a whole, shows conclusively that he contributed to his injury by his own negligence, and therefore is without any right of recovery.

In re DEMPSTER.

DEMPSTER v. WATERS-PIERCE OIL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1909.)

Nos. 92, 2,947.

1. BANKRUPTCY (§ 100*)—ADJUDICATION—COLLATERAL ATTACK.

The validity of an adjudication of bankruptcy cannot be collaterally attacked by a creditor in a court of another jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 142; Dec. Dig. § 100.*]

2. BANKRUPTCY (§ 11*)—JURISDICTION OF COURT—SCOPE—PROPERTY IN OTHER DISTRICTS.

Under the bankruptcy law there are no courts of primary and ancillary jurisdiction; but the jurisdiction of the court which makes an adjudication extends to all property of the bankrupt situated anywhere in the United States, and it may make such orders with respect thereto as are necessary for the preservation, collection, and administration of such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

3. BANKRUPTCY (§§ 104, 114*)—JURISDICTION OF COURT—ANCILLARY PROCEEDINGS.

A court of bankruptcy is without jurisdiction, on a petition or motion filed by a receiver in bankruptcy appointed in another district, to appoint an ancillary receiver or to grant an injunction to restrain a sale of property of the bankrupt within its district; its power to entertain such a petition or motion, or to grant such relief, being limited to causes or proceedings regularly pending before it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156, 165; Dec. Dig. §§ 104, 114.*]

4. BANKRUPTCY (§ 115*)—RECEIVERS—AUTHORITY TO MAINTAIN PLENARY SUIT.

A receiver in bankruptcy, appointed under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), is charged with the duty of preserving the property of the bankrupt, and to that end, where property is situated at a distance from the court of his appointment and is in danger of being dissipated through sales by judgment creditors, which would cause irreparable damage to the estate before he can apply to that court, he may maintain any plenary suit or action necessary for its protection in the district where the property is situated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 115.*]

Appeal from the District Court of the United States for the South-eastern Division of the Eastern District of Missouri, in Bankruptcy.

On April 10, 1908, a petition in involuntary bankruptcy was filed in the District Court for the Southern District of New York, against the Hudson Valley Lead Company, a corporation organized under the laws of that state, asking that it be adjudged bankrupt upon its confession in writing that it was insolvent and unable to pay its debts. The following day the court appointed Harry Arnold receiver of the property of the corporation and authorized him to conduct its business. The principal estate of the bankrupt was a lead mine and machinery and other property used in working the same, situated in Southern Missouri. A few days prior to the filing of the petition in bankruptcy,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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namely, March 25, 1908, the appellant, Dempster, recovered a judgment against the bankrupt in the circuit court of Madison county, Mo., for \$11,380.23, upon which execution was issued and levied upon a large amount of the company's real and personal property. The sale was advertised to take place April 17th, and if carried out would have completely disrupted the business of the corporation and greatly impaired the value of the estate. On April 16th the creditors (among others the Waters-Pierce Oil Company) who filed the petition in bankruptcy in New York and the receiver presented a "petition" in the United States District Court for the Eastern District of Missouri, setting forth the proceedings in the New York court, the seizure of the property under the execution, and the imminence of the sale. It further stated that the sale would result in a preference to Dempster, and waste and destroy the estate of the bankrupt. This petition was not a bill in equity, and prayed for no subpoena or answer. It pertained to no suit or proceeding pending in the court where it was filed, but was in effect a motion made in no cause before the court. It prayed (1) for the appointment of an "ancillary" receiver to take possession of the estate in Missouri; and (2) for an injunction restraining Dempster and the sheriff from selling the property on the execution. No notice was served upon Dempster or the sheriff, but the bankrupt appeared by counsel and consented that the relief asked for be granted. On the same day, April 16th, an ex parte order was made in accordance with the prayer of the petition. The sheriff, upon this order being presented to him, turned the property over to the receiver.

June 19th Dempster applied to the trial court to vacate its order, because made without jurisdiction, and for a return of the property to the sheriff. Before this date the corporation had been adjudicated a bankrupt in the original proceeding in New York and a trustee had been duly elected and qualified. He appeared and answered the petition, not only setting up the adjudication and his own election, but further stating that Dempster had appeared repeatedly in the federal court of New York, and among other things had petitioned that court to transfer the proceeding to the United States Court for the Eastern District of Missouri. The matter came on to be heard on petition and answer, and evidence adduced by the parties. The court entered an order that the receiver appointed in the District Court in Missouri turn over to the trustee in bankruptcy appointed in the proceeding in New York "all the property of the bankrupt taken possession of by the receiver, but without prejudice to the rights of Dempster to claim and enforce in any court of competent jurisdiction any right or lien to which he may be entitled by reason of the judgment heretofore rendered in the circuit court of Madison county, Mo." It was further ordered that the injunction against Dempster and the sheriff, restraining them from interfering with the possession of the ancillary receiver, be continued as to the possession of the trustee. A review of this order is sought both by appeal and petition.

H. J. Cantwell and John C. Brown, for appellant.

E. D. Anthony, for appellees.

Before VAN DEVANTER, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). The appellant mainly contends that the written admission of the corporation that it was insolvent and unable to pay its debts was collusive, and that the adjudication in bankruptcy in New York was without authority of law. This is a collateral attack upon the judgment of the New York court, which cannot be permitted. When the petition in bankruptcy in that court was filed, it was a caveat to all the world, and the appellant here was thereby made a party to that proceeding. If in his judgment it was without authority of law, or the petition was collusive, it was his duty to appear in that court and contest the proceeding, and, if dissatisfied with the judgment, seek his redress by

appeal. He cannot be heard to raise the question collaterally in another court.

We are of the opinion, however, that the entire proceeding in the trial court was *coram non judice*. It was definitely decided in this circuit in the case of *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316, that under the present bankruptcy law "there are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction." The court in which the petition is filed has plenary jurisdiction in bankruptcy throughout the United States. Within that limit all the estate in the possession of the bankrupt or held by another as his property is brought immediately within the custody of the court and made subject to its protection. The filing of the petition is an attachment of the estate, and an injunction restraining any act which will interfere with its administration in bankruptcy. This jurisdiction is national, and takes no account of districts or states. In *re Wood and Henderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; In *re Williams* (D. C.) 123 Fed. 321, approved by the Circuit Court of Appeals of the Second Circuit, in the case of *In re Von Hartz*, 142 Fed. 726, 74 C. C. A. 58. See, also, *In re Williams* (D. C.) 120 Fed. 38; *In re Schrom* (D. C.) 97 Fed. 760. Any proceeding necessary for the protection of the estate had in any other district must take the form of a plenary action at law or suit in equity. A petition or motion, such as was presented to the trial court, can only be made in an action, suit, or proceeding pending in court. The appointment of a receiver or the issuance of an injunction can only be made in some cause properly before the court. Inasmuch as there was no cause or bankruptcy proceeding pending in the Eastern District of Missouri to which the petition or motion here under review could be attached as a provisional remedy, the trial court was wholly without jurisdiction to entertain the motion.

A contrary conclusion is reached in the cases of *In re Benedict* (D. C.) 140 Fed. 55, and *In re Dunseath & Son Co.* (D. C.) 168 Fed. 973, where the authorities are reviewed. The decisions there relied on, however, are misapprehended. *Sherman v. Bingham*, Fed. Cas. No. 12,762, and *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, were both plenary suits. The former was an action of *assumpsit*, instituted by declaration and summons, to recover money wrongfully received from the bankrupt. The latter was a suit in equity, instituted by bill and subpoena, to set aside a fraudulent preference. The question raised in these cases was whether under Bankr. Act March 2, 1867 (14 Stat. 517, c. 176), United States courts had jurisdiction of a plenary action brought by the trustee in any district other than that in which the petition was filed, and it was decided that such jurisdiction existed. Such suits are spoken of by the court as ancillary; but the word "ancillary," as there used, simply means that the suits are in aid of the court of bankruptcy in collecting the assets of the estate. They lend no countenance to the filing of a petition or motion in a court where no cause is pending.

Under the present bankruptcy law the trustee is vested with all the property belonging to the bankrupt, and may pursue any remedy

available to the owner of property. If the property has been reduced to possession, the court of bankruptcy can grant him full relief in the exercise of its summary jurisdiction. If it is held adversely, he can only recover it by plenary action or suit. The only court in which he can proceed by petition or motion is the court in which the proceeding is originally instituted. In *re Williams* (D. C.) 123 Fed. 321; *Ross-Mecham Foundry Co. et al. v. Southern Car & Foundry Co.* (D. C.) 124 Fed. 403; In *re Von Hartz*, 142 Fed. 726, 74 C. C. A. 58. The only cases to the contrary, besides those mentioned in the preceding paragraph, are In *re Peiser* (D. C.) 115 Fed. 199, in which the subject is not in any way discussed, and In *re Sutter Bros.* (D. C.) 131 Fed. 654, which must be regarded as overruled by the case of In *re Von Hartz*, 142 Fed. 726, 74 C. C. A. 58.

It does not follow, from what we have said, that the parties in interest here were without remedy. The authority of the bankruptcy court to appoint a receiver for the preservation of the estate pending the adjudication, to authorize the receiver temporarily to conduct the business of the alleged bankrupt, and to make all orders necessary for the accomplishment of those objects, applies to the entire estate of the bankrupt, wheresoever it may be situated in the United States, and is not confined to such property as may be within the district wherein the petition in bankruptcy is filed. In short, the authority to take precautions for the preservation of the estate pending the adjudication in bankruptcy is quite as broad, territorially speaking, as is the authority to collect, administer, and settle the estate after a trustee is appointed. Section 2, cl. 3, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), authorizes the court to appoint receivers "for the preservation of estates, to take charge of the property of bankrupts." Wherever the estate is in the United States, there this jurisdiction extends. In its exercise the court may authorize the receiver to take possession of property belonging to the estate wherever situated, and restrain third parties from interfering with that possession, and may also restrain them from pursuing remedies in other courts which will conflict with the duties of the receiver. In the recent case of *In re Muncie Pulp Co.*, 151 Fed. 732, 81 C. C. A. 116, the Circuit Court of Appeals of the Second Circuit held that a court of bankruptcy in the Southern District of New York had power to authorize its receiver to take possession of real property belonging to the estate in Arkansas, and to restrain creditors residing in that state from prosecuting actions in its courts by attachment against the property. Upon the authority of that case, the court of New York in the instant case had jurisdiction to restrain the execution sale now under consideration by specific order. If the pendency of that sale was not discovered by the receiver until he reached the state of Missouri, and at a time when it would have been too late to apply to the court of his appointment, there were still several courses open to him: (1) He might have applied to the state court out of which the execution issued to restrain further proceedings thereon, and it would have been the imperative duty of that court, under section 11 of the bankruptcy act, to grant the relief. (2) The sheriff held the property as the property of the bankrupt.

Otherwise there would have been no foundation for his levy. *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. In this case the Supreme Court decided that money arising from an execution sale of the property of the bankrupt, while in possession of the officer making the sale, could be arrested and reclaimed by the trustee. Much more could property which is simply held under a levy be recovered on behalf of the estate. Holding the property as the property of the bankrupt, it would have been the duty of the sheriff, upon demand of the receiver, to acknowledge his right and suspend further proceedings under the writ. Any priorities which the creditor secured by the levy would have been fully protected in the court of bankruptcy. (3) If the state authorities had refused to accede to the requests of the receiver, he could have filed a plenary suit to enforce his right to the possession of the property and to restrain its dissipation and waste by the execution sale. It would seem that the United States Circuit Court would have jurisdiction of such a cause as a suit arising under the laws of the United States, within the meaning of the judiciary act. The limitations of section 23 of the bankruptcy law relate only to suits brought by trustees, and do not apply to suits by receivers.

It has been held that a receiver in bankruptcy has no power to maintain suits for the recovery of property in the possession of third parties under a claim of right. *Boonville National Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *In re Kolin*, 134 Fed. 557, 67 C. C. A. 481; *Guaranty Title & Trust Co. v. Pearlman* (D. C.) 144 Fed. 550. It would be easy to press the doctrine of these cases too far. It is true, as they hold, that the collection of the estate belongs to the trustee; but its preservation pending the election of a trustee is the duty of the receiver, and in many cases the property of the bankrupt can only be saved from dissipation by the receiver's taking it into his immediate actual possession. His powers in preserving the estate are larger than those of a trustee. When necessary for its preservation, the court may direct him to take possession of property, although the same is held adversely under a claim of right—property so situated that the trustee could only recover it by a plenary action. This is the express holding of the Supreme Court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. It is true that in that case the party having adverse possession intervened in the bankruptcy court by petition for the protection of his right. But the Supreme Court declares broadly the power of the receiver or marshal to take possession of property though held adversely. It quotes from the case of *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277, where the court sustained the exercise of such a power under the act of 1867 by an officer proceeding in invitum, and holds that the doctrine declared in that case is equally applicable to receivers and marshals acting under the present bankruptcy law. See, also, *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388. As the Supreme Court points out in *Sharpe v. Doyle*, this power is indispensable to the preservation of estates. If it did not exist, it would be possible for dishonest bank-

rupts and those acting in collusion with them to completely dissipate the estate. *Horner-Gaylord Co. v. Miller* (D. C.) 147 Fed. 295.

Peculiar circumstances might also exist, owing to the great distances in this country and the wide distribution of estates, in which it would be impossible for the receiver to apply to the court of his appointment to enforce the delivery of possession of property belonging to the estate against persons refusing to acknowledge his rights, and when the property would be dissipated and the estate suffer irreparable loss unless prompt relief could be obtained. In such a case the receiver could, in our judgment, maintain any action or suit necessary for the protection of the estate. The authorities which hold that a receiver in bankruptcy has no power to seize property or maintain suits for the protection of the estate outside the district of his appointment confuse such a statutory receiver with the ordinary receiver in chancery. A receiver of the latter class derives all his powers from the order appointing him, and is confined to the jurisdiction of the court from which it emanates. A receiver in bankruptcy, on the contrary, not only derives his powers from the statute, but the jurisdiction of the court appointing him, as already explained, is, as to such receiverships, coextensive with the United States. This distinction is clearly recognized in *Booth v. Clark*, 17 How. 322, 334, 15 L. Ed. 164; *Hale v. Allinson*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 380. While such a receiver acts at all times under the supervision of the court, his authority to maintain suits for the protection of the estate need not be expressly granted. It would spring by implication from the nature of his duties.

The question brought to this court in the present case is a naked question of law arising upon uncontroverted facts, and can well be dealt with under the petition to revise. The appeal is therefore dismissed.

It follows, from what we have said, that in no possible view of the matter was the court below possessed of jurisdiction to entertain this proceeding. Its order or decree must therefore be reversed, with a direction to dismiss the petition or motion without prejudice to the rights of any of the parties concerned; and it is so ordered.

KNICKERBOCKER STEAMBOAT CO. v. CUSACK.

(Circuit Court of Appeals, Second Circuit. January 30, 1905.)

No. 100.

1. FALSE IMPRISONMENT (§ 7*)—CIVIL LIABILITY—DEFENSES.

In an action solely for false imprisonment, the termination of the criminal proceedings is immaterial, and it is not a defense that the plaintiff pleaded guilty to the charge made against him.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

2. ARREST (§ 63*)—ON CRIMINAL CHARGE—AUTHORITY TO ARREST WITHOUT WARRANT.

Under Code Civ. Proc. N. Y. § 177, which allows an arrest by an officer without a warrant only for a crime committed or attempted in his pres-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

ence, or when the person arrested has committed a felony, although not in his presence, or when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it, the arrest without a warrant of a person charged only with a misdemeanor not committed in the officer's presence is illegal.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 144-156; Dec. Dig. § 63.*]

3. FALSE IMPRISONMENT (§ 8*)—CIVIL LIABILITY—MEASURE OF DAMAGES.

Under the general rule of damages in cases of false imprisonment that the person causing a wrongful imprisonment is liable for all the natural and probable consequences thereof, where the mate of defendant's vessel pointed out the plaintiff, who was a passenger, to an officer, and demanded his arrest, and after the officer had illegally arrested him without a warrant and taken him before a magistrate the mate filed a complaint against him falsely charging him with a criminal offense, plaintiff's imprisonment on such charge may properly be regarded as a continuation of the original wrong, for which defendant was liable in damages.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68-73; Dec. Dig. § 8.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

The defendant in the court below brings this writ of error to review a judgment for the plaintiff entered upon the verdict of a jury in the United States Circuit Court for the Southern District of New York.

Benjamin Trapnell, for plaintiff in error.

Henry H. Bowman, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiff was a passenger on board the excursion steamer General Slocum, belonging to the defendant, on an excursion trip from Paterson, N. J., to Rockaway Beach and return. There was some fighting on the boat, in the course of which plaintiff was assaulted. The mate of the Slocum separated the parties, put the plaintiff's assailant and some other persons in the hold, and, when the steamboat arrived at Rockaway Beach, pointed plaintiff out and directed a police officer to arrest him. The officer took plaintiff to the magistrate's court at Far Rockaway, where the mate made a complaint against him. The plaintiff at first pleaded not guilty, but afterwards changed his plea to guilty, and was fined \$5. He did not have the money to pay the fine, and he was chained with some criminals and put into a van and driven to Long Island City, where he was put in jail and kept in confinement until the next morning, when he was discharged. He sued for this false imprisonment, and obtained a verdict for \$800 damages.

The claim of counsel for defendant that the plea of guilty in the magistrate's court was a bar to this action is not well founded. The authorities are practically unanimous to the effect that, in an action solely for false imprisonment, the termination of the criminal proceedings is immaterial. *Newell on Malicious Prosecution*, 307; *Burns v. Erben*, 40 N. Y. 463; *Hopner v. McGowan*, 116 N. Y. 405-410,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

22 N. E. 558; *Barry v. Railroad Co.*, 51 App. Div. 385, 64 N. Y. Supp. 615. The New York Code of Civil Procedure allows the arrest by an officer without a warrant only for a crime committed or attempted to be committed in his presence, or when the person arrested has committed a felony, although not in his presence, or when a felony has, in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it. Code Civ. Proc. § 177. Here the plaintiff was guilty only of a misdemeanor, and the arrest was illegal. *Thorn v. Turck*, 94 N. Y. 90, 46 Am. Rep. 126; *Barry v. Railroad Co.*, supra; *People v. Pratt*, 22 Hun, 300; *Loomis v. Render*, 41 Hun, 268. The exception to the refusal of the court to charge the twenty-ninth request to charge raises the question of the measure of damages. This request was as follows:

"(29) That, if the arrest was unlawful, it was only so from the time the plaintiff was arrested until he reached the magistrate's court, which was by the undisputed evidence of the police officer less than one hour, and that damages can only be given against the defendant for the arrest on the boat and the holding of him until he came into the magistrate's jurisdiction."

In respect to this proposition the court charged the jury, *inter alia*, as follows:

"If you should come to the conclusion that the mate was not warranted in pointing the plaintiff out to the officer for the purpose of having him arrested, then naturally there follows from that the question what he should receive for this indignity, and it would be an indignity if you find the former conclusions to prevail, what damages you shall give him for such acts, and it seems to me very clear that the proceedings which followed from the time Officer Thompson laid his hand on him until he was back at his home flow naturally from the action of the mate in pointing him out to Officer Thompson."

The general rule of damages in cases of false imprisonment is that the person causing a wrongful imprisonment is liable for all the natural and probable consequences thereof. 12 Am. & Eng. Encyc. of Law (2d Ed.) 778, and cases cited. The plaintiff is entitled to recover damages for what the party wrongfully did. *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796. The independent illegal acts of the officers of the law are not the natural and probable consequences of such false arrest.

Thus, in *Gulf, C. & S. F. Ry. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447, where plaintiff sued the railway company for forcible removal from a train by a constable acting on complaint of defendant, the court held the company not liable for the acts of the officer after plaintiff's removal in putting plaintiff in irons, formally arresting him on warrant, and detaining him until released on bail. And in *Frankfurter v. Bryan*, 12 Ill. App. 549, it is held that, where the arrest is caused on one charge and a fine was imposed on another charge, the complainant was not liable for the false arrest. In *McCall v. McDowell*, Fed. Cas. No. 8,673, defendant was held liable for imprisonment and indignities suffered by plaintiff solely on the ground that they were the probable consequences of such confinement in a military prison, if not provided against by him.

But, as to the question whether the action of the magistrate or other officer of the law after the surrender of the person imprisoned is the

natural and probable consequence of the original unlawful act, the authorities are in conflict. In *Shea v. Manhattan Railway Co.* (Com. Pl.) 8 N. Y. Supp. 332, where defendant's employé caused the arrest of the plaintiff by a police officer and accompanied the officer to the police station and signed a complaint before the magistrate, and the plaintiff was discharged, the court held that all the proceedings taken together constituted one continuous act of imprisonment, and that the arraignment of the plaintiff before the police justice was an inevitable concomitant and sequence of his arrest. The court there cited with approval the following language of the court in *Rown v. Christopher & Tenth Street Railroad Co.*, 34 Hun, 471:

"What was done was a continuous act, beginning with the attempt of the driver to remove the passenger and terminating only with his discharge the next morning by the court before which he was taken. * * * To present the case clearly to the jury, the evidence of what occurred after the plaintiff was taken from the car and up to and including the time of his discharge was proper for their consideration. It simply exhibited the development of the events naturally following and arising out of the unlawful act of the driver in endeavoring to remove plaintiff from the car."

In the latter case the action appears to have been for damages for unlawful removal from a car, for assault, and for unlawful imprisonment for resisting the effort at removal. The court held that the defendant was liable for all the consequences of all of said acts.

In *Murphy v. Countiss*, 1 Harr. (Del.) 143, in an action for trespass, assault, and battery and false imprisonment, the court held that the plaintiff could recover, not merely for the time the constable was bringing him to jail, but for the whole period of his imprisonment. And in *Mandeville v. Guernsey*, 51 Barb. (N. Y.) 99, the court says:

"The arrest being wrongful, the defendant is liable for all the injurious consequences to the plaintiff which resulted directly from the wrongful act. * * * A person who has arrested a party without process, or on void process, wrongfully, cannot detain him on valid process, until he has restored such party to the condition he was in at time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment, commenced without authority, and by his wrongful act."

See, also, *In re Allen*, 13 Blatch, 271, Fed. Cas. No. 208, and cases cited; *Powell v. Hodgetts*, 2 Carrington & Payne, 432.

On the other hand, in *Locke v. Ashton*, 18 L. J. Q. B. 76, the plaintiff was a carman in defendant's employ, and had been sent to bring 20 sacks of oats from the premises of certain grain merchants to those of the defendant. Plaintiff brought back with him only 19 sacks, whereupon the defendant gave him into custody on the charge of stealing the missing sack. The magistrate, before whom the complaint was preferred, remanded the plaintiff, but subsequently discharged him, upon its appearing that the missing sack was left with the city toll collector as security for tolls. The judge instructed the jury that the plaintiff was entitled to damages for the whole time that he was kept in custody. The case was heard on appeal before Chief Justice Denman and Judges Coleridge, Wightman and Earl. It was there argued that defendant was liable for all the consequences of his wrongful act within

the doctrine of *Scott v. Shepard*, 2 W. B. 892. The court held as follows:

"The remand, in respect of which the jury gave damages, was the act of the magistrate, not the act of the defendant; and therefore ought not to have been taken into consideration by the jury in assessing the damages."

In *Langford v. Boston & Albany Railroad Company*, 144 Mass. 431, 11 N. E. 697, where the agent of the defendant made a complaint to a trial justice against the plaintiff for unlawfully refusing to pay his fare, and the magistrate issued his return in due form for plaintiff's arrest, it was held that defendant was not liable in trespass for the acts done by the officer in serving the return, even though the magistrate had no jurisdiction to issue the return. *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457, is to the same effect.

In *Teal v. Fissell* (C. C.) 28 Fed. 351, the court in holding that the party making the complaint was not liable for the act of the justice said as follows:

"To hold the prosecutor responsible in such a case who simply discharges a public duty in making information of a supposed offense would not only be grossly unjust to him, but would also be highly injurious to the public interests. * * * He has nothing to do with issuing the writ; no authority or influence respecting it. It is the justice's duty to pass upon the facts, and determine whether a warrant shall issue. His functions are judicial. * * * Here the prosecutors honestly believed an offense had been committed, and that the information laid before him (the justice) was truthful. They were, therefore, in no respect responsible for what followed."

In *Barker v. Stetson*, supra, the court says:

"The authorities are conclusive that, when a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction."

In *Brown v. Chapman*, 60 Eng. Common Law, 364, the plaintiff sued in trespass for assault and false imprisonment. There the defendant preferred a charge of embezzlement to the magistrate, and the plaintiff was taken into custody. The court held that the acts of the defendant in making the charge, and even in stating in the presence of the magistrate that he, the defendant, gave the plaintiff into custody, amounted to nothing more than calling upon the magistrate to exercise his jurisdiction. The court there in affirming the nonsuit ordered in the court below discussed the cases bearing on this question, and concluded that a person making a complaint or applying to a magistrate for a return for the arrest of the accused only appeals to the magistrate to exercise his jurisdiction, and that the complainant is exempt from liability in trespass.

In *Newman v. New York, Lake Erie & Western Railroad Co.*, 54 Hun, 335, 7 N. Y. Supp. 560, the plaintiff was arrested by the servant of the defendant as a suspicious person, and was afterwards discharged on the ground that the arrest was made without legal authority. There was a conflict in the testimony as to whether the plaintiff's detention in the police station was or was not at the instance of defendant's officer. The court was therefore asked to direct the jury that, if they should be of the opinion that defendant's officer arrested

the plaintiff, it was not liable for what subsequently occurred by reason of the action of the police officer or of the justice in detaining the plaintiff, unless they believed it was at the request of defendant's officer. The court declined to make this charge, and held that the defendant was entitled to the instruction requested. In its opinion the court said as follows:

"From the time when the plaintiff was taken before the sergeant he was subject to his control and direction, and if he, in the discharge of his duty and the exercise of his authority, considered the case to be one requiring the further detention and examination of the plaintiff, it was his act and not that of the defendant. If, on the contrary, the detention was produced by the instigation or urgency of an officer in the employment of defendant, having authority on its behalf to make the arrest, then the defendant would be liable for the damage sustained by this continued detention of the plaintiff, and the case should have been in that manner submitted to the jury, instead of the subject being withdrawn, as it was, from their consideration by this refusal to charge."

This court is not agreed as to the general rule of liability for damages applicable in such cases where the evidence fails to show any action on the part of a defendant other than such as is necessary to place the person arrested under the control of the magistrate. In the case at bar, however, it appears that the mate pointed the plaintiff out and told the officer to arrest him, saying, "Catch that fellow, take him"; that he charged him with being one of the men who had caused the disturbance; that he made the complaint before the magistrate on which plaintiff was committed, and in said complaint charged plaintiff with using threatening, abusive, and insulting behavior with intent to provoke breach of the peace. The evidence shows that these accusations were not justified by the facts, and that plaintiff merely defended himself against an unprovoked assault. The mate admitted that the first thing he saw was that somebody struck plaintiff in the face, and that he told plaintiff that he, plaintiff, had been abused, and that a great wrong had been done him.

In these circumstances we think the conduct of the mate after the arrest may be justly regarded as a continuation of the original wrong for which defendant was liable, and that the subsequent proceedings were the direct result of the unjustified and pernicious activity and urgency of the mate, and only indirectly and remotely attributable to the action of the committing magistrate. We think, furthermore, that in either view of the case the plaintiff was entitled to a verdict, and we are not prepared to say that the damages imposed would have been excessive if they had been assessed for the indignity and suffering endured prior to the proceedings before the magistrate.

The judgment is affirmed, with costs.

LEHIGH VALLEY R. CO. v. PROVIDENCE WASHINGTON INS. CO.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 262.

1. INSURANCE (§ 622*)—CONSTRUCTION OF CONTRACT—LIMITATION OF ACTION.

An open policy of marine insurance issued to a carrier on its cargoes, insuring them "for account of whom it may concern," contained a provision that no actions should be maintained thereon "unless commenced within the time of 12 months next after the disaster causing such loss or damage shall occur." *Held*, that such policy was not one of liability insurance, but that the sinking of a vessel, causing damage to its cargo, was the "disaster" causing the loss, and that the insured had immediately a right of action for the benefit of any party in interest, independently of any antecedent recovery against it by the cargo owner, and that an action was barred in 12 months thereafter.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 622.*

Conditions in policy as to time for bringing suit, see notes to *Steel v. Phoenix Ins. Co.*, 2 C. C. A. 473; *Rogers v. Home Ins. Co.*, 35 C. C. A. 404.]

2. WORDS AND PHRASES—"WAIVER."

A "waiver" is the intentional relinquishment of a known right.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831-7832.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 167 Fed. 223.

In the policy sued upon the respondent insured the libellant, "for account of whom it may concern, on all kinds of grain and flaxseed, against any and all risks and perils of fire, inland navigation and transportation, the property of the assured or held in trust or custody, or as freighter, forwarder, bailee or common carrier, while on board barge or barges, lighter or lighters, boat or boats, float or floats." On January 23, 1903, while the policy was in force, 4,500 bushels of wheat covered by it and in the course of transportation by the libellant as common carrier were damaged by the sinking of a canal boat upon which they were loaded. The owners of the wheat assigned their claim for its loss to one Bradley, who in March, 1906, obtained a decree against the libellant in the District Court. In April, 1907, this decree was affirmed on appeal by this court. The libellant paid the amount of the decree and within 12 months thereafter brought this action to recover the amount so paid together with expenses.

The District Court held that the respondent was not liable because: (1) The action was not commenced within the time limited by the following provision of the policy: "It is further hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the time of 12 months next after the disaster causing such loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of 12 months next after the disaster causing such loss or damage shall have occurred, the lapse of time shall be taken and claimed as conclusive evidence against the validity of the claim thereby attempted to be enforced." (2) The policy provided that it should not apply, should there be any existing insurance by the owner of the goods, and there was such insurance.

Robinson, Biddle & Benedict (U. S. Montgomery, of counsel), for appellant.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The question of primary importance in this case is whether the action was commenced within the 12-months limitation period of the policy. If the limitation is a bar, there is no necessity for considering the other questions presented. The disaster which caused the damage to the grain occurred in 1903. If this were the "disaster" of the limitation clause, this action—begun in 1907—was commenced too late. If, on the other hand, the decree which held the libelant liable was, with respect to it, the "disaster," the action was commenced in time. In other words, the question is whether the policy can be treated as one of liability insurance.

As already shown, the libelant was insured "for account of whom it may concern," and the policy covered the grain while in the custody of the libelant as a common carrier or bailee. We think that upon the occurrence of the damage by the sinking of the vessel the libelant had immediately a cause of action upon the policy. As bailee and carrier it had a special property in the wheat. Moreover, its right to recover upon the policy was not merely for its own benefit, but for the benefit of the other interested parties. It is true that after payment to the general owner recovery upon the policy would have afforded reimbursement as in the case of liability insurance. But that did not make it a liability insurance policy. As already stated, the libelant had the right to recover independently of any antecedent recovery against it and to hold the amount recovered either for its own benefit by way of reimbursement or for the benefit of other parties in interest. It follows, therefore, that as the libelant could have brought suit immediately after the accident, the limitation clause operated as a bar to this action, which was commenced several years afterwards.

The next question is whether the respondents waived the defense of the limitation clause. A waiver is the intentional relinquishment of a known right. We see nothing in the record showing that the respondent or its agent intended to waive this defense. The testimony concerning a promise to bear a part of the expenses of the litigation is entirely insufficient to establish such a waiver. The fact that the respondent insisted upon other defenses did not amount to a waiver of this defense. Moreover, we find nothing operating against the respondent by way of estoppel.

The decree of the District Court is affirmed, with costs.

EL CAMBIO GOLD MINING CO. v. CUCCHARAS MINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

No. 1,669.

SHIPPING (§ 27*)—SALE OF VESSEL—ACTION FOR PRICE—FAILURE TO DELIVER.

A purchaser of a half interest in a steamer, which contracted to pay therefor one-half her cost, to be shown by an itemized bill to be furnished by the seller, and on the transfer of such half by a good and sufficient bill of sale free from liens, *held* not bound for the purchase price, where no bill of the cost nor bill of sale was tendered prior to the time when the vessel was lost.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 27.*]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

J. B. McLaughlin and John L. Fleming, for plaintiff in error.

J. H. Shankland and J. P. Chandler, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. The plaintiff in error, a corporation organized and existing under the laws of South Dakota, brought this action in the court below to recover of the defendants in error money alleged to be due upon contract. The cause was tried before the court without a jury upon stipulation of the parties, and resulted in a judgment of nonsuit. The contract was in writing, bore date October 17, 1904, and provided for the sale by the Cambio Gold Mining Company to the Cucharas Mining Company of a half interest in a certain steamship, called "Arrow," her tackle, apparel, etc., after the vessel should be taken by the vendor to the port of Mazatlan, Mexico, and there placed under the Mexican flag, and, upon the consummation of such sale, further providing for the future operation of the ship by the vendor and vendee through a corporation to be organized by them under the laws of the territory of Arizona, upon certain terms and conditions specified in the contract, but which need not be detailed. The contract expressly declared the plaintiff in error to be the owner of the ship, and contained an express warranty on its part:

"That said vessel, with her tackle, apparel, furniture, boats, and other appurtenances, is now, and shall continue to be, until the transfer at Mazatlan, republic of Mexico, of a half interest to the vendee according to the terms and stipulations of this instrument, wholly and exclusively the property of the vendor, and free of liens, incumbrances, and claims of any and every description."

It also contained these express covenants on the part of the vendor: To properly equip the vessel and cause her to be navigated as expeditiously as possible to the port of Mazatlan, and there to place her under the Mexican flag, with all the proper and legal forms; that immediately upon the vessel reaching Mazatlan in good order, and her being there placed under the Mexican flag, the vendor should deliver to the vendee an itemized bill, accompanied by proper vouchers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in writing, when vouchers could be obtained, which statement should include the original cost of the vessel, her tackle, apparel, furniture, boats, appurtenances, etc., the expenses for fuel and navigation to Mazatlan from Port Townsend, Wash., where she then was, the expense of placing the vessel under the Mexican flag, and any and every other necessary expense incurred in the premises, and thereupon the vendor should tender and deliver to the vendee a proper bill of sale or other instrument sufficient to pass the title to a half interest in the vessel and her equipment to the vendee upon the concurrent payment on its part to the vendor, in lawful money of the United States, of one-half of the proper total of the aforesaid itemized statement; the Cucharas Mining Company expressly covenanting:

"To purchase, at the time and place and in the manner aforesaid, the half interest aforesaid, and well and truly to pay the purchase price, to be made certain in the manner aforesaid."

The agreement contained the further provision that any sum of money advanced by the vendee for the benefit or on account of the vessel, at the request of "the president, manager, master, or superintendent," between the time of the execution of the contract "and the time of transfer as aforesaid, shall be and remain a lien, without interest, chargeable against said vessel, and to be credited upon the purchase price as aforesaid when ascertained." The agreement also contained provisions for the organization by the vendor and vendee of a corporation under the laws of Arizona, the capital stock of which should be owned equally by the vendor and vendee, for the future operation of the ship for the benefit of the parties interested.

The evidence introduced upon the trial showed that when the vendor got the vessel to Mazatlan it ascertained that under the laws of Mexico no ship carrying the Mexican flag could be operated by a foreign corporation, and that, upon that fact being brought to the notice of the Cucharas Mining Company, the president of that company, in a letter to the president of the El Cambio Gold Mining Company, wrote:

"I am in receipt of a letter from Mr. H. P. Durrell, inclosing letters from your attorneys, Taylor & Howat, and Messrs. Wholen & Bartning, of Mazatlan, stating that it is impossible for us to operate the steamship Arrow with a foreign company. We note that you think it best to organize a Mexican company with \$50,000 capitalization. If it does not cost too much to organize this company, and cause too much delay on account of red tape, I think it would be the best way out of it. If, however, the cost is excessive, and there will be great delay, I think it would be much better for you to do as your attorneys suggest, and transfer the vessel to your agents at Mazatlan, and operate the boat in their name, of course, having our ownerships set forth properly with a private contract. Inasmuch as most of the business will have to go through your agents' hands, I am inclined to think this would be the best way out of it. However, you are on the ground and understand the situation better than I do. Therefore we will leave the matter in your hands, and hereby give our consent to the necessary changes in our contract with your company to cover this operation of the steamer under the plan as set forth above."

In its amended complaint the plaintiff in error alleged:

"That the transfer of said vessel and her equipment and paraphernalia to said Mexican corporation was substituted for the agreement to transfer the one-half interest therein to the defendants."

The above letter does not sustain that averment, and there was no other proof tending to sustain it; and as it appeared from the evidence that the plaintiff in error never did deliver or tender to the contemplated vendee the itemized bill provided for by the contract, and never did deliver or tender to it any bill of sale or other instrument sufficient, or even purporting to pass to the vendee the half interest in the vessel and her equipment, as provided for in the written contract, and that the ship was lost before the consummation of the contemplated sale, the court below was clearly right in giving, as it did, a judgment for nonsuit against the plaintiff.

The judgment is affirmed.

THE GHAZEE.

(Circuit Court of Appeals, Second Circuit. June 15, 1909.)

No. 265.

1. SHIPPING (§ 132*)—CONNECTING CARRIERS—SUIT FOR SHORT DELIVERY OF CARGO—BURDEN OF PROOF.

When it is shown that goods, when delivered by a vessel which was the last carrier to the consignee, were deficient in quantity, the presumption is that the missing goods were delivered to such vessel, and the prima facie case so made out is not only one of liability against the owner, but of a maritime lien against the ship, and the burden rests upon her to prove that she delivered all that she received.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

Presumptions and burden of proof as to cause of loss or injury to goods shipped by vessel, and diligence or negligence of carrier, see note to *The Patria*, 68 C. C. A. 398.]

2. SHIPPING (§ 141*)—LOSS OF CARGO—EXEMPTION OF LIABILITY IN BILL OF LADING.

An exemption in a bill of lading of liability for loss of cargo by theft does not relieve the vessel, where there was negligence on her part which contributed to or facilitated the theft.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 141.*]

Appeal from the District Court of the United States for the Southern District of New York.

Robinson, Biddle & Benedict (H. S. Hertwig and Wm. S. Montgomery, of counsel), for appellant.

J. Parker Kirlin and John M. Woolsey, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This action was brought by the assignee of two through bills of lading to recover damages for the alleged loss of bristles out of cases shipped from Tientsin, China, to Shanghai on certain steamers and there transhipped to the steamship *Ghazee* for transportation to Boston.

It is admitted that all the cases in question were delivered to the *Ghazee* and were carried by her to Boston, and the testimony is uncontradicted that part of their contents, amounting in all to 830 pounds and valued at \$1,500, were missing from the cases when they were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

delivered to the consignee. Indeed, before the trial it was stipulated by the parties that there were more bristles delivered to the first carrier at Tientsin than were delivered to the consignee by the Ghazee on her discharge at Boston.

The defenses of the Ghazee were: (1) That she delivered the goods in the same condition in which she received them; (2) that there was no proof that the missing bristles had been delivered on board her, and, consequently, no maritime lien was established; (3) that she was relieved from liability by the following exceptions in the bill of lading:

"The acts of God, * * * robbers or thieves by land or sea, on board, in craft, or on shore, whether in the service of the shipowner or not. * * *

"Merchandise on wharf in craft or elsewhere awaiting shipment or delivery is absolutely at shipper's or consignee's risk."

It is well settled by the authorities that:

"A connecting carrier who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity will be held liable in an action for the damage or deficiency without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which they were delivered." 3 Hutchinson on Carriers, § 1384, and cases cited.

Or, as stated by the claimant in its brief in speaking of the proof required of such a carrier:

"He has merely to show that the cargo was not damaged while in his custody, and that he delivered it in the same condition in which he received it."

This rule is, manifestly, as applicable to carriers by sea as to land carriers, and, in our opinion, is unaffected in its operation by the principle that in order to maintain a proceeding in rem delivery of the cargo upon the vessel must be shown. When it appears that goods delivered by the last carrier to the consignee are deficient in quantity, the presumption is that the missing goods were delivered to such carrier; and the prima facie case made out is not only one in which a carrier's liability is shown, but in which a maritime lien against the ship is established. Presumptively the missing bristles were delivered on board the Ghazee. Unless she sustained the burden of proof that they were not so delivered, she was liable in this action.

Now the burden was upon the Ghazee to establish a negative—that the goods were not lost or stolen while in her custody. She attempted to do this by showing: That her officers watched the cases as they came over the ship's side and were being stowed in the hold and saw nothing wrong; that the cases went into a part of the hold where it would have been very difficult to broach them; that on several occasions the hold was inspected, and no change in the condition of the cases was seen; and that no bristles were found on the deck. This testimony went far to show that the cases were not opened while upon the ship, but did not go far enough. The chain of negative proof required was incomplete. The proof left several hypotheses consistent with the loss of the bristles upon the ship and with her liability therefor. Thus, for example, it appears that the ship lay eight days at Shanghai, and that two quartermasters were on duty at night. These men were not called as witnesses. In the absence of any proof it can-

not be assumed that they did their full duty. For all that appears they may have failed in the performance of their duties and through negligence made it possible for thieves to enter the holds, extract the bristles, and put back the cases. In such a case the exemption in the bill of lading would not relieve the ship. While a general exemption against thieves may be valid, it is not to be construed as including or as applicable to a case where there was negligence on the part of the ship which contributed to the theft or facilitated it. *Cunard S. S. Co. v. Kelley*, 115 Fed. 686, 53 C. C. A. 310.

Of course we are not expressing an opinion that the bristles were stolen in the manner suggested. We merely point out that they might have been so taken to show that the ship failed to remove the presumption against her. She assumed a difficult task—to establish a negative. But the difficulty in establishing it in no way relieved her from the burden of doing so if she were to escape liability, and, as we have seen, the vessel has not sustained this burden. She has merely presented evidence from which inferences both ways may be drawn. She has failed to fulfill the obligation of showing the fact that the loss did not occur while the goods were in her custody.

The decree of the District Court is reversed, with costs, and the cause remanded, with instructions to enter a decree for the libellant for its damages—to be ascertained in the usual way—and costs.

THE SENECA.

(Circuit Court of Appeals, Second Circuit. June 15, 1909.)

No. 270.

SHIPPING (§ 116*)—SUIT FOR SHORT DELIVERY OF CARGO—BURDEN OF PROOF.

Where through bills of lading for boxes of bristles recited that the weight and quantity were unknown, the burden rests upon the shipper to show their weight, when received, in order to hold the last carrier liable for a claimed short weight in the quantity delivered.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 435; Dec. Dig. § 116.*]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 163 Fed. 591.

J. Parker Kirlin and John M. Woolsey, for appellant.

William M. Beard, Walter P. Paret, and James T. Kilbreth, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This action—likewise for the loss of bristles—is, with respect to the burden of proof, the converse of that of *The Ghazee* (decided at this time) 172 Fed. 368. In that case it was stipulated that more bristles were delivered to the first carrier than were delivered to the consignee, and it was held, under the last carrier rule, that the burden was upon the ship to show that it delivered them in the condition in which they were received. In this case there was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

no such stipulation, and the burden was upon the libelant to show that the bristles which were abstracted were delivered to the ship.

This burden of showing delivery to the ship we think was not sustained by the libelant. There was no positive testimony that the boxes were full of bristles when delivered on board the ship. The libelant's whole case depended upon showing the weights; and yet the bill of lading contained no notation of weight and recited that weight, quality, quantity, contents, and value were unknown. The boxes were not in fact weighed after they were placed on board the ship, and it does not appear that they were weighed before. No evidence of negligence in the care or custody of the cargo during the voyage was offered by the libelants. That which was offered came from the ship and tended to show that the boxes were not broached during the voyage.

All the evidence of the weight of the 50 cases relied upon by the libelants was a receipt or boat note signed by the mate of the ship after the issuance of the bill of lading containing a notation "Pls 50," coupled with testimony that such notation meant "50 piculs"; a picul being a Chinese weight of $133\frac{1}{3}$ pounds. But while this receipt was admissible in evidence against the vessel, it was subject to explanation. We are satisfied that the mate who signed it did not understand the meaning of the obscure notation of a foreign weight. He knew that the boxes had not in fact been weighed, and we think it clear that there was no intention upon his part in signing the boat note to vary the recital of the bill of lading that the weights were unknown. Even to a person understanding the meaning of the phrase, the notation would seem to be a rough estimate, rather than an accurate statement of weights. In our opinion the notation, under the circumstances, was insufficient either to show the weight of the boxes or to shift to the ship the burden of proving its inaccuracy. No principle of estoppel operated against her.

We think that the libelants failed to show that the bristles which were abstracted were ever delivered on board the Seneca and, consequently, that the libel should have been dismissed.

The decree of the District Court is reversed, with costs, and the case remanded, with instructions to dismiss the libel, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. TOLEDO, P. C. & L. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. July 29, 1909.)

No. 1,868.

1. PATENTS (§ 157*)—CONSTRUCTION—PAPER PATENTS.

While the fact that the device of a patent has never been put in use does not affect the validity of the patent, it is ground for giving it a strict construction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 157.*]

2. PATENTS (§ 112*)—VALIDITY—PRESUMPTION FROM ISSUANCE.

The presumption of the validity of a patent arising from its issuance is weakened by the fact that certain prior patents, claimed to anticipate, were not cited to nor considered by the examiner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 164; Dec. Dig. § 112.*]

3. PATENTS (§ 328*)—ANTICIPATION—ELECTRIC CONTROLLER.

The Brown patent, No. 618,163, claim 6, for a method of electrical control, designed to secure an acceleration of speed of motors and at the same time protect them from injury, is void for anticipation by the Potter patent, No. 524,396.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

L. F. H. Betts, for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is an appeal from a decree dismissing the bill in a suit for patent infringement. The patent is No. 618,163, issued January 24, 1899, to W. M. Brown, assignor, and assigned to appellant, complainant below, May 27, 1902. The patent is entitled as one for "electric motor control." More definitely, it is one for a method of electric motor control and for an apparatus to practice such method. It contains twelve claims. The first six relate to the method, and the other six to the apparatus. Claim 6, the last of the method claims, is the only one put in suit. It is what is called a "paper patent," in that it has never been used by the appellant, and that though it is in the business of selling electrical controllers. The excuse given for not using it heretofore is that its use would require a motor adapted thereto, and up to this time it has not deemed it best to put such a motor on the market. The validity of the patent, however, is not affected by its nonuser. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. But it may be said to have a bearing on its construction. In view thereof the patent should not be given a broad or liberal construction. Judge Putnam, in the case of *Bradford v. Belknap Motor Co.* (C. C.) 105 Fed. 63, with reference to such a patent, said:

"We must proceed with great caution and avoid giving the complainant the benefit of anything beyond what his invention and patent clearly require."

The grounds on which the lower court dismissed the bill are thus set forth in the conclusion of Judge Tayler's opinion:

"So I come to the conclusion:

"1. That all that is important or useful in the patent in suit has been long before discovered and used.

"2. The departure in the patent in suit from preceding forms is so slight and its absence of advance in real usefulness so apparent that we can readily understand why it has never gone into practical use.

"3. Whatever improvement Brown made, it was an improvement obvious to any one skilled in the art and so slight as to be of negligible value."

We do not understand from this that it was thought that the patent is not, to a certain extent, at least, an advance on the prior art. It seems to be conceded that it is; the position being that the advance is so slight as to be of no real value, and, such as it is, is obvious to one skilled in the art. The appellee's contention, however, is that it is not to any extent an advance thereon, having been fully anticipated by

disclosures made in prior patents. The patents relied on are: No. 435,958, issued September 9, 1890, to M. J. Wightman, assignor; No. 444,900, issued January 20, 1891 to M. J. Wightman, assignor; No. 524,396, issued August 14, 1894, to W. B. Potter, assignor; and No. 587,442, issued August 31, 1897, to W. H. Knight and W. B. Potter.

The application for the Knight and Potter patent antedates the Potter patent. The first Wightman and the Knight and Potter patents are each for a method of electric motor control. The second Wightman and the Potter patents are each for an apparatus to practice a method of such control. Each of these, as a matter of course, discloses the method which it is adapted to practice.

It will help us to determine whether claim 6, the one in suit, was so anticipated to understand, to a certain extent at least, the nature of the methods covered by the first five claims, and it will clear up the situation if we address ourselves to certain preliminary matters before proceeding to a consideration of said claims.

Those methods are applicable only where a plurality of electric motors are in use, and that where the field of each motor is provided with duplicate windings. In the specification they are treated as applicable where two such motors are in use, and to them when used in operating a street railway car. In disposing of this case we will so limit ourselves.

An electric motor consists of two parts, one stationary and the other rotary. The former is called the "field," and the latter the "armature." The latter lies within the former. Each itself consists of two subordinate parts, a soft iron core and an insulated copper wire wound around the core. What we mean when we say that the field of each of the two motors has duplicate windings is that it has two coils of such wire wound around its core. The armature and the field winding of each motor are in series, i. e., in continuous relation. Their function is to conduct the electric current coming to them from the trolley wire around their respective cores, from whence it passes to the ground. In passing around the cores the current magnetizes them, and it is the magnetic action so induced that causes the armatures and, sequentially, the axles of the car wheels to which they are attached and those wheels to rotate and the car to move.

The control of the two electric motors is effected by controlling the electric current which flows through them. The apparatus by which it is controlled is termed the "controller," or "switch." It is the cylindrically shaped structure or drum stationed on the car platform on top of which is a crank with a handle whereby the motorman operates it. Such control is exercised to effect several separate and distinct ends, each of which is essential to the successful running of the car. They are as follows, to wit: Starting the car, stopping it, accelerating or lowering its speed, reversing its direction, and preventing the motors being burnt out in the course of effecting the other ends. Conceivably an invention relating to a method of control of two motors so used may be so broad as to cover all the ends for which it may be exercised or it may be limited to some one of them. Here each of the first five of the method claims is limited to a single end, to wit, accelerating the speed of the car. Claim 6 has to do with so

accelerating and at the same time preventing the motors being burnt out.

In dealing with the first five of the method claims we will consider them together. The patent in suit discloses two separate and distinct methods of accelerating the speed of rotation of the armatures of the two motors. One is by varying the circuit relations of the field windings, i. e., the course of the current therethrough, in such a way as to reduce in successive steps the opposition to its flow until the minimum of possible opposition is reached, and doing this first with one motor and then with the other. By so doing, as the opposition is reduced, the flow of the current through the motors is increased and the speed of rotation accelerated in successive steps.

There are two kinds of possible opposition to such flow. One is termed "ohmic resistance," and the other "counter-electro-motive force." The former is the opposition of the wire through which the current flows, and varies with the size and length thereof. It is passive or dead and is analogous to that which friction gives to the flow of water through a pipe. The latter is active or live and is analogous to that which the load on a water motor causes the vanes or blades thereof to present to the flow of water therethrough. It is generated by the armatures of the motors and is dependent on two factors, the speed of rotation of the armatures and the strength of magnetic action of the fields. This strength is itself dependent on two factors, the quantity—amperes—of current flowing around the cores, and the number of times it flows around them; the product of the two being termed "ampere-turns." The force so generated is like that of the current itself, except that it acts in the opposite direction, and hence its name "counter-electro-motive force." Certain differences between these two kinds of opposition need to be emphasized. Opposition from such resistance exists whether the armatures are rotating or not; whereas, that from such force can exist only when they are rotating. Again, opposition from such resistance can exist as well outside as within the motors; whereas, that from such force exists only within the motors. And, further, opposition from such resistance consumes a portion of the current by turning it into heat, thereby wasting such portion thereof; whereas, opposition from such force does not waste any portion of the current, and it is the overcoming thereof by the magnetic force induced by the current that causes the armatures to rotate and the work to be done.

There are three possible variations of the circuit relations of the duplicate windings of a motor, i. e., of the course of the current therethrough. They may be in series, i. e., so related that the current flows through one and then through the other. They may be in parallel or multiple arc, i. e., so related that the current divides between them and the two portions thereof flow therethrough simultaneously. Or they may be out of relation, so that the current does not flow therethrough either successively or simultaneously, but only through one of them. This being out of relation may be either entire or partial, caused when partial by a shunt—a path of low resistance around one of the windings—in which case a slight portion of the current flows through the shunted winding. These three possible variations of the

circuit relations of the windings yield three grades of opposition from ohmic resistance, one to each variation. The maximum grade is when the windings are in series. The next highest grade is when they are out of relation. It is one-half of the maximum grade. The minimum grade is when they are in parallel. It is one-half of the intermediate grade and one-fourth of the maximum. They yield only two grades of opposition from counter-electro-motive force; two of them yielding the same grade of opposition from this source. The maximum grade is, as in the case of the maximum grade from ohmic resistance, when the windings are in series. The minimum grade is when they are out of relation or in parallel, and the existence of each grade of opposition from this source depends, as heretofore stated, on the fact that the armatures of the motors are rotating. Out of these three possible variations of the circuit relations of the duplicate windings of a motor there comes therefore three grades of opposition to the flow of current therethrough.

As a consequence of this, these three possible variations of these relations yield also three rates of speed of rotation of the armature of a motor; the minimum rate existing when the maximum grade of opposition exists, i. e., when the windings are in series, the next when the intermediate grade of opposition exists, i. e., when the windings are out of relation, and the maximum when the minimum grade of opposition exists, i. e., when the windings are in parallel. And, if the opposition to the flow of the current is reduced first in one motor and then in the other, in the order of the grades thereof, the maximum opposition existing in both motors when the reduction begins, four distinct grades of opposition from that then existing are yielded, and the speed of rotation is accelerated in four successive steps from the rate then existing, assuming the armatures of the motors to be then rotating.

The other method of accelerating the speed of such rotation disclosed by the patent is by varying the circuit relations of the motors as a whole, and not simply of the duplicate windings thereof. There are three possible variations thereof, the same as in the case of the duplicate windings. They may be in series—out of relation—or in parallel. As the first and last are the only ones used in accelerating the speed, no further reference need be made here to the second one. When the two motors are in series, the current flows through them successively, i. e., first through one and then through the other. When in parallel, it divides between them, and the two portions thereof flow therethrough simultaneously. The lowest rate of speed exists when the two motors are in series, and that existing when they are in parallel may be said to be double what it is when they are in series, assuming the motors to be able to hold up under this condition. This is so because when the motors are in series the force or voltage of the current is divided between them; whereas, when they are in parallel each motor has the full force or voltage.

The method of acceleration covered by each of the first five method claims of the patent in suit is a combination of these two distinct methods of acceleration, and the only difference between the claims is in their phraseology. The way in which the patentee combined them

is shown diagrammatically in Fig. 2 accompanying the specification of the patent. It is as follows, to wit:

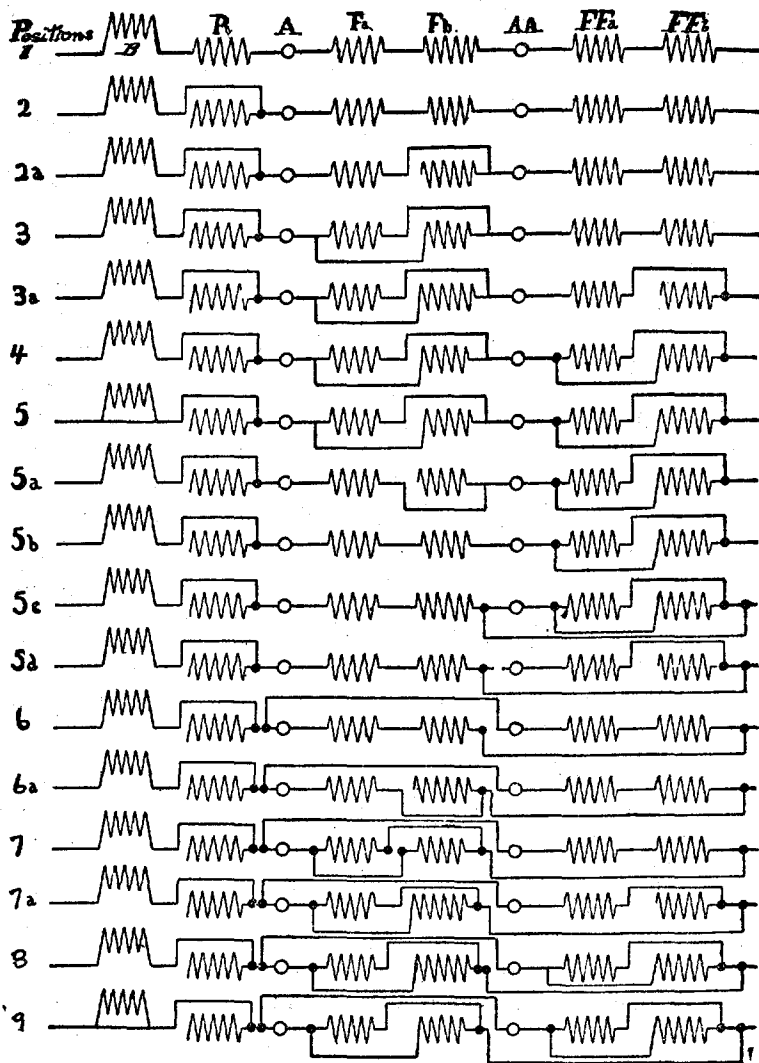


Fig. 2.

In explaining this diagram we would, for the present, ignore so much thereof as is under the letters B and R. That portion thereof has nothing to do with what is covered by the claims of the patent. A represents the armature of one motor, and Fa and Fb the two windings of the field of that motor. AA represents the armature of the other motor, and FFa and FFb the two windings of its field. 1 represents the position at starting, and 2, 3, 4, 5, 6, 7, 8, and 9 represent eight different running positions. 2a represents a transition position

between running positions 2 and 3; 3a a like position between running positions 3 and 4; 5a, 5b, 5c, 5d, four transition positions between running positions 5 and 6; 6a a transition position between running positions 6 and 7; and 7a a like position between running positions 7 and 8. It will be noted that at starting position 1, the windings of each motor are in series, presenting the highest grade of opposition to the flow of current from ohmic resistance, that from counter-electro-motive force not existing, as the armatures are not then rotating. At position 2 the same opposition is maintained; the armatures now rotating. At position 2a the field windings of the left-hand motor are out of relation, and the current flows through but one of them, presenting the next lowest grade of opposition of both kinds in that motor. At position 3 the field windings of that motor are in parallel, presenting the lowest grade of opposition at all possible in that motor; that from ohmic resistance alone being thereby lowered. At positions 3a and 4 exactly the same course as in positions 2a and 3 is followed with the right-hand motor. Thus it is that at positions 4 and 5 opposition to the flow of the current when the two motors are in series is reduced to its lowest grade, and the armatures thereof are rotating at their highest rate of speed with the motors in that relation. In reaching this rate of speed, including it, we have four distinct rates of speed.

Positions 5a, 5b, 5c, 5d, and 6 restore exactly the same amount of opposition that existed at starting position 1. This is so because position 6 finds the field windings of each motor in series. There is this significant difference, however, between the two positions. At position 1 the two motors were in series; whereas, in position 6 they are in parallel, having become so in that position. Up to position 6 the first method of acceleration heretofore described has been in use. At position 6 the other method is called in, and by the change the rate of speed due to the parallel relation with the opposition within the motors at its highest is attained. A detailed consideration of these five positions is not in order here. They are covered by claim 6, the claim in suit, and will be considered fully when we reach that claim. Inasmuch, then, as when the two motors come into such relation the opposition within them is at its highest, just as at starting from rest when they were in series, the speed is capable of further acceleration by calling in the first method of acceleration which was then in use, i. e., by reducing the opposition by successive steps to its lowest grade, first in one motor and then in the other; and this is what is done in the remaining positions. At position 6a the field windings of the left-hand motor are out of relation so that the current flows through but one of them, thus presenting the next lowest grade of opposition of both kinds in that motor to that existing in position 6. At position 7 the field windings of that motor are in parallel, presenting the lowest grade of opposition; that from ohmic resistance alone being thereby lowered, and the lowest grade of opposition at all possible in that motor. At position 7a and 8 exactly the same course as in position 6a and 7 is followed with the right-hand motor, and at position 8 the highest rate of speed possible is attained. Position 9 is exactly the same as position 8—just as position 5 is the same as position 4. The signifi-

cance of this will appear when we take up that portion of the diagram which we have been ignoring, which we will shortly do.

In reaching the rate of speed at positions 8 and 9 we have five distinct rates of speed, including it, from that existing at position 5, thus making nine in all, so far as this portion of the diagram is concerned.

This detailed explanation of the diagram shows that the method of acceleration covered by the patent is a combination of the two methods of acceleration pointed out and how it combines them.

But, before passing to claim 6, a word or two should be said as to that portion of the diagram which thus far we have ignored. Though, as stated, it has no relation to anything covered by the claims of the patent, an understanding of it will shed light on our path. We have noted that one of the differences between opposition from ohmic resistance and that from counter-electro-motive force is that the former can exist outside of the motors; whereas, the latter cannot. It is possible therefore to provide in the car circuit between the controller and the motors a winding of wire, which, if in circuit, will be the source of opposition from ohmic resistance, exactly as the field windings thereof are; and, if provided, cutting same out of circuit, and thereby reducing the opposition arising therefrom, will accelerate the speed of the car, just as reducing the opposition from internal ohmic resistance will do so. What the ignored portion of the diagram covers is two such windings. They are in the car circuit between the active part of the controller and the motors. One of them is the winding of what is termed the blow-out magnet, designated by the letter B. It is within the drum of the controller. It is around a soft iron core, which the current in passing through the winding magnetizes. Its function is to prevent formation of arcs when the contacts of the controller are broken in the course of operation. Though such is its function, cutting it out of circuit, and thereby removing such opposition as it affords, will accelerate, to a certain extent at least, the speed of rotation of the armatures of the two motors. It is claimed that the opposition which it affords is negligible; but the diagram evidences that the patentee thought it afforded enough opposition to make its cutting out of circuit cause an appreciable acceleration in speed of rotation, for he cuts it out twice, and there is no explanation for his doing so except to accelerate such speed. This he does at positions 5 and 9, and this is the only particular in which those positions differ from the immediately preceding positions, to wit, 4 and 8. At position 4 the highest rate of speed with the motors in series has been attained, leaving out of consideration this winding, and by cutting it out in position 5 a still higher rate of speed in that relation is attained. At position 8, without reference thereto, the highest rate of speed with the motors in parallel has been attained, and the cutting it out in position 9 yields a still higher rate of speed in the parallel relation—the highest rate of speed that is possible for the armatures to attain under any conditions. Inasmuch as positions 5 and 9 are likely to be positions of continuous running, during which the controller connections are not broken and the magnet is not needed to blow out arcs, there is no reason why it should not be cut out of circuit and thus accelerate the speed.

The other winding referred to is termed the "rheostat" or "external resistance," and is designated by the letter R. It is generally placed under the car body, and may consist of an assemblage of plates instead of a coil or coils of wire. In the diagram it is shown in but one position, and that is position 1, the starting position, when the current is turned into the car circuit and the armatures begin to rotate. In position 2 it is cut out and remains out thereafter. This is the only particular in which position 2 differs from position 1. The effect of cutting it out is to reduce that much opposition to the flow of the current and to accelerate the speed of rotation over what it was in position 1, just as the cutting out of the winding of the blow-out magnet in positions 5 and 9 did likewise. We have thus three additional rates of speed by so cutting out these two windings, as stated, or twelve in all, in an ascending scale from the lowest to the highest.

This brings us to claim 6, the one in suit. The method covered by it, as heretofore stated, is one for accelerating the speed of rotation of the armatures and at the same time for preventing their being burnt out in the process of acceleration. It is in these words:

"The method of shifting two motors from series to parallel relation, consisting of strengthening the field and ohmic resistance of one motor, then placing a shunt around the other motor, and then placing said shunted motor with its field strength and ohmic resistance increased in parallel with the first mentioned motor."

Its nature, as also heretofore stated, is disclosed by so much of positions 5a, 5b, 5c, 5d, and 6, i. e., the transition positions 5a, 5b, 5c, and 5d and the running position 6 of the diagram as are not under the letters B and R. It consists, according to the claim, of three separate and distinct steps, to be taken successively.

The first one is "strengthening the field and ohmic resistance of one motor." Strengthening the field, as we have seen, increases the counter-electro-motive force. By this step, then, both forms of opposition within the motor are brought into play. The manner, however, of so doing, i. e., of increasing the strength of field and ohmic resistance, or the extent of so doing is not stated, as the language is general and indefinite; but the diagram and explanation thereof in the specification discloses a way of so doing, and that to the maximum, so that this step yields in the motor its maximum grade of opposition to the current. It is shown in positions 5a and 5b. In position 5a the field circuit of the left-hand motor is changed from what it is in position 5. There the two windings were in parallel. The change in position 5a is to out of relation entirely. The effect of this is to double the ohmic resistance of that motor; the strength of the field remaining as before. In position 5b the field circuit thereof is again changed. The windings are put in series. The effect of this is to again double the ohmic resistance and at the same time the strength of the field. It is thus seen that by this step, taken in this way, the field windings of this motor are shifted back from parallel to series, and that in exactly the same way in which they had theretofore been shifted from series to parallel.

The second step is "placing a shunt around the other motor," thereby putting the two motors out of relation almost entirely. This is shown by position 5c.

The third and last step is "placing said shunted motor with its field strength and ohmic resistance increased in parallel with the first-mentioned motor." By this step the two motors are changed from out of relation almost entirely to parallel relation, and simultaneously therewith the field strength and ohmic resistance of the other or shunted motor is increased and both forms of opposition within it are brought into play. It is not said here how the field strength and ohmic resistance thereof is increased, or the extent to which this is done. A way of so doing, however, is disclosed by the diagram and explanation thereof, as in the case of the first step—the same way as there—and the increase is to the maximum, thus yielding the maximum grade of opposition in this motor. It is by shifting the windings of the motor back from parallel to series in the same way in which they had theretofore been shifted from series to parallel. This step is covered by positions 5d and 6, though position 5d would seem to go beyond the step as given in the claim in putting the motors out of relation entirely.

It is thus seen that the method covered by the claim in question is complex. It involves a change in the motor circuit, i. e., from series to parallel, and also in the field circuits, i. e., from parallel to series. In each instance the change is not instantaneous but first to out of relation. The change in the motor circuit has to do with accelerating the speed; whereas, that in the field circuit has to do with preventing the motors being burnt out by the change in the motor circuit. The danger of being burnt out is due to the sudden inrush of current upon the change being made, caused by each motor receiving the entire voltage thereof, and the change in the field circuit prevents such burning out by developing the opposition within the motors to the flow of the current to its maximum at the time the change in the motor circuit is completed. It may be said also that the change in the field circuits has to do with lessening the rate of acceleration due to the change in the motor circuit and making it so that, whilst the motors remain in parallel relation, by changing the field circuits successively from series to parallel relation, the same as was done before the change in the motor circuit, the opposition within the motors may be gradually withdrawn and the rate of speed gradually accelerated.

Claim 6, however, does not expressly disclose that the method covered by it was intended to effect any such ends. In this particular it is unlike the other five method claims, as each of them in characterizing the method covered by it as one of acceleration did so disclose the end intended to be effected by it. Claim 6 characterizes the method covered by it simply as one of "shifting two motors from series to parallel relation." In so doing it is not strictly accurate, for, as we have seen, it covers considerably more than a change in the motor circuit. Strictly speaking, there are but two methods of changing two motors from series to parallel relation. One is instantaneously without any intermediate step, as is done in the Condict patent hereafter referred to. The other is by first putting them out of relation and then in parallel as here. But claim 6, as we have seen, covers more than this, in that it provides for changes in the field circuits; the change in one taking place before the motor circuit is altered and whilst the

motors are still in series and the other simultaneously with the motors attaining the parallel relation. Inasmuch, however, as the latter changes are in order to make the change in the motor circuit effective and to limit its effect, broadly speaking, the method covered by the claim may be said to be one of shifting "two motors from series to parallel relation."

Such, then, is the nature of the method covered by this claim and the ends effected by it. It is to be noted that it is a course of procedure in relation to and within the motor circuit by which the speed is accelerated and the internal resources of the motors are so marshaled as to prevent the inrushing current harming the motors upon their attaining the parallel relation and to limit the increase of acceleration. It has nothing whatever to do with the car circuit outside of the motor circuit. In this particular it is just like the method covered by the purely acceleration claims. It is confined to the motor circuit, and by it also the internal resources of the motors are so marshaled as to provide, in connection with that arising from the change in that circuit, nine distinct rates of speed in an ascending scale. The patentee's mind was concentrated on the motor and field circuits. In the acceleration claims he so handled them as to gradually accelerate the speed from the lowest to the highest rate thereof; and in the sixth claim he so handled them as to accelerate the speed a certain degree and to prevent harm to the motors from so accelerating it.

Claim 6, however, is a subordinate feature of the patent. Nor are any of the acceleration claims in their entirety the main feature thereof. Rather a portion of those claims is the central feature thereof, to wit, so far as they cover the changes in the field circuits both in the series and parallel relation. The patentee thus expresses himself on this subject in the specification:

"I provide switches by the movement of which I may effect gradual acceleration in the speed of the motors by varying in successive steps the field strength and ohmic resistance of one motor without changing that of the other. Having lowered the field strength and ohmic resistance of one motor, I then pass through the same steps with the second motor. Larger changes of speed I obtain by making series multiple changes of the motors as a whole, so that the central feature of my invention is that the smaller changes in speed, both in moving through the series and parallel positions are made by the circuit changes of the field of first one motor and then the other."

That portion of the method of claim 6 which has to do with preventing harm to the motors when they are placed in parallel is not, however, the only way of preventing such harm under this circumstance. The specification of the patent and the diagram of Fig. 2, as heretofore indicated, disclose a method of preventing similar harm to the motors at starting position 1 of the diagram, when, as we have seen, there is no counter-electro-motive force to check the flow of the current. It consists in the use of the rheostat or external resistance, which in addition to the ohmic resistance within the motors is sufficient to prevent harm to them. This method of preventing harm to the motors can be used when they are changed from series to parallel. It differs from the other method in that it amounts to calling in outside help; whereas, that method relies on the motors to protect themselves. And, though there may be no necessity for so doing, it may be used in

connection with the other method of preventing harm, thus affording, as it were, double protection.

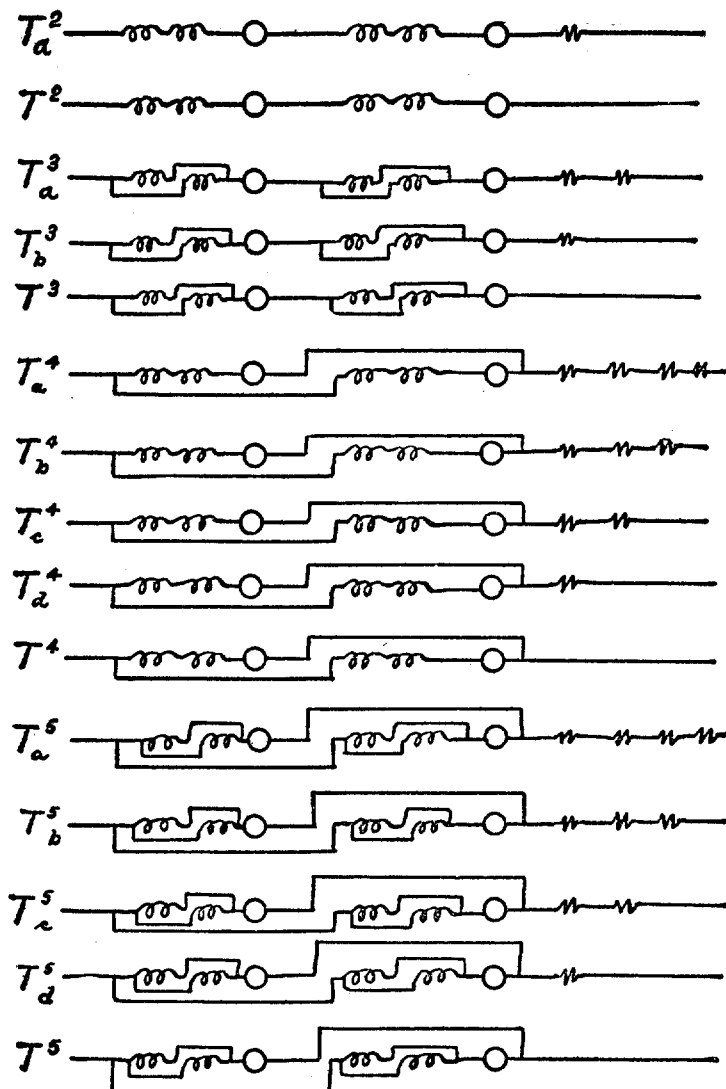
It seems clear that the patentee had in mind the use of this method of protection when the motors are changed from series to parallel as well as at starting and considered that, as a rule at least, there would be no necessity to use it when such change was being made in connection with the method of protection disclosed by claim 6, for, in describing position 6 of that claim in the specification, he expressly excluded its use. He said:

"The first multiple position, position 6, in which, without inserting any external resistance, armature AA is connected with the trolley side. * * * Simultaneously the series connection is completed between FFa and FFb. * * * The two motors are now in multiple with each other, and, as this would tend to cause a very sudden acceleration, the field coils of the motors are arranged with their greatest strength so as to increase the counter-electromotive force of the motors; the same arrangement also giving the highest ohmic resistance of each motor."

But it seems equally clear that the patentee also thought that conditions might arise when it would be "desirable and suitable" to use such additional outside protection in connection with that provided by claim 6, though he gave no indication as to what those conditions were. To make this good we will have to take into consideration all that the patentee has said in relation to the use of external resistance, for he refers to it several times in addition to the reference contained in the quotation just made from the specification; and to comprehend his full meaning reference should be had also to the patent issued to G. H. Condict, November 20, 1888, No. 393,323, which undoubtedly Brown must have had in mind when conceiving his invention. It is for an apparatus, to wit, a switch, and not for a method of electric motor control. Condict seems to have been the first to solve the problem of shifting two motors from series to parallel relation in the course of their operation in order to accelerate the speed of rotation of their armatures. He seems not to have conceived the idea of dealing with the motors one at a time when they were in series and again when in parallel; but in both relations he dealt with both motors at the same time, and that in the same manner. Nor does he seem to have conceived the idea of changing the field circuits or the motor circuits from series to parallel mediately, i. e., through an intermediate step, to wit, by first putting them out of relation. He changed each immediately from the one relation to the other. Thus it was that he secured only four different rates of speed by manipulating the field and motor circuits. At starting he had the windings of each motor in series. He then changed them in each immediately from series to parallel. He then changed the motor circuit by changing the two motors immediately from series to parallel, simultaneously therewith changing the field circuits of each motor immediately from parallel to series. And finally he changed the field circuits of each motor; the motors being in parallel, immediately from series to parallel. In connection with each of these four changes he used external resistance. His rheostat was provided with four of such resistances. He used one at starting, two at the next change, and four at each of the other changes, and these resistances he removed gradually one at a time. In so doing he pro-

vided eleven rates of speed in addition to the four already mentioned, assuming them to be those existing when the resistances are all in use as intended, or fifteen in all. What we have said will be better understood if we insert here the diagram of the method practiced by Condict's switch prepared by appellee's expert. It is as follows, to wit:

Condict Patent Connections.



It may be truly said that Condict was wasteful in the use of external resistance, for, as heretofore stated, opposition to flow of current from ohmic resistance differs from that from counter-electromotive force, in that it consumes a portion of the current, turning it

into heat, and the production of current requires the expenditure of money. He seems to have used such resistance for protective purposes and to have cut it out gradually so as not to suddenly change the opposition to the current beyond a given amount, and yet its use in the way in which he used it and its gradual removal had the effect of producing many different rates of speed.

It is in connection with the method of this patent that the further references of Brown to the subject of external resistance now to be quoted are to be considered. In referring to the general object of his invention, he says that it has therefor "an improved method and apparatus for accelerating the motors and regulating the speed thereof in which the motor circuits are utilized so far as possible to gradate the flow and rate of acceleration, whereby as little as possible of the energy taken from the line shall be dissipated in wasteful external resistances." He does not say that by his method such dissipation is entirely excluded, but only that "as little as possible" thereof shall take place; and he does not limit this little as possible to the use of external resistance at starting, which the diagram shows. Indeed, there is reason to hold that he does not here refer to such use, because such use is not a part of his method. Nor has it connection therewith, as it does not begin until after the starting position is left. Certainly there is nothing here which excludes the use of external resistance in connection with his method, i. e., subsequent to starting, under certain conditions.

Again he says:

"Heretofore the controllers most generally used combine series multiple changes with successive steps in which external resistances are inserted or removed. It has been, however, proposed to employ the circuit changes of the coils of the motors themselves to effect the necessary changes; but such proposed forms have generally been faulty, in that they do not provide sufficiently small graduations of speed, and in that they make changes of the motor circuits which are too complicated and effect too sudden and serious reactions upon the motors. By my improved method, as hereinbefore outlined, I am enabled to obviate this difficulty, as I at no time make too abrupt a change in the motor circuit or one that will do any damage to the motors, and I am able to provide a simple form of apparatus in which a gradual acceleration of the motors is attained by the movement of a single operating lever and by which a number of speed regulations may be gained in which no power is wasted in external resistances."

This would seem to exclude the use of external resistance in connection with his method; but, in the light of a subsequent reference, the meaning can be no more than that it is not to be so used as a rule only and not under every condition.

Again he says:

"R represents an external resistance which I prefer to insert in circuit when the motors are starting from rest."

And in describing that position he says:

"In this position therefore the current passes through blow-out coil B, the artificial resistance R, and the armature and the field of both motors in series; the two windings of each field being also in series. This is shown in position 1 of Fig. 2. I prefer to use the resistance R at the first point, and even might take further resistance steps at this point, as the motors are without any counter-electro-motive force and therefore have only their ohmic resistance to cut down the current flow. This, however, might be dispensed with if desired."

These two statements amount to no more than an expression that the patentee favors the use of such resistance at starting only and might favor more resistance than that provided by the single resistance shown by the diagram at this point. They do not exclude use of resistance at other points under every condition.

Possibly, however, if this were all the patentee had to say on the subject of external resistance, there might be some ground for saying that he thought that under no conditions would external resistance be needed in connection with his invention, and that the only occasion for its being used under any conditions would be at starting; but this is not all he says thereon. He says further:

"It will be seen that without undue complication of parts I am enabled by my improved method and apparatus to gradually accelerate the motors without undue complication of motor circuits and without wasting any substantial current in dead or artificial resistances. However, it is, of course, obvious that I might in connection with my invention also use resistances where conditions make it desirable and suitable."

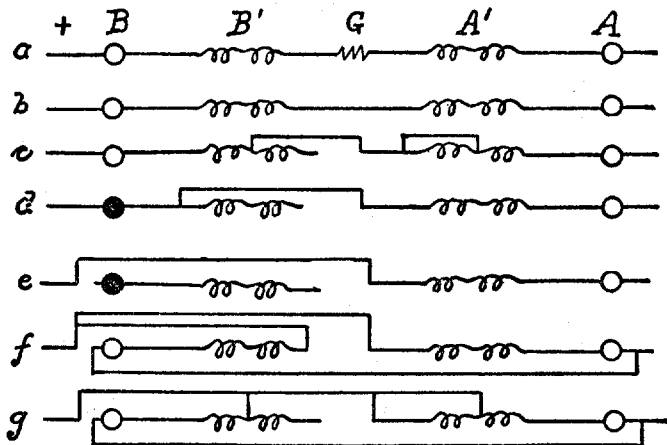
It is urged that here he has reference to its use in position 1; but that cannot be. He has already expressed himself as to its use there, and said that he not only preferred its use in that position, but that he might take further resistance steps at that time; and the expression is not that he preferred its use then where conditions made it "desirable and suitable." Indeed, there is no indication that its use in that position might be dispensed with under any conditions. Here he is alluding to its use in another connection, where, as a rule at least, it is not needed, but where conditions might make its use "desirable and suitable," and that is as it is expressed "in connection with my invention." Its use in position 1 is not in connection with his invention. His invention has nothing to do with position 1. It has to do with the later positions—those that illustrate the acceleration claims and claim 6. He does not say which position of his invention it might be used in connection with; but the language is broad enough to cover either. In the first sentence of the quotation he speaks of his method being such as to enable him "to gradually accelerate the motors" without the use of such resistance, and it is in this connection, i. e., in connection with the gradual acceleration of the motors, that he says in the last sentence thereof conditions might be such as to make its use "desirable and suitable." Claim 6 is a step in the gradual acceleration of the motors. We think it clear therefore that the patentee contemplated that conditions might be such as to call for the use of external resistance in connection with the method covered by claim 6.

But not only did he contemplate such use of external resistance, i. e., that afforded by the rheostat, in connection with that method, as shown by the specification, he also provided therein for the use of a certain amount of external resistance in connection therewith under all conditions, i. e., that amount afforded by the coil of the blow-out magnet. It is true that it is not provided for protective purposes, but follows only from the use of the blow-out magnet to prevent arc-ing in the controller. Still it is there. It is true also that the resistance so afforded does not amount to much. As stated heretofore, it is claimed by appellant to be so little as to be negligible, and its expert has shown

by calculation how little it is. Yet it is so much that its withdrawal affords an appreciable acceleration in the speed of rotation of the armatures. For, as stated heretofore, the cutting out of the coil in the running positions 5 and 9 when the magnet is not needed for blowing-out purposes is to be accounted for only on the ground that thereby such an acceleration will be caused, and at the same time the current which would otherwise be wasted will be saved.

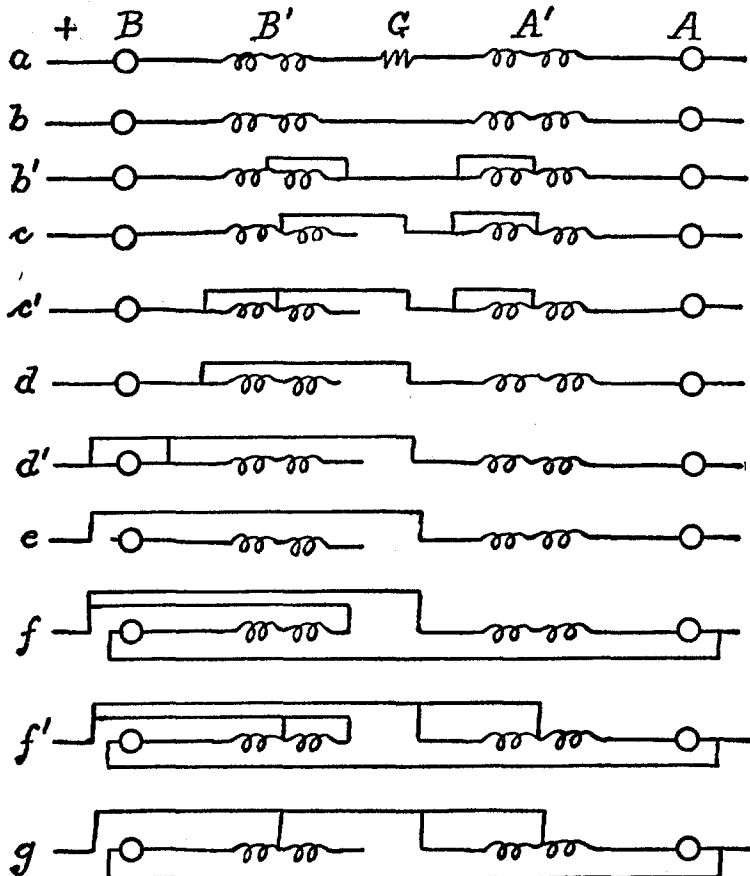
Has, then, claim 6 been anticipated by either of the patents relied on? This is the vital question in the case, to which all we have been saying leads up, and we believe helpfully so. In the view we take of the case we do not find it necessary to refer to but two of those patents. They are the Wightman patent, No. 444,900, and the Potter patent, No. 524,396. As stated, each is for an apparatus to practice a method of electric motor control and discloses the method which it is adapted to practice. That method is applicable to two motors, each of which is supplied with duplicate windings and involves operation of the two motors first in series and then, after transition from series to parallel, in parallel. The method of the Wightman patent calls, in the process of acceleration, for the treatment of both motors alike simultaneously, both in the series and the parallel relation, and not for their treatment alike in succession, as in the Brown patent; and there is the further difference between it and the Brown patent that the variation of the duplicate windings in order to reduce opposition to the flow of the current and accelerate the speed does not consist in first cutting them out of relation entirely and then putting them in parallel but in cutting them out of relation partially by throwing a shunt around one of them. The different positions in the method are not diagrammed in the patent; but each expert has presented a diagram thereof. Their diagrams differ in the number of positions assigned to the method. That of appellant's expert is confined to the positions described in the specifications of the patent. Appellee's expert adds certain other positions which he thinks are essential to make the method operative. That of the former is as follows, to wit:

Wightman Patent 444900.



That of the latter is as follows, to wit:

Wightman Patent 444900.



It will be seen that the positions so added are b', c', d', f'. It is agreed by both experts that the process of transition or shifting from series to parallel relation begins after position c is left and ends with position f, though, as heretofore noted, strictly speaking, shifting cannot be said to begin until some change is made from the series relation. The word "shifting" in claim 6 has a broader meaning and includes the step taken whilst the motors are still in series immediately preceding the making of the change. So, here, it is used to cover the step or steps taken whilst the motors are in series immediately preceding the change and preparatory thereto. As we are concerned only with the shifting or transition process, it is not necessary to refer to any other positions than those from position c to and including position f. BB' represent the armature and field coils of one motor, and A'A the field coils and armature of the other motor. G represents the rheostat

or external resistance. It will be noted that it is in circuit at starting and is then cut out of circuit and so left through all the other positions. In this particular there can be no question that Brown follows Wightman. In position c the minimum grade of opposition exists, and the armatures of the motors are at their maximum rotation with the motors in series, for one coil of the field of each motor is shunted from the circuit. Confining ourselves first to the diagram of appellant's expert, it must be accepted that Wightman's method is exactly that of the letter of claim 6 of Brown's patent. In position d the field and ohmic resistance of motor A'A, the right-hand motor, are strengthened by the removal of the shunt around one of the field windings thereof, so that they are both in series. There is, however, a difference here between Wightman and Brown. Wightman strengthens by adding the other winding. Brown strengthens by changing the windings from a parallel relation first to out of relation and then to series relation; but, if Brown's first step covers any method of strengthening the field and ohmic resistance, it is anticipated by any method thereof. If, however, it is limited to the method disclosed in the specification of his patent, still it is anticipated by Wightman, though Wightman's method is not the same as his, because it is an equivalent method. The appellant is forced to concede this because appellee's method is that of Wightman and not that of Brown. In view of this, it is not necessary that we commit ourselves to the position that it is an equivalent method, but simply to assume that it is. It is because either Brown's claim covers any method of strengthening or appellee's method is the equivalent of Brown that it can be claimed that appellee infringes Brown. If so, it follows necessarily that Wightman anticipates Brown.

In position e we have the second step of Brown. A shunt is placed around the left-hand motor. Appellant's expert made the point that such is not the case, because that motor is entirely out of circuit; but its counsel does not so contend, and we need not be detained here. Then in position f we have the third step of Brown. The shunted motor—the left-hand one—is placed with its field strength and ohmic resistance increased in parallel with the other motor.

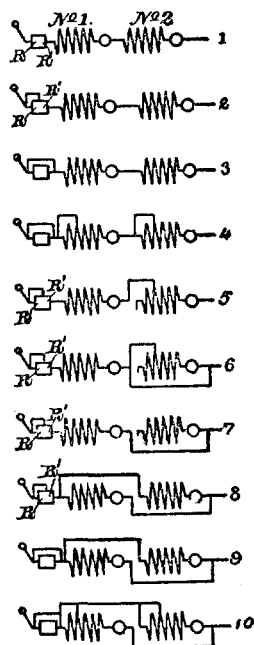
So we think there can be no question that if we confine ourselves to the mere letter of Brown's claim, and go not a step beyond it, Wightman anticipated Brown. He has the same three steps, and no more, and that in Brown's order. But we do not consider that that attitude of caution which should be taken towards a paper patent requires us to be scrupulous. If Wightman's method is not within the spirit of Brown's claim, it does not anticipate, and we understand the real nature of appellant's position as to this Wightman patent to be that his method is not within the real nature and meaning of Brown's claim. The basis of this position lies in the fact that, simultaneously with strengthening the field and ohmic resistance of the right-hand motor, Wightman, in position d, renders inactive, or, as it is called, "kills," the left-hand motor, and when he shunts it in position e it is in that condition. This is indicated in the diagram of appellant's expert by filling in solidly the armature of that motor. This is so because the windings thereof are out of circuit and shunted. This motor is inactive in that it is not the source of magnetic action. As its

armature winding is in circuit, of course, it furnishes internal ohmic resistance to that extent. There is room to contend that the real intent and meaning of Brown's claim is that, when the field and ohmic resistance of one motor are strengthened and a shunt is thrown around the other, the latter motor shall be active. It is so shown in Brown's diagram. If such is the case, then it would seem that it should be held that Wightman's method is not that of Brown, and hence does not anticipate; but, as the case does not hang on this Wightman patent, we do not find it necessary to determine whether this is so or its effect, if so, or whether the meaning of claim 6 is as contended. None of these matters are affected if Wightman's method is accepted to be as shown in the diagram of appellee's expert. As we view that diagram, in which, however, we may be mistaken, it is more favorable to appellee than that of its expert. It shows that in position c Wightman, before taking the first step of Brown, conceding position d to be his first step, killed the left-hand motor and rendered it inactive, so that it is possible to say that Wightman's method consists of four steps and Brown's of only three, and one who effects a thing by more steps than another does not affect it in the same way in which such other does.

Then, as to the Potter patent: We think that it is clear that it anticipates the sixth claim of the Brown patent. The apparatus covered by it is adapted to practice two methods which are slightly different. There may be some question as to whether that shown by Fig. 18 of the drawings accompanying the specification is an anticipation. It is that shown by Fig. 2 which we think anticipates. It is as follows, to wit:

The method shown by that diagram is like those of the Condict and Wightman patents which we have considered, in that in the process of acceleration, other than where the change of the motors from series to parallel is involved, it treats both motors alike simultaneously, and not successively, as Brown does. It is also like the Wightman method, in that it affects the ohmic resistance and counter-electro-motive force of the motors by shunting or short-circuiting a portion of the field windings and removing the shunt or short circuit, and not by putting the windings out of relation and then in parallel and out of relation again and then in series, as Brown does. It is like Condict, Wightman, and Brown, in that it makes use of rheostatic external resistance at starting, but unlike them in that here it removes that resistance gradually, so as to get two rates of speed, shown by positions 2 and 3. It is unlike Wightman and like Condict, in that it makes use of such resistance as a protection during the shifting of the motors from series to parallel, though it does not make such an extravagant use thereof as Condict does; only half

FIG. 2.



of that used at starting being put in circuit. It differs from Brown in the matter of such resistance, in that it makes use of such portion thereof during the shifting process under all conditions; whereas, Brown, as a rule, does not then use it, using it only where conditions make its use "desirable and suitable." And yet they are alike, in that they both use external resistance during that process, Potter that from the rheostat, and Brown that from the coil of the blow-out magnet. When we come to the shifting process itself—that which is covered by claim 6 of the Brown patent—we find it disclosed as it exists in the Brown patent. At position 4 the ohmic resistance and counter-electro-motive force of the two motors are at their lowest, and with position 5 the preparation for the shifting begins; the motors being still in series. The ohmic resistance and field strength of motor No. 1 are increased. This is the first or preparatory step of claim 6 disclosed by positions 5a and 5b of Brown's patent. It is true that here, as in case of Wightman, the increase is secured by removing the shunt around a portion of the field winding of that motor, and not by changing those windings from parallel relation first to out of relation and then to series, as Brown does; but, as said when dealing with the Wightman patent, either claim 6 covers any method of increasing the field strength and ohmic resistance, and hence is anticipated by any method of so doing, or, if it is limited to the method disclosed in Brown's diagram and the descriptive part of his specification, appellant is forced to concede that the method of Potter is the equivalent thereof in order to make out infringement, because appellee uses the method of Potter and not that of Brown. Either Potter anticipates or appellee does not infringe. With position 6 the shifting process actually begins. This consists in placing a shunt around motor No. 2, which is the second step of Brown's sixth claim and position 5c of his diagram. Position 7 is exactly the same as Brown's position 5d. With position 8 the shifting process is completed by placing the shunted motor with its field strength and ohmic resistance increased in parallel with motor No. 1, which is the third and last step of that claim and the same as position 6 of that diagram.

In the first step, when the field strength and ohmic resistance of motor No. 1 are increased, motor No. 2 remains active and so continues to be when shunted by the second step, as is the case with Brown.

There can be no question, then, that Potter has the identical three steps that Brown has, and that in the same order. He first strengthens the field and ohmic resistance of one motor, then shunts the other motor, and then places that motor with its field strength and ohmic resistance increased in parallel with the first motor; and, when he is dealing with that motor and shunts the other motor, the latter motor is active.

The only difference between him and Brown is that he increases the field strength and ohmic resistance of each motor in its order in a different way from Brown; but that way is the same as that used by appellee, so that appellant, to maintain infringement, is bound to concede that it is an equivalent way.

The ground upon which appellant claims that, notwithstanding this, Potter does not anticipate Brown, is that, in connection with this manipulation of the motor circuit as a whole and of the field circuits, Potter uses in the ear circuit outside of the motor circuit rheostatic external resistance as additional protection to the motors whilst the motor circuit is being so changed and upon the completion of the change, and Brown does not. In the language of its counsel, Brown discovered "that it was possible to dispense with all external resistance in passing from series to multiple and to rely only upon the internal protection of the motor circuits."

This advance of Brown, it urges, was not obvious to one skilled in the art and possessed utility. That it was not obvious to such an one, it maintains, is made out by the fact that no one before Brown attained to it, and in support of this position the case of *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 49 C. C. A. 409, is cited.

That it possessed utility, it contends, is made out by the fact that appellee uses it, and in support of this position it cites the cases of *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Fed. 267, 56 C. C. A. 547; *Canda v. Michigan Malleable Iron Co.*, 124 Fed. 486, 493, 61 C. C. A. 194; *Dunn Mfg. Co. v. Standard Computing Scale Co.* (C. C. A.) 163 Fed. 521; *Dubois v. Kirk*, 158 U. S. 60, 15 Sup. Ct. 729, 39 L. Ed. 895.

But it does not rely solely on such evidence of utility. By its expert it has proven that the current wasted by the use of the rheostat in such a case represents $26\frac{2}{3}$ horse power, and, in reply to appellee's suggestion that such waste is for only a second, it says that this is so hundreds, if not thousands, of times a day—as often as the motorman finds occasion to shift the motors from series to parallel.

We do not find it necessary to deal with each one of these several positions; but, in passing, we would say this as to the matter of the utility of the advance. In order to determine whether Brown, without rheostatic external resistance, but with the external resistance of the blow-out magnet coil, is more useful than Potter, with rheostatic external resistance, i. e., wastes less current during and upon the change of the motors from series to parallel, it has to be known which involves the use of the most ohmic resistance altogether, i. e., whether Brown's external resistance plus his internal resistance exceeds that of Potter plus his internal resistance, for, so far as the waste of current from ohmic resistance is concerned, it is immaterial whether it is external or internal; and it is possible that appellee's internal ohmic resistance is considerably less than that of Brown plus his external resistance, so that appellee's usage may not be a witness to the utility of Brown. The record may make a disclosure on this subject; but, if so, we have been unable to find it.

It is sufficient to say that we do not think appellant's response to the defense of anticipation is sufficient. The discovery of Brown relied on was a mere idea, and ideas are not the subject of a patent. As said by Judge Lurton in *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 72 Fed. 67, 75, 19 C. C. A. 13, 21:

"Patents cover the means employed to effect results. Neither an idea nor a function nor any other abstraction is patentable."

Nor did Brown attempt to secure a patent on that idea. What he patented was simply a process of changing a motor circuit from series to parallel to increase speed and at the same time changing the field circuits of the motors to prevent harm to the motors during the other change and upon the completion thereof. He patented a thing; that thing was a process or method; the process or method was these changes in the motor and field circuits in the manner called for in the claim; and the result which he secured was acceleration of speed and protection from harm. If this identical thing or its equivalent is found in Potter, the latter anticipates Brown, and Brown's patent is void. This thing is found in Potter identically as in Brown, except as to the changes in the field circuits, and here the changes are what we are authorized to assume are the equivalent of the changes in Brown. The fact that Potter, in connection with this thing, uses external resistance as an additional protection, and Brown omits it, does not affect to any extent the identity of the two things. Brown's thing is that of Potter. The fact that he omits what Potter uses in connection with it does not make his thing a different and a new thing. It is the same old thing accomplishing the same result in the same way that it does in Potter. This is not to be likened to the case of a combination formed out of less than all the elements of a larger combination securing the same result as that combination, in which case the lesser combination is a different thing from the larger and hence patentable. Here Potter's external procedure and internal procedure did not constitute a combination effecting a certain result. They were two separate things used in conjunction, or rather at the same time; each effecting a separate result. The internal procedure effected an increase in speed and protection from harm; whereas, the external procedure effected simply protection from harm. And, so far as protection from harm is concerned, the two did not combine to secure such protection. Each separately yielded such protection, and that not exactly in the same way, as the internal procedure yielded counter-electro-motive force, as well as ohmic resistance, whilst the external procedure yielded the latter alone.

Brown, himself, recognized that the external procedure and internal procedure were two separate and distinct things, and that their use together did not create a new thing in which the two lost their identity in a larger thing when he referred to the fact that external resistance might be used in connection with his invention where conditions made it "desirable and suitable." Had Brown preceded Potter, there would seem to be no question but that Potter would infringe upon Brown. If so, then it follows, according to the well-recognized principle, Potter anticipates Brown. On the ground therefore that Brown is anticipated by Potter, we feel constrained to hold that Brown is void.

It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the examiner in the Patent Office and were overlooked by him. This circumstance affects the presumption in favor of the validity of the patent from its issuance.

Cleveland Foundry Co. v. Kauffman (C. C.) 126 Fed. 658; American Soda Fountain Co. v. Sample, 130 Fed. 145, 64 C. C. A. 497.

The decree of the lower court is affirmed.

NATIONAL DUMP CAR CO. v. RALSTON STEEL CAR CO.

(Circuit Court of Appeals, Sixth Circuit. August 2, 1909.)

No. 1,926.

1. PATENTS (§ 61*)—SCOPE—"PIONEER PATENTS."

A pioneer patent is one which first discloses means to accomplish a certain result, and the term does not apply to a patent for new means to accomplish a result already attained in another way, although they may be an improvement on the old way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DUMP CARS.

The Caswell reissue patent, No. 12,447 (original No. 806,394), for an improvement in cars, consisting of trapdoors in the bottom of the car which may be opened to dump its load, claims 31, 32, 44, 48, 58, 59, 60, 61, 62, and 63, which relate only to the doors, and means for operating them, disclose invention, but not of a primary character, and are not infringed by a device which does not contain the longitudinal shaft operated by means of cogged pinions and plates to open and close the doors, which is an essential feature of each claim, nor any equivalent therefor having substantially the same mode of operation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Thomas F. Sheridan and Robert H. Parkinson, for appellant.

H. A. Seymour, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The questions arising upon this record concern the validity, the scope, if the patent is valid, and the infringement of letters patent originally granted to William A. Caswell, assignor to the National Coal Dump Car Company, dated December 5, 1905, and reissued February 6, 1906. The number of the reissued patent is 12,447, and it professes to be for "a new and useful improvement in cars." "The invention relates," says the patentee, "to a class of freight cars having a level floor, provided with trapdoors adapted to be opened to dump their loads, when the latter consist of sand, gravel, coal or grain." And the patentee further states that the main feature of it "is the dispensing with the side sills heretofore used in all cars" of which he had any knowledge. He goes on to explain how the presence of such side sills obstructs the dumping out to the side of the track the contents of the car, and states in a general way that he arranges his trapdoors in a series along each side of the floor of the car hinged at their inner edges and provided with means for support-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing and operating such doors, so that when opened they deflect the coal, etc., outside of the track. As is at once seen, this operation is facilitated by removing the heavy and bulky side sills of the only cars of which the inventor had any knowledge. Then he adds:

"All these and other features as well as the details of my construction are fully set forth below."

It now appearing that the patentee was mistaken in supposing that he was the first to dispense with side sills, and that his device for doing this and otherwise supporting the side of the car was probably anticipated, he now relies upon one of the "other features," namely, his apparatus for operating his dumping doors. The appeal is from a decree dismissing the bill upon a finding that there was no infringement.

Inasmuch as all the claims which are involved in the present controversy relate to the trapdoors and the means for operating them, we will pass by, with a brief description, that part of the scheme for taking out the side sills and supplying their function of strengthening the car and carrying the load by other means. He does this by putting four sills lengthwise along the middle of the car, a little distance apart, and building a floor thereon through the whole length of the car. To the outside of this floor, and apparently upon the outer edge of his outer sills, he hinges his doors. To atone for the lack of side sills, he strengthens the sides of the car by using heavier planking, using diagonal iron braces and suspending stout iron straps from the top of the side of the car to the bottom of the car and there turning them inward to help in supporting the load. He also uses for the same purpose "headers" extending from the bottom of the car frame upward and outward to the sides of the car. In each of these headers he makes a long slot to accommodate the devices for operating his dumping doors, a feature to be explained when we come to consider the "other features" with which we are now more particularly concerned.

There are 63 claims in the patent, 10 of which are said to be infringed. All of these 10 relate to his means for operating the dumping doors. The principal member of his apparatus consists of a long straight movable shaft of iron (or steel) extending from end to end on each side of the car. A crank-handle is located at the end of the car, and this is connected by intervening gear with the end of the long shaft, whereby the shaft is made to revolve. The shaft is carried through the long slots in the headers above mentioned. On the shaft and inside each header a cogged pinion is fastened, and on the bottom of each slot a plate is secured having cogs to mesh with the cogged pinion on the shaft. Thus, when the shaft is revolved, the cogged gear above described carries the shaft through the slots in the headers upward and outward or downward and inward. There are flanges on the sides of the cogged pinions which prevent the shaft from longitudinal movement. Partly to prevent the load bearing injuriously upon this gear for effecting movement of the shaft, loose rollers are set upon the shaft extending above the headers and supporting the doors. A horizontal rest is provided at the side of the car, so that

when the shaft is revolved out to the side, the door rests upon the rollers without any impulse to swing downward. As before stated, the inner end of the door is hinged to the side of the stationary floor, or to the timber under the floor, and the door extends out to the side of the car.

With this explanation it is perceived that the operation is this: Assuming that the car is loaded and the dumping doors are closed up and resting on the rollers at the outer end, the crank-handle at the end of the car is turned in the proper direction, the long shaft and the fixed cogged pinions revolve on the cogged plates under them, and together with the loose rolling pinions on the shaft, which support the doors, all descend down through the long slots in the headers.

The outer end of the door follows this downward and inward movement of the shaft and rollers until the load on the door slides, or rolls, off outside of the track. It should be added that, to prevent the door from swinging down too far, a stop is fixed behind it. To close up the doors, the crank-handle is turned the other way, the long shaft rolls upward and outward through the slots in the headers, and, carrying along the loose pinions, lifts up the ends of the doors to their original position. It must be confessed that there is a good deal of ingenuity in this organization, and, if it is practically useful, we should think it to be, without doubt, a patentable invention. We attach this proviso because there is some evidence in the record which raises a doubt whether from the complexity of the apparatus and the rough usage it must encounter it would not be so far liable to derangement and breakage as to destroy its utility; but we resolve that doubt, as we think we should, in favor of the patent, and we are quite prepared to believe with counsel for appellant when they say that prior to the invention of Mr. Caswell there was not a single freight car in use in the United States, or elsewhere, equipped with door-opening mechanism of this kind. We find nothing in the record which leads us to doubt it.

The claims involved are these:

"31. The car having a longitudinal series of dump doors along its sides, headers or cross-frame members between adjacent doors, and a shaft extending through and sustained by said headers and supporting the doors, substantially as specified.

"32. The car having a longitudinal series of dump doors along its sides, headers or cross-frame members between adjacent doors, and a shaft extending through and sustained by said headers and supporting the doors; said shaft being also supported at its outer end from the end sill, substantially as specified."

"44. In a car of the class described, the combination of a supporting-frame portion, a drop-bottom portion therefor formed of a plurality of swinging sections pivotally secured together at each side of a longitudinal center of the car, a reciprocating bar extending longitudinally of the car, and movable transversely thereof in engagement with each swinging section, and means for reciprocating said bar to open and close the swinging sections, substantially as described."

"48. In a car of the class described, the combination of a supporting bottom frame, a drop-floor section hinged to a longitudinal member of the frame, means supporting said section and contacting with its under surface and movable toward and from said longitudinal frame member in opening and closing said section, said means being sustained in the cross-framing of the bottom, and means for operating said supporting means."

"58. In a car, the combination of a car frame having longitudinal sill mechanism, end sills and transverse beams between such end sills, a dumping door secured to the car frame movable to open and closed positions, and dumping door supporting mechanism supported by such transverse beams; said supporting mechanism being movable longitudinally of the door.

"59. In a car, the combination of a car frame having longitudinal sill mechanism and transverse beams mounted between the ends of the car frame, dumping doors secured to such car frame movable to open and closed positions, and door-operating mechanism mounted in such transverse beams and connected with the dumping doors; said supporting mechanism being movable longitudinally of the door.

"60. In a car, the combination of a car frame having transverse beams, dumping doors secured to such car frame movable to open and closed positions, and door-supporting and operating-shaft mechanism beneath the dumping doors and supported by the transverse beams; said supporting mechanism being movable longitudinally of the door.

"61. In a car, the combination of a car frame having transverse beams mounted between the ends of the car, dumping doors secured to the car frame movable to open and closed positions, shaft mechanism mounted in such transverse beams beneath the dumping doors and operatively connected therewith for opening and closing the doors and supporting them in closed position, and means for operating such shaft mechanism; said shaft mechanism being movable longitudinally of the door.

"62. In a car, the combination of a car frame having longitudinal sill mechanism, end sills and transverse beams secured to such longitudinal sills and extending transversely of the car, dumping doors mounted in the car frame on opposite sides of its longitudinal center movable to open and closed positions and having their inner edges hinged to the car frame, forming flat-bottom portions for the car when in closed position, and door operating and supporting shafts mounted in the transverse beams beneath the dumping doors and operatively connected therewith; said shafts being movable longitudinally of the door.

"63. In a car, the combination of a car frame having transverse beams between the ends thereof, dumping doors secured to such car frame movable to open and closed positions, and shafts extending longitudinally of the car supported by such transverse members of the car frame and in operative engagement with the swinging sides of the dumping doors outside their longitudinal centers for supporting them."

The next question is: What is the character of this patent? What does it stand for? Before answering this question, we must find out how far the art of constructing apparatus for operating dumping boards in vehicles and other things kindred to railroad cars, or so near to them as to suggest to the mind of an experienced mechanic the adoption of such devices in railway cars, had been advanced. It is well and clearly shown by the opinion of Judge Sater, in the court below, that there was nothing new in the result effected by the operation of the patentee's devices for dumping doors, and by this we mean the general result of dumping the contents of a car, and not the particular mechanical result or results effected by the co-operation of some of the parts of the combination. There can be no question, and, as counsel put their case to us, it is not disputed, that the prior art showed cars with dumping doors forming part of their structure adapted to dump their loads downward through the floor and between tracks, and others adapted to open out and deflect the contents to one or both sides of the track, and some constructions showed longitudinal series of doors, operated simultaneously by means of a single crank or lever.

The only point made is that none of the previous constructions of means for effecting the dumping was the same as, or similar to, Caswell's. It is significant that counsel for the appellant should claim that this invention was a pioneer, and therefore included all means having functions adapted to effect the like result. A comparison with the means employed by the defendants for operating the dumping doors shows that this contention of the appellant in respect to the rank and scope of its patented invention is necessary to its case. If Caswell had been the first to devise a way, and the means of making it effective, for opening and closing the dumping doors on cars or other kindred things containing articles in bulk, it might be that his invention would be entitled to the rank and scope which he claims for it; but we have said enough to show that in his case such was not the fact. Counsel repeat with much emphasis that he was the first to invent the means described in his patent, and this is admitted; but this priority is only such as must be shown in every case to constitute a patentable invention. In this sense and to this extent every patentable invention is a pioneer; but it is obvious this is not the meaning of that title as used in judicial decisions defining the law upon this subject.

The case of *Morley Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, is the one to which constant reference is made for the definition of a "pioneer invention," and it is in itself probably the best illustration we have of facts which exhibit a pioneer or primary invention. It showed the invention of a machine containing the means for automatically—that is, by the simple application of power—separating, one by one, buttons having shanks and eyes, from a mass, turning the buttons so that they should present their eyes to the necessary uniform position, carrying them to the fabric, and there, at uniform prescribed distances apart, sewing them upon the fabric. It was an invention of the highest order. The instrumentalities employed and their mode of operation seemed almost to indicate intelligence in the machine; but what is most to the point is that Mr. Justice Blatchford was at pains to show that Morley was the first to devise means to accomplish such a result. This was what constituted the invention a pioneer and distinguished it from that class of inventions which only provide a new way of accomplishing a result which had theretofore been attained by others by other instrumentalities and in a different way. In other words, the learned justice showed that the thing done, the work performed, had never been accomplished by any machine known to the earlier art. We have referred to that case for the purpose of aiding in defining what is meant by a "pioneer invention," or to that class of inventions in which the novelty consists in the provision of means for the production of an entirely new result, one never before attained; but it is worth while to proceed with the case cited to show what effect was given to the determination of the court in regard to the character of the invention. To all such inventions, the court said, it was the policy of the law to award a corresponding compensation. The public were acquiring something altogether new, and not merely a substitute for what it already had; although the substitute might be better than the original, and to that extent might be entitled to reward.

In carrying out this policy the courts have given a liberal scope to the invention, one corresponding with its novelty, and have held that it covered not merely the very means employed, but all others which perform the same office in substantially the same way as that of the patent. In this statement of the rule the stress lies in the word "substantially." It is intended to cover all mere variations of forms, which nevertheless do the same work, perform the same "office" (to use a very suggestive word), as is accomplished by the patented device. If, indeed, the same office is not performed by the instrumentalities of an alleged infringement, if, to repeat, they do not do the same work, there is no infringement; but it is certain that the rule just stated does not apply to the case of a patent for an improvement upon an existing machine, nor to one which provides a new way to accomplish a result already attained in another way. The rule as to these latter cases is that such patents do not cover other devices which, although they perform the same work and accomplish the same result, yet do it by a different mode of operation.

Walker, in his works on Patents, states the law correctly when he says, in section 352:

"But the test of function is only the first of several tests of equivalency. The fact that one thing performs the same function as another, though necessary, is not sufficient to make it an equivalent thereof."

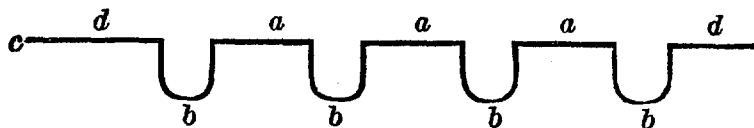
And further, in section 353, he adds:

"Function must be performed in substantially the same way by an alleged equivalent as by the thing of which it is alleged to be an equivalent, in order to constitute it such."

And he cites authorities of the highest character, which fully sustain these statements. This last requirement is the one which, in the case of a primary patent, is not insisted upon; but in the case before us the rule just stated, without the qualification, applies.

With these observations we turn to the examination of those parts of the defendant's apparatus for operating the dumping doors which are involved in the charge that these 10 claims of the complainant are infringed. The defendant's devices are those set forth in patents granted to one Becker later than that of the complainant's, and they have the benefit of the presumption arising from their grant that they do not infringe. Passing from this to their actual construction, we find that they dispense with heavy side sills for the car. This they were authorized to do by earlier forms of construction. They build one strong central sill lengthwise through the middle of the car. Above this they raise a narrow member, to which, on each side, the doors are hinged. The doors fill the whole bottom of the car, and there is therefore no floor between them, as in Caswell's patent. Thus they dump the whole contents of the car. The outer ends of the doors abut upon small side sills, which can be made small because they are made of metal. Narrow I-crossbeams, supported at the center of the main sill, extend across the car from side to side. There is no movable long shaft which travels in the headers and carries the pinions rolling up and down under the doors, and, as there is no such shaft

to be moved, there is no cogged pinion meshing with a cogged base to move the long shaft out and in, as in Caswell's patent. Instead of all this mechanism of the Caswell patent, a long stationary crank-shaft is suspended in brackets hanging down from the cross-sills. This long shaft, if we call it such, is made up of a series of double cranks, thus:



Supposing the shaft above mentioned to be journaled in the brackets at *a a*, rolling pinions on which the doors rest are journaled on the other loops of the shaft at *b b b*. The operation effected by this combination is this: By means of a crank-handle at *c*, the crank-shaft *d d* is turned over until the pinions on *b b b* contact with the doors. By continuing this movement the doors are raised to place, and this is made to happen when the section *b b b*, and, of course, the pinions on them, are directly over the sections of the shaft *a a*. Thus the load on the doors rests in counterpoise on the sections *b b b*. Then the doors are closed and the position is secured. All that is necessary to dump the load is to turn back the shaft off the counterpoise, or dead center, as a mechanic would call it, when the doors and their load drop by gravity and the load is discharged. There are no means for dropping the doors gradually, or of arresting the fall at any stage of their progress, as in Caswell's arrangement. The sections *b b b* fall over and down about half a circle, and then, after brief oscillation, hang suspended under the sections *a a*. This form of shaft, having loops to contact with the doors to open and close them, was not new with Becker, but was taken from the old art, older than the date of Caswell's invention.

It is, we should think, idle to say that this is the same as, or anything at all similar to, the operation of Caswell's device, and since the movable long shaft of that patent is an element in each of the claims involved, and neither it nor its mode of operation is found in the alleged infringing structure, we need not go into a comparison of other elements in the combinations of these claims, as the learned judge in the court below thought fit to do in his very satisfactory opinion. The gist of the whole of this part of the invention disappears when the movable main shaft is taken out; but it may in truth be said that there is scarcely any resemblance between the particular means employed in Caswell's patent for operating the dumping door and those employed by the defendant for the same purpose.

The judgment of the court below will be affirmed, with costs.

NOTE.—The following is the opinion of Sater, District Judge, in the court below:

SATER, District Judge. The complainant, as owner of reissued letters patent No. 12,447, issued to it as assignee of William A. Caswell, February 6, 1906, in lieu of surrendered and canceled letters patent No. 806,394, applied for December 20, 1902, and granted December 5, 1905, charges the defendants with infringement of the thirty-first, thirty-second, forty-fourth, forty-eighth,

fifty-eighth, fifty-ninth, sixtieth, sixty-first, sixty-second, and sixty-third claims set forth in such reissued letters. The bill also alleges that the defendants Ralston and Becker, while acting as official, confidential, and trusted employes of the Caswell Car Company, the complainant's predecessor, owner of the invention and application for letters patent forming the basis of such reissue, conspired and confederated to appropriate the Caswell invention and improvement for the purpose of forming the defendant company, in whose service they are now as officials and employes engaged in designing, manufacturing, and selling combined freight and dump cars, in violation of the complainant's rights. The connection of Ralston and Becker with the defendant company as officials and employes is admitted; but the defendants each deny the other charges made against them, and assert that the complainant's letters patent are wanting in invention and novelty, and that the cars made and sold by them are the sole inventions of the defendant Becker, and are covered by letters patent Nos. 762,118, 736,471, 763,947, and 768,722, all of which are owned by the defendant company. They further allege that the complainant is estopped to deny their right to use, manufacture, and sell cars made in accordance with the Becker patents.

Various types of dump cars were well known, and several kinds of cars with swinging doors, capable of being opened and closed by mechanical means, had been invented prior to the filing of any application for letters patent by either Caswell or Becker. In his reissued letters patent Caswell recognizes this fact in the statement: "This invention relates to that class of freight cars having a level floor adapted to the carrying of any class of freight and provided with trap doors adapted to be opened to dump the loads when they consist of sand, gravel, coal, or grain; the car being also adapted to be unloaded by shovel. A type of such cars is shown in my patent, No. 619,670." He knew that others had preceded him in the field of dump car invention, that the prior art had so far progressed as to admit of a classification of such cars, and that what he claims as his invention was typical or representative of a given class. That Becker is also chargeable with similar knowledge is manifest from apt statements embodied in his several applications for letters patent.

If we seek the uppermost thought in Caswell's mind, we find it as an initial statement in the third paragraph of his specifications, as follows: "The main feature of the present invention is to dispense with the side sills heretofore used in all cars of which I have any knowledge. The omitting of the side sills enables me to obtain an opening along the sides of the car floor and outside the track sufficiently large to permit the discharge of large lumps of coal without hindrance, so that all the coal can be dumped outside of the track into a chute or onto a sizing grate, and where, even if it is not immediately removed, it will not interfere with the movement of the car. This feature is of great importance, especially in coal cars. The trap doors employed are arranged in two series, one along each side of the car, and are hinged at their inner edges, and are provided with novel means for supporting and operating them, and when opened they deflect the coal beyond the track, so that the latter remains unobstructed. All these and other features, as well as the details of my construction, are fully set forth below and also illustrated in the accompanying drawings." Again he says: "The intermediate sills are at some distance from the side of the car, and, as the ordinary side sill is dispensed with, it will be seen that opportunity is thereby gained between the intermediate sills and the sides of the car for the wide doorways needed for large coal." Caswell was not, however, the first to dispense with the side sills in devices designed for transporting loads, as appears from the patents of Clark, No. 69,075, September 24, 1867, Koplin, No. 470,299, March 8, 1892, Lyon, No. 101,030, March 22, 1870 and Bellows, No. 644,890, issued March 6, 1900; nor was he the first to conceive such a device with swinging doors hinged at their inner ends and dumping its load outwardly beyond its wheels, as will appear from an examination of the patents last named.

Caswell, to regain the strength and in part the supporting power lost by dispensing with side sills, provided for such a construction of his car sides as to give them increased strength and enable them to bear a material part of the load. His method of so doing he details as follows: "The walls of the superstructure or box of the car are greatly strengthened over previous con-

structions so, that they are adapted to assist materially in supporting the weight of the load. The walls consist of heavy plank, 44 (though sheet steel may be used in place of the plank), and they are braced by diagonal braces, 42, and bolted to the wall plank by bolts, 43. These braces are not merely tying devices, but, on the contrary, are made large enough so that, in addition to that function, they also serve efficiently in stiffening the walls and enabling them to resist the tendency to sag under the load. They project into the car, and consequently the load will lodge upon and be supported by them to a very considerable extent, and to the extent that the load does thus lodge upon them the doors are relieved. They are stayed at their upper ends by the bent-over web, 45, of the angle irons, 46, forming the stakes of the superstructure (see Fig. 26), and at the bottom they rest upon or are attached to the cross members of the car frame, which are more particularly described below. Each brace extends from a stake to the adjacent cross member, much as in bridge and other truss work. I aim by this feature to increase rather than diminish the tendency of the load to arch or dome, because the weight upon the doors is thereby reduced and they are consequently more easily opened." The construction whereby a part of the load is carried by the sides of the car was anticipated by the Bellows patent, No. 644,890, the specifications of which recite that, in a car constructed in accordance therewith, "the sides of the car constitute plate girders which carry their proportion of the material or load in the car, replacing the ordinary side sills for this purpose. This plate girder construction of the sides does away with these heavy side sills below the floor level of the car, and thus not only reduces the weight of the car, but allows easy access to the part supported below its bottom. This is an important feature of my invention, and I intend to cover the same broadly irrespective of the particular construction of the car."

As the Caswell doors constitute a considerable portion of the floor area, to support them when closed, as a further substitute in part for the strength lost by reducing the number of sills, he utilizes the adjacent members of the cross frame instead of longitudinal sills; i. e., side sills, for they are the only sills with whose use he dispensed. On this point he says: "The doors form a large part of the floor area, and its outer side portions and cross frame members are placed between each pair of them, so that they may be supported in their closed positions from the adjacent members of the cross frame, instead of the longitudinal sills, as is the customary construction." The last four quotations from his specifications indicate that the bodily movable shaft, 106, is a part of the "novel means for supporting and opening" the doors. He was manifestly ignorant of the fact that others had dispensed with side sills. His primary purpose was to accomplish that result (for he says, "This feature is of great importance"), and not to provide a movable acting sill in lieu of side sills. With him, as with all previous inventors who discarded side doors, provision for operating and supporting them with whatever load they might bear, became necessary. The means provided by him operates and supports them with whatever load they have, in whatever position they may be found within the limits of their movement.

At the time Caswell and Becker applied for their respective patents here involved, they had been preceded by inventors who had devised wagons or cars having the inner ends of their dump doors hinged at each side of the longitudinal center to sills parallel with the central sill, or to a central sill, or at a point at the longitudinal center, or having a longitudinal series of dump doors along their sides with headers or cross-beams between them. Koplin's patent No. 470,299, March 8, 1892, discloses a longitudinal series of simultaneously opening doors. The dump doors in some instances dropped their load beneath the car or wagon, in others to the side. In some instances the devices dump their entire load, or practically so, as seen in the patents of Clark, Koplin, the Ingoldsby patents, Wittig, No. 590,637, Marnell, No. 342,526, Campbell and Rankin, No. 484,491, and Lewis, No. 495,096. In other instances the dump doors drop but a portion of the load, as seen in the patents of Cox, No. 476,366, Wormelsdorff, No. 489,111, Campbell and Carlton, No. 598,136, Williamson and Pries, No. 610,218, Bellows, No. 644,890, and Caswell, Nos. 645,587, 657,012, and 619,670. The prior art discloses a variety of mechanisms for the opening or the opening and closing of dump doors. Counsel have not agreed

fully in their classification of such mechanisms nor is it necessary that a full and correct classification be made. Types of door mechanism employing the rock shaft are Bellows, No. 644,890, and Koplin; a hook or latch, Clark, and the British patent of Fox, No. 11,017; a chain and windlass, Souder, No. 676,101, Campbell and Carlton, No. 598,136, Lyons, No. 101,030; a crank shaft, Campbell and Rankin, Wittig, Koplin, the British patent of Kirkconel and Noble, No. 8,709, Dederick, No. 109,188, Marnell, No. 342,526, Goodwin No. 403,584, and Kelly and Murphy, No. 689,197; a reciprocating bar and shaft, Muller, No. 707,342. We are concerned in this case with only the latter two types.

To what extent, if any, Caswell and Becker were respectively indebted to the prior art, must appear from an examination of their devices. The complainant affirms that Caswell's is a pioneer patent. This the defendants deny, and assert that the claims alleged to be infringed are restricted to the particular arrangement and construction of car supporting frame, dump doors, and dump-door actuating mechanism disclosed by his letters patent, and that the Becker invention and the Ralston car are not only substantially different from Caswell's, but possessed of conspicuously distinguishing features. The applications for their respective patents were pending at the same time. Section 4904, Rev. St. (U. S. Comp. St. 1901, p. 3389), imposed on the Commissioner of Patents the duty of declaring Becker's application an interference with that of Caswell, if in his opinion it was such, and, after a hearing by the examiner as to the question of priority of invention, to issue a patent to the party adjudged to be the prior inventor: the defeated party having, however, the privilege of appealing from the decision of such examiner. As interference proceedings regarding the applications were not declared or suggested, and as officials are presumed to perform their duties, it necessarily follows that in the judgment of the Patent Office officials there were features that distinguished one invention from the other, and that there was therefore no occasion for interference proceedings. Mr. Justice Shiras, in *Boyd v. Jaynesville Hay Tool Company*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973, in speaking of a like situation, said: "As both applications were pending in the Patent Office at the same time, and as the respective letters were granted, it is obvious that it must have been the judgment of the officials that there was no occasion for an interference, and that there were features which distinguished one invention from the other. In *Pavement Company v. City of Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312, Mr. Justice Strong said: 'The grant of the letters patent was virtually a decision of the Patent Office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent.' It would also seem to be evident that, as the purpose of the invention was the same, and as the principal parts of the respective machines described were substantially similar, it was also the judgment of the office that the distinguishing features were to be found in some of the small and perhaps less important devices described and claimed. *Burns v. Meyer*, 100 U. S. 671, 25 L. Ed. 738."

The complainants invoke the doctrine of equivalents. Under the rule announced in *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930, if Caswell's invention is original, he has the right to treat the defendants as infringers if they make a car "operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same functions. The inventor of the first improvement could not invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first." Another statement of the rule is found in *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053. Mr. Justice Bradley said: "Like almost all other inventions, that of double brakes came in when in the progress of mechanical improvement it was needed; and, being sought by many minds, it is not wonderful that it was developed in different and independent forms,

all original, and yet all bearing a somewhat general resemblance to each other. In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the things desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs. These general principles are so obvious that they need no argument or illustration to support them." The complainant's and defendants' respective devices must be tested by the rule above announced.

The Caswell device belongs to the flat floor type of dump cars, which doors dump only a part of the load. A reason for this is found in Prof. King's uncontradicted statement that in 1903 "Mr. Caswell stated that a car could not be made to dump its whole load, as such a car would not be strong enough to stand up under the required service." Caswell devised a car with a central, level, immovable, longitudinal section of floor, from three to four feet wide, in immediate contact with and affixed to two central longitudinal sills and two intermediate parallel sills placed under the outer edges of the immovable floor structure. The Wormelsdorff dumping car has a quite similar sill arrangement, but not an overlying fixed level floor section. A floor section of that character, however, is disclosed in the devices of Williamson and Pries, Bellows, No. 644,890, and Caswell, Nos. 645,587 and 657,012. Consequent upon this method of floor construction, the dump doors are literally arranged along the sides and do not extend to the longitudinal center of the car, but only to the intermediate sills, and bear a correspondingly less portion of the load. He provides a series of plurality of swinging sections or doors arranged along the sides of the car, but so did Koplin. The inner ends of his doors are attached or hinged to the floor of the car or a longitudinal member of the frame, at each side of the longitudinal center of the car, and on opposite sides of such center, and no other means are provided or contemplated for hinging such inner ends. In view of his sill construction, to extend his doors to and hinge them at the actual longitudinal center would render them inoperative, because they could not then dump their loads. His placing them on opposite sides of and some distance from the center is consistent with a construction which insures a car which dumps only a part of its load, and with his belief that such construction is necessary to impart the requisite strength to a dump car.

Becker's device belongs to the flat floor type of cars whose doors dump the whole or practically the whole of the load. The same result is accomplished by the devices of Koplin, Souder, Marnell, and Wittig. To accomplish this result, and dump the load outside of the rail, it is necessary to dispense with all longitudinal floor sills between the center and outer edge of the car. The Ralston car, however, retains the outer sills; but they are placed above the floor. It has no longitudinal central floors. A central longitudinal sill or box girder, as in the Bellows patent, No. 644,890, is employed, which, that the car may dump its entire load, does not contact with, but is located below, the car floor a distance equal to the width of the cross-beams (I-beams) or headers which it supports on its upper surface. The dump doors extend inwardly to the center of the car and carry the entire load, excepting such as may rest on the cross-beams, and are secured or hinged, not as are complainant's at each side of the longitudinal center of the car, or to a longitudinal member of the car frame, or to the car frame, as variously expressed in complainant's claims, but at the longitudinal center of the car to rods located above the central sills. The Ralston car does not, therefore, infringe that element of the combination found in the forty-fourth, forty-eighth, fifty-eighth, sixtieth, sixty-first, sixty-second, and sixty-third claims, which specifies the manner and place of hinging the inner end of the dump doors of complainant's car.

The cross-beams, 75, of the Caswell device, do not span the car, but reach only to the central sill, to which they are attached. Above each beam is a centrally webbed metal frame, bolted at its ends and sides to adjacent parts of the mechanism. The headers of the Ralston car are I-beams, which rest on top of the single central sill and extend entirely across the car. The Caswell cross-beams are deeper than those of the Ralston car. This is attributa-

ble to the elongated perforations or openings in the Caswell cross-beams, whereby they are so weakened that it became necessary to strengthen them by building them up from below. As a means of supporting and operating the dump doors, the cross-frames are provided with elongated openings, 113, inclined downwardly towards the central line of the car, which openings are flanged to give added strength and to support racks, 112, secured in the openings' bottoms. Four bodily movable shafts, 106, each extending half the length of the car and carrying rollers for half of the doors on either side of the car, extended through the elongated openings. These shafts at each end and between each pair of doors are provided with rimmed gears, which gears are fast on the shaft. At the outer end of the elongated openings in the cross-frames is a short horizontal portion on which the shaft rests when the doors are closed. On the shaft beneath each door are two anti-friction door-supporting rollers, 105, which contact with metallic bearing plates in the bottom of each door. When a rotary movement is imparted to the shaft which extends through the elongated openings, the shaft moves bodily through such openings; the gears which are fast on it meshing with their corresponding rack, 112. The rotation of the shaft in one direction causes it to traverse the openings downwardly and inwardly, that the doors may open; the rotation of it in the other direction causes the shaft to move upwardly and outwardly, closing the doors. The doors of the Caswell car opened gradually. They may also, when desired, as in ballasting, be opened but partially and held in such position. The use of rack and gear for opening and closing dump doors is shown in the Ingoldsby patent, No. 613,279, November 1, 1898; the gears being attached to the bottoms of the doors and being operated by pinions supported on a shaft in brackets below.

The Caswell door-opening and door-closing shaft, like that of Muller, is of the reciprocating type. The Muller patent shows under each door a straight rigid reciprocating bar, 15, movable bodily lengthwise of the door, and carrying anti-friction rollers, 14, contacting with the inclined faces, 15, of brackets, 12, secured to the under side of each door near its side edges. The reciprocating bars support the doors when closed, as in the Caswell patent. By rocking the shaft, 22, each reciprocating bar is moved lengthwise of the door, and the door is swung open by its own weight and that of the load. The movement of the reciprocating bar, as the doors open, is aided by the inclined faces, 13. In the Caswell device, the movement of the reciprocating bar, 106, as the door opens is aided by the inclination of the elongated slots, 113, in which it travels. In the Muller patent the incline is on the door; in the Caswell, in the supporting transverse beam; but functionally the mechanisms are equivalent. When the shaft, 22, of the Muller patent, is reversed to close the doors, the reciprocating bars move bodily in the opposite direction, acting on the inclined portion of the doors, and forcing them closed, and supporting them in that position. Muller made his bar reciprocate bodily longitudinally of the car; Caswell made his reciprocate bodily to and from the central line of his car by slotting his transverse beams so that the bar may be brought near to the doors and thus using one bar for a series of doors. In the Muller device the doors are all operated simultaneously along either side of the car bottom, and he expressly specifies that: "The rollers may be mounted on horizontal slides instead of on the links as shown. The doors may extend entirely across the bottom, instead of between the center and side sills, as shown, and may be used on a gondola or other type of car, and the parts may be otherwise varied in construction and arrangement within the scope of my invention." The arrangement and construction of the devices are different; but the principle embodied in the one is found in the other. In the Bellows patent, No. 644,890, it is also specified that "the door-actuating shaft may extend longitudinally of the car," and that, without departing from his invention, other changes may be made in his car, the doors and their actuating mechanism.

In his letters patent Caswell specifically provides that the reciprocating door-opening and door-closing shaft shall operate *in and extend through* the elongated openings in the cross-beams. After describing the construction of his cross-frame members, especially with reference to the rimmed gears, the racks and the elongated openings, he says: "With this construction it will be seen that any rotary movement given to the shaft, 106, will cause it to move

bodily *through* the openings, 113, by reason of the engagement of the gears 109, 110, and 111, with their respective racks." Again he specifies: "For operating the shaft so that it will move bodily down or up *in* the openings, 113, any suitable mechanism may be employed," etc. Another part of his specifications recites: "By providing all of them (cross-frame members) with the webbed castings at their ends, I am enabled to form *in* them the inclined ways, through which the door-supporting shafts move, and at the same time to give those shafts support *in* each member, and thus prevent any deflection of the shafts by the load upon the door." This feature of construction enters into and is made an essential in each of the following claims, as quoted: In his thirty-first and thirty-second, "a shaft extending *through* and sustained by said headers and supporting the headers;" in the twenty-eighth, "means supporting said section and contacting with its under surface and movable towards and from said longitudinal frame member in opening and closing said section, said means being sustained *in* the cross-frame of the bottom;" in his fifty-ninth, "door-operating mechanism mounted *in* such transverse beams and connected with the dumping doors," etc.; in his sixty-first, "shaft mechanism mounted in such transverse beams beneath the dumping doors and operatively connected therewith for opening and closing the doors and supporting them in their closed position;" in his sixty-second, "door-operating and supporting shafts mounted in the transverse beams beneath the dumping doors," etc. The italicizing of the words "in" and "through" is mine. The omission of these words from the other claims in question indicates that they were not used accidentally, but discriminatively, to express an important feature of construction and operating, and Caswell became bound by whatever limitation such words impose. *Menze v. Schmidt* (C. C.) 154 Fed. 845. A substantial reason existed for mounting his door-opening and door-closing reciprocating shaft in and extending it through the elongated openings. This was necessary to bring it close to the under side of the doors to support them in all their intermediate positions.

The door mechanism of the Ralston car is of the crank shaft type. The car has two series of dumping doors, each of which is operated by a single crank shaft having a series of crank arms on which are journaled friction rollers engaging the lower surface of the door. Each crank shaft is journaled in a bracket bearing attached to the under side of the cross-beam and projecting below the same sufficiently, and necessarily distant from the doors, to permit of the vertical oscillation of the crank arm. In the Bellows patent is found a rock shaft journaled in a depending bracket, extending, it is true, from the sides of the car; but his specifications permit of a different arrangement of this device. A hand lever on the outer end of the Ralston crank shaft is used for operating it. The load is dumped by a rather slight rotation of the crank shaft, as in the Bellows device, causing its crank arms to move beyond their dead center, as in the Dederick device, and away from, instead of towards, the center of the car, when they drop by weight of the load, and discharge their contents. The doors, when fully opened, are supported by the crank arms; but in the Caswell patent by a rod, 138. The doors are closed, as in the Bellows device, in which the shaft may be longitudinally arranged and thereby open all the doors on one side of the car simultaneously, by partly rotating the crank shaft, thereby causing the shaft arms to swing outwardly and upwardly in the arc of a circle and lift the doors. When the doors are in their closed position they are supported by the crank shaft; the crank arms having been moved inwardly, in raising, slightly past their vertical positions or dead centers, against stops in the under side of the door. Each of the Caswell shafts rotates completely in opening and closing the door. In the Ralston car, each crank shaft rotates through a little more than 180 degrees only; its rotary motion being limited, much like that in the Wittig patent. It cannot reciprocate, because it is held in fixed bearings. The doors cannot be opened gradually or held in a partially open position, but swing, when their dropping movement commences, to their fully opened position. If complainant's patent is closely approached by the prior art, it is not infringed by an actuating device which permits the doors to fall suddenly, instead of gradually. *Gould v. Spicers* (C. C.) 20 Fed. 317. The transverse beams of the Ralston car are imperforate, and the shaft is not mounted in, and does not extend through, the

transverse beams of the car frame, and therefore there is lacking in the Caswell car construction that element of a combination hereinbefore set forth in the thirty-first, thirty-second, forty-eighth, fifty-ninth, sixty-first, and sixty-second claims of the Caswell patent, which provides for mounting a shaft in and extending it through the elongated openings of the cross-beams, and for this reason the car does not infringe any one of those claims. The perforations of his cross-beams is an essential element of such claims. *Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. 48, 37 L. Ed. 1019. The elongated slots are not only made an element of those claims, but the specifications show them to be necessary in the construction of Caswell's device; and he cannot assert that it is not material and that the means employed in the Ralston car of supporting the door-actuating shaft is an equivalent and covered by his claims. *Wells v. Curtis*, 66 Fed. 318, 13 C. C. A. 494. Moreover, the use of brackets for supporting such shafts antedated all of the patents here involved.

The crank shaft in the Ralston car has a vertical, but not a reciprocating, movement, and therefore does not infringe the forty-fourth and twenty-eighth claims of the Caswell device; one of the elements in the forty-fourth combination claimed being "a reciprocating bar extending longitudinally of the car, and movable transversely thereof in engagement with each swinging section," and in the forty-eighth claim "means supporting said section and contacting with its under surface and movable towards and from said longitudinal frame member in opening and closing said section." The crank shaft or door supporting mechanism in the Ralston car is not movable longitudinally of the dump door, and does not, therefore, infringe the fifty-eighth, fifty-ninth, sixtieth, sixty-first, and sixty-second claims, in each of which such longitudinal movement is made a feature. The longitudinal shaft reciprocates bodily as an entirety. It is straight and rigid, and necessarily so, to perform the function assigned it in Caswell's construction. Whether or not a straight, rigid, longitudinal shaft, bodily reciprocating towards and from the center line of the car through elongated openings in the cross-frames, and supporting the dump doors when closed, and at all points between their closed and fully opened positions, and capable of holding them partially open at any intermediate point, is mentioned in the Caswell claims in controversy, the Caswell patent must be limited to a car having such a shaft when read in connection with the specifications which make such shaft a principal feature of the invention, and the drawings, in all of which the shaft is shown. *Kampfe v. J. R. Torrey Razor Co. (C. C.)* 149 Fed. 778. Having limited himself to such a shaft, Caswell cannot complain that the defendants use a crank shaft, an old and well-known device. *Blumire v. Sheldon Axle Works (C. C.)* 149 Fed. 780.

In view of the state of the art, Caswell's invention is not a pioneer. The advance towards the modern dump car has been gradual and proceeded step by step, so that no one can claim the complete whole. Caswell is therefore entitled only to the specific form of device which he produced. The defendants are entitled to their specific form so long as it differs from and does not include that of complainant. If the language of the thirty-first and thirty-second claims is not in any event readable upon the Koplin device, it becomes so if so broadly construed as to include the construction shown in the Ralston car. So too, if the language of the residue of the claims be given the broad construction contended for, I am unable to see why they may not be read upon one or more prior patented devices, such, for instance, as those of Bellows, Koplin, Wittig, and perhaps of others. The claims in controversy, to avoid invalidation, must be restricted to the particular construction and arrangements of parts to which Caswell has himself limited them by his specifications (*McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 41 C. C. A. 627), and, so construed, there is no infringement. Not being a pioneer in his line of improvement, whatever may be the language of his claims, neither he nor his assignee can enjoin a device resembling his own in the adoption of ideas found in the prior art. *Consolidated Valve Co. v. Crosby Steam Gauge & Valve Co.*, (C. C.) 7 Fed. 768.

Considering the two door-actuating mechanisms as entireties, they proceed along wholly different lines. That of the Ralston car is less complicated, less expensive to manufacture and maintain in repair, than that of the Caswell device, more useful, and productive of a different result, in that it dumps the

whole, or practically the whole, of the load. Conceding that these features are not necessarily tests of invention, nevertheless utility may help to determine the question; increased efficiency being accepted as an important factor. It is also significant that there has been a recognized need of such a car as that of the defendants, and that the efforts of others to meet it failed, and that success was attained only after repeated experiments. *American Caramel Co. v. Thomas Mills & Bros.*, 149 Fed. 743, 79 C. C. A. 449.

In the course of the argument, several of the earlier patents were characterized as worthless and wanting in utility. There is no evidence that such was the case. The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility; and when a prior patent appears on its face to be relevant to the consideration of the prior art, the later inventor should show that such device was not useful, and, if a patentable novelty of his own invention is in dispute, that such earlier patent did not disclose the principle of his later patent. *E. M. Miller Co. v. Meridan Bronze Co.* (C. C.) 80 Fed. 523.

The charge of conspiracy to appropriate the invention of the Caswell patent in suit is not sustained. Becker did not by his contract with the Caswell Car & Improvement Company sell his inventive powers to his employer; nor did he, to develop and put in practicable form his invention, use the property of his employer, or the services of its employes, or any part of his time to which it was entitled. He might, therefore, performing all the duties assigned to him in the line of his employment, exercise his inventive faculties in any direction he chose, with the assurance that whatever invention he might thus conceive or perfect would be his individual property. *Solomons v. United States*, 137 U. S. 346, 11 Sup. Ct. 88, 34 L. Ed. 667. Nor does the record show that Ralston acted in bad faith with the Caswell Car Company or its predecessor. He rendered them substantial financial assistance. On or about May 12, 1904, he frankly announced to the stockholders of the Caswell Car Company his desire to sever his connection with it, his relation with the Ralston Company, and his purpose to exploit its patents and pending applications for patents. On November 22d of the same year he resigned the presidency of the Caswell Company, and on that date Caswell, in consideration of a final settlement then made between him and the Ralston Car Company, and the satisfactory settlement of all matters of every kind and nature in controversy or dispute between them, acknowledged full satisfaction of every claim and demand whatsoever he then had or theretofore had had against Ralston and the Ralston Car Company, and disclaimed any right, title, interest, or claim in any patents or applications for patents then pending belonging to Ralston or the Ralston Car Company. This disclaimer was subsequent to the issuance of Becker's four patents, Nos. 763,947, 763,841, 762,118, and 768,722, all of which were granted to the Ralston Car Company as Becker's assignee.

Regarding the matters in controversy of which settlement was made Ralston, whose affidavit was offered in evidence by the complainant, has this to say: "When said agreement and transfer of stock was entered into at the request and in the interest of Mr. Caswell, affiant requested Mr. Caswell, on his part, to disclaim any right, title, or interest in any patents or applications for patents, which applications for patents were then pending, and which belonged to affiant or the Ralston Car Company, in order to prevent any possible annoyance from threats of future litigation with respect to said invention or patents, and in order that affiant might assure all such as were disposed to invest in the Ralston Company that the patents and pending applications owned by the company were free of all claims and demands by said Caswell or the Caswell Car Company, and said Caswell acquiesced in this agreement." On March 4, 1905, the board of directors of the Caswell Car Company adopted a series of resolutions, reciting that the license theretofore issued by such company to the Ralston Car Company for the use of patents belonging to the Caswell Car Company be canceled, no use whatever having been made of the same by the Ralston Car Company, and that the Caswell Car Company make claim to no right or interest whatsoever in any patent owned, used, controlled by, issued to, or assigned to the Ralston Car Company by Becker or any one else. The minutes of this meeting were approved at a subsequent meeting of the board.

On December 11, 1905, Caswell filed an application, serial No. 291,280, for a patent for an improvement in dumping mechanism for metallic cars. Excepting in some two or three instances, his drawings and the numerals shown on them are precisely the same as those shown in the Becker patent No. 763,841. The language of Caswell's specifications is largely identical with that found in the Becker specifications. Inadvertently an interference was declared with the Becker and other patents, and subsequently dissolved as to some of the parties. Thereupon Becker withdrew his application originally filed in the interference proceedings, and filed another for a reissue of patent No. 763,841, and the interference proceedings were resumed. Caswell, although he had made oath that he believed himself to be the original, first, and sole inventor of the improvement described and claimed in his specifications, and that he did not know and did not believe that the same was ever known or used before his invention or discovery thereof, or patented or described in any printed publication in any country before his invention or discovery thereof, filed no testimony, but suffered a judgment of priority of invention of the subject-matter in issue to be rendered in favor of Becker. In describing his invention, Caswell, using the precise language which Becker had used in his specifications, said: "My invention consists broadly in a crank shaft having a crank arm adapted to engage the doors, so that by merely revolving the shaft upon its axis in opposite directions the doors will be opened and closed." He also made oath that he completed his invention prior to February 19, 1904, the date of the Becker application, and that the original drawings attached to his affidavit were made on or before the dates of February 1, 1903, June 1, 1903, and June 28, 1903, respectively, and that a car embodying his invention was ordered from the Pullman Car Company on or about May 1, 1904, the working drawings of which were begun in the latter part of December, 1903, or the first part of January, 1904, and that the car was completed on or before July 1, 1904. He would have it believed that, at a time when he was protesting that a car could not be made of sufficient strength to dump substantially its entire load, he had drawings for just such a car, and that prior to July 1, 1904, he had completed working drawings for the construction of a car embodying his invention, which showed a crank-shaft mechanism, for which invention, notwithstanding the demand for a car of the character described, he withheld his application for a patent until December 11th following.

If the crank shaft type of door-actuating mechanism was not, on December 11, 1905, the equivalent of the door-actuating mechanism shown in the patent issued to him in 1902, and in his reissued patent, when did it become so? If the two mechanisms were equivalents, what was the occasion for his seeking a patent, the important feature of whose mechanism was a crank shaft? If he was the original, first, and sole inventor of such mechanism, why did he not at this first opportunity offer his proof to establish that fact and Becker's piracy, instead of suffering judgment for priority of invention to be entered in Becker's favor? Caswell was not produced, and did not offer himself as a witness. The answer, therefore, to these inquiries, must be found, if at all, in the facts and circumstances disclosed by the record. The reasonable conclusion to be drawn from the record, in my judgment, is that Caswell recognized that the two door-actuating mechanisms are different, and not equivalents, that he endeavored to avail himself of both; that priority of invention as between him and Becker, as regards the crank-shaft mechanism, belongs to Becker; and that the two freely given disclaimers stood as a barrier to his successful maintenance of his claim, in the interference proceeding, of original, first, and sole invention. The disclaimers and the abandonment of such proceeding do not consist with the charge of conspiracy made in the bill. Caswell and his successors in title may not be heard to say that at the time of the disclaimers and of the interference proceeding the precise nature of the Becker invention was not known.

I shall not enter into a discussion of the license granted to the Chicago, Burlington & Quincy Railroad Company, or to the Atchison, Topeka & Santa Fé Railway Company, or to Ralston, or the assignments made of the Caswell patents, because they do not, in my judgment, affect the result. Dueber

Watch-Case Mfg. Co. v. Robbins, 75 Fed. 17, 21 C. C. A. 198; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Curtis on Patents (4th Ed.) § 215.

An order may be drawn dismissing the bill at the complainant's costs.

HOLT MFG. CO. v. BEST MFG. CO.

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

No. 1,608.

1. PATENTS (§ 34*)—INFRINGEMENT—ACTION AT LAW—EVIDENCE.

Where the question of invention is left to the jury in an action for infringement of a patent, no evidence tending to show the true state of the art at the date of the claimed invention should be excluded.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 38; Dec. Dig. § 34.*]

2. PATENTS (§ 276*)—SCOPE OF INVENTION—COMBINED STEAM HARVESTER AND THRASHER.

The Best patent, No. 410,307, for a combined steam harvester and thrasher, is for a claimed combination of elements all of which were old; the chief feature of novelty claimed for the combination being the operation of the cutting and thrashing machinery by means of a supplementary engine mounted upon the thrasher frame, to which steam is supplied from the boiler of the traction engine by means of a flexible pipe. Such supplementary engines had previously been used for the same purpose on similar machines driven by horse power. *Held*, that such patent was not a pioneer patent, but an improvement patent only, and that it was error in an action for its infringement to refuse to so instruct the jury, and to submit the question to them for decision.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 276.*]

In Error to the Circuit Court of the United States for the Northern District of California.

I. M. Kalloch and Francis St. J. Fox, for plaintiff in error.

J. J. Scrivner, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error was plaintiff in the court below, where it brought this action for the alleged infringement of letters patent granted on the 3d day of September, 1889, to one Daniel Best, for an improvement in combined harvesters and thrashers. The defendant to the action was the Holt Manufacturing Company, which is the plaintiff in error here. The trial resulted in a verdict and judgment in favor of the plaintiff for \$35,000.

Long before the issuance of the plaintiff's patent, mowers and reapers had been superseded on many of the great western grain fields by combined machines, operated by steam as well as by horse power, which cut, thrashed, cleaned, and sacked grain. The plaintiff's patent, as has been said, was for an improvement in combined harvesters and thrashers. No new element entered into the make-up of its machine; but the contention on its behalf was and is that it was a patentable combination of old elements, whereas, the conten-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion on behalf of the defendant was and is that it was a mere aggregation of such elements.

Of course, if it was a mere aggregation, that is to say, if what Best did was merely to bring together a lot of old elements, which in their new places did no more than their old work, there was no invention, and the action must necessarily fail; but if the old elements are so assembled as to coact in a unitary organization, and thereby produced a new and useful result, and such combination be more than a mere mechanic skilled in the art could have suggested, then patentability may be properly affirmed of it. That was really the only issue presented by the pleadings; the answer of the defendant merely denying, "generally and specifically, each and every allegation contained in the plaintiff's complaint."

Best testified that the difficulty with the old horse-power machines was that the power came from the movement of the horses operating upon the main wheels of the machine, and in his testimony sought to show, among other things, that he had overcome that difficulty by substituting therefor steam power. We extract from his testimony:

"I was manufacturing a horse combined harvester for about three years before I conceived the idea of making them steam combined.

"Q. Tell the jury what a combined harvester is, going back to that old harvester that was in operation that you made and was in general use? A. The horse-power, you mean?

"Q. Yes, tell them what a horse-power machine was at that time, not the present machine that is made nowadays. A. The horse-power machine consists first of a header to cut the grain, then a thrashing machine to thrash it, and then a grain separator to separate the different kinds of grain, to put them in separate sacks. This machine was driven, got its power from one main, big wheel.

"Q. What do you call that wheel? A. The main driving wheel. It was located on the left-hand side of the machine. It is the same wheel that carries the machine, and the wheel that carries the right-hand side of the machine, the opposite side, that wheel also drove the header part, so the whole mechanism is driven from the machine. The difficulty with that machine was, after experimenting with it two or three years, we found we could not take up down-grain. The difficulty with these horse-power machines in taking up down and heavy grain is that we could not get power enough from the wheels, strong enough, to drive those sickles and separators when she was cutting this heavy down-grain and taking up large quantities of straw. Horses had to travel at just the same speed all the time, and when they would come to this thick, heavy down-grain, if you would undertake to take it up it would choke down, and the result was the horses would run over it, and you would leave it on the ground. This, I discovered, was an enormous loss to the farmers, and as high as \$6 or \$8 or \$10 an acre was left on the ground. I went to work immediately to see if I could not contrive some plan whereby we could take up all of this straw and thrash it and get the grain clear off the ground where those big crops were. I figured out that it would require from 80 to 100 horse power to do it. To start first, I built a traction combined harvester of large size, and then I applied an engine on my harvester frame, about 30 horse power. I found by this machine that, when I went in this heavy grain, I could travel at any speed I wanted, travel from a quarter or half a mile to a three mile speed, just according to the amount of straw that was on the ground, and that I could stop still. Whenever this heavy straw pushed ahead of my machine, or where it all rotted off on the ground, where it drops down and gets damp, it lays perfectly loose on the ground, and no machine will go through it and take it up because it will shove right ahead. On this machine, when it shoved ahead, it would throw up 4 or 5 feet high, and I could back up the machine in a few seconds and pick that up and take it aboard and bring it on my header with the reel and stand still there and thrash it out. On that

same ground, if a horse-power machine was working, or a header, or a sub-binder, or even a mower, you could not save at best more than two-thirds of it, while in the process we take it right down within a couple of inches of the ground and get it all."

The record shows that, about two years before what the plaintiff claims as the Best invention, one Berry had procured the issuance to him of a patent for a "combined steam traction header and thrasher," which invention the patentee declared relates "to that class of agricultural machines known as 'combined harvesters and thrashers,' and particularly to that class in which the power of the engine is directed not only to the operation of the several parts of the machine, but also to the progression of the machine," the construction and combination of the devices of which the patentee specifically described and claimed in a series of claims, the eleventh of which is as follows:

"11. In a combined steam traction harvester and thrasher, the frame, A, and an engine carried thereby, whereby its progression is effected, in combination with the thrasher, I, connected with the frame, A, a supplementary engine, M and power transmitting devices from said last-named engine to the cylinder of the thrasher, whereby it is driven at a uniform rate independent of the progression of the machine, substantially as described."

To further show the state of the art at and prior to the time of Best's claimed invention, the defendant undertook to show by the witness Kincaid, who testified that as early as 1883 he was called upon to design a steam harvester for one Pritchard, to be hauled by horses, though operated by means of a boiler and engine attached to the separator, that he saw that completed machine either in 1885 or 1886, and, being asked to describe it, the court, on the objection of the plaintiff that it was pulled by horses, declined to permit the witness to do so, although he testified that its thrashing and cutting machinery was operated by steam by means of a boiler located on the frame of the thrashing machine, and, on motion of the plaintiff, struck out the testimony of the witness. We think those rulings erroneous. It is not always easy, as the court below told the jury, to determine the true line of distinction between invention and that which one skilled in the art many readily suggest; but where, as in the present case, the determination of that question was left with the jury, we think it clear that nothing tending to show the true state of the art at the date of the claimed invention should have been excluded from their consideration. See 3 Robinson on Patents, 1020; *Aron v. Manhattan Ry. Co.*, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; *Penn. Ry. Co. v. Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; *Benbow-Brammer Co. v. Richmond Works (C. C.)* 159 Fed. 161.

On the trial the plaintiff's witness Smyth, being asked on his direct examination wherein, in his opinion, Best's invention lay, said:

"I should say that it lies in bridging the gap between the traction engine and the harvester and header mechanism by crossing that gap with a device adapted to convey the energy or power by steam, rather than mechanical means to an engine located upon the thrasher frame so that the power of that engine may be applied to its greatest perfection to the header and thrasher mechanisms; in other words, in the substitution—I am going to use a couple

of unusual terms, but I think they will apply here—the substitution of a molecular transference of energy rather than a molar, that is, through a fluid medium, rather than through a mechanical medium.”

And, in the same connection:

“In my opinion it involved the highest type of invention, that inspiration of idea, that happy thought of changing the method of transferring the power back from the traction engine to the other devices, was, in my opinion, one of the happiest thoughts that could be imagined.”

When asked on cross-examination, in regard to his foregoing statements, the following question:

“Q. You think that the discovery that a flexible pipe would carry steam from the boiler in the position in which I have located it to the supplemental engine in the harvester frame is an indication of inventive talent and the exercise of inventive faculty, do you?”

—the witness Smyth answered:

“Under the circumstances, I emphatically say that it is an example of the highest type of inventive faculty.”

Subsequently the defendant offered in evidence a patent issued to one Glover on the 8th day of December, 1888, for a traction engine, one feature of which was the conveying of steam through a flexible pipe from a boiler and engine carried on an engine truck, to a steam chamber arranged below a water tank carried on a separate frame. We extract from the testimony of the witness Smyth:

“Q. Did you hear Mr. Best testify that the novelty of his invention consisted in mounting a supplemental engine on the harvester frame with a flexible steam connection? A. I don't remember it, but I assume he did say so.

“Q. If he did say so, do you think he told the truth? A. Oh, certainly.

“The Court: Q. That is, that the crux of his invention was the mounting of the supplemental engine upon the harvester frame, and connecting it with a plastic or flexible connection? A. Yes, sir.

“Mr. Kalloch: Q. If he did say so, was that correct? A. Yes, sir.”

Certainly, if it be true that the novelty of the Best invention consisted in the mounting of his supplemental engine upon the harvester frame and connecting it with the flexible pipe, the defendant was entitled to show, if it could, that that idea, as well as mechanism for such pipes, was old. There was therefore error in excluding, as the court below did, the Glover patent.

On the trial the defendant requested the court to instruct the jury, among other things, as follows:

“The Best patent sued upon in this case is in no sense a pioneer patent. In view of the prior art, as disclosed by the Berry patent, the construction which the court is required to give the Best patent places it in a class wherein the application of the doctrine of mechanical equivalents is very narrow, and the patentee is limited to the precise devices and combinations shown and claimed in his patent. If therefore you find from the evidence that the defendant has not made or used or sold a combined harvester and thrashing machine having a supplemental or auxiliary engine mounted upon a platform at the side of the thrashing machine, your verdict should be for the defendant.”

The court refused to so instruct, but, on the contrary, by its instructions, left it to the jury to determine whether or not the Best patent was a pioneer one, to all of which the defendant excepted.

Allusion has already been made to the fact that each and every element entering into the Best patent was old, and the record shows

that the novelty claimed for it consisted chiefly in the location of the supplemental engine on the frame of the harvester, and the transferring of the power from that engine to the header and thrasher mechanisms by means of the flexible pipe; in other words, what Best did was, not to invent a combined steam harvester, but to make improvements in such harvesters, and his patent shows upon its face that he himself so characterized his invention. Leaving out of consideration the Pritchard machine and the Glover patent, the record shows that the preceding patent issued to Berry was for a combined steam harvester and thrasher, in which the power of the engine was directed not only to the operation of the several parts of the machine, but also to its progression. Among other things, it consisted: (1) Of a traction-engine frame mounted on wheels, whose sole function was the supporting and progression of the machine, effected by means of a boiler and engine; the driving power being transmitted through gears to the traction wheels. (2) Of a header frame connected by hinges with the side of the traction-engine frame. (3) A draper-platform carrying the draper, elevator, sickle, reel, and such other parts as are necessary thereto; the various parts of the header being operated by power transmitted from the engine located on the traction-engine frame. (4) Of a thrasher located on the left-hand side of the traction-engine frame, and its inner side attached to that frame by hinges, whereby it accompanies the traction engine, but still has its independent motion, enabling it to conform itself to the ground over which it travels. (5) A self-feeder of the thrasher, with which the elevator spout of the header communicates. (6) The cylinder of the thrasher. (7) An endless chain for driving the endless apron-platform and straw-carrier of the thrasher; such parts being operated from the engine located on the traction-engine platform by means of a shaft and connections, which engine also operated the elevator and the riddle, the cylinder, feeder, fan, and the pickers of the thrasher, however, being driven by means of an independent engine also located upon the traction-engine frame, and which supplemental engine is operated by steam taken from the boiler of the main engine. (8) Of an elevator by which the thrashed grain is taken up to the hopper, from which it is discharged to the sacker. (9) Of certain water tanks with suitable connecting pipes for the supply of water to the boiler. And (10) of fly wheels on the driving shaft of the main engine.

The operation of his machine was thus described by Berry:

"The progression of the entire machine is in effect wholly from the main engine by means of power transmitted to the traction wheels, a, which, as I have heretofore mentioned, serve no other purpose than that of supporting the machine and of causing its progression. They transmit no power to operate the parts of the machine. In the progression of the machine the hinged header frame on the one side, and the hinged thrasher on the other, have their own independent motion, and do not therefore cramp, whatever may be the character of the ground over which they pass. The draper-platform, with all its parts, is adjusted easily and conveniently, being kept level in all positions. The course of the grain is the usual one and needs no detailed description. The straw is discharged at the rear end free of dust and chaff, and is carried by the chute, O, down to the platform to where the engineer stands, and the surplage is stored in the receptacle, Q. The whole machine is readily started from the seat p 10."

Berry then proceeded to set forth his claims, the eleventh of which has been hereinbefore set out.

We think it very plain, from what has been said, that Best cannot be properly regarded as a pioneer inventor, who is one who stands at the head of the art, or who has at least made such a distinct step in its progress as to distinguish it from a mere improvement or perfection of what had gone before, and that the court below should have so instructed the jury, and not have left it to them to determine that question.

For the reasons stated, the judgment must be, and hereby is, reversed, and the cause remanded for a new trial.

WARREN BROS. CO. v. CITY OF MONTGOMERY et al.

(Circuit Court, M. D. Alabama, N. D. August 9, 1909.)

1. PATENTS (§ 297*)—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.

On an application for a preliminary injunction to restrain infringement of a patent, a decision of a superior or co-ordinate court of another territorial jurisdiction sustaining the validity of the patent on a final hearing, in the absence of contrary decisions, will be treated as almost conclusive, and will be followed, unless new evidence of a decisive character is presented.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 484; Dec. Dig. § 297.*]

2. ABATEMENT AND REVIVAL (§ 10*)—SUITS FOR INFRINGEMENT—PENDENCY OF PRIOR SUIT.

The pendency of a suit for infringement of a patent in one district does not preclude the complainant from instituting a suit in another district against the same defendant and another, not a party to the first suit, to enjoin an infringement therein; but in the later suit the court will only consider and adjudicate upon alleged infringements within its own district.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 86; Dec. Dig. § 10.*]

3. PATENTS (§ 300*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.

The fact that the owner of a patent has established a royalty for its use by licensees does not deprive a court of equity of jurisdiction to enjoin its infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 480; Dec. Dig. § 300.*]

Jurisdiction of federal courts in suits relating to patents, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

4. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—STREET PAVEMENT.

The Warren patent, No. 727,305, for an improvement in street pavements, *held* valid, on a motion for preliminary injunction to restrain threatened infringement, and an injunction granted, subject to the right accorded defendants to prevent its issuance by giving bond.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

5. EQUITY (§ 3*)—JURISDICTION—IRREPARABLE INJURY.

Irreparable injury, in such a sense as to create a standing in a court of equity, does not necessarily mean that complainant will be ruined or grievously harmed if the court of equity does not intervene, but only that some legal right of complainant will be illegally taken from it, which in equity and good conscience it is entitled to enforce, the proper and full enjoyment of which will be impaired or lost if equity declines to interfere and puts complainant to its action at law for damages.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 3.*]

In Equity.

See, also, 166 Fed. 309.

The bill in this case is filed by Warren Bros. Company, the owners of letters patent No. 727,505, issued to J. F. Warren, to prevent infringement of a new and useful improvement in street pavements. The defendants are the city of Montgomery and the Metropolitan Engineering & Construction Company, to whom the former let the paving of a part of one of the streets in the city of Montgomery. It is claimed that, if the specifications for the work are followed, it will necessarily result in the infringement of the patent. The case is now submitted on motion for a preliminary injunction upon sworn bill, the record of the litigation concerning this patent in the Circuit Court of Appeals for the Sixth Circuit, the record of a similar suit for the Eastern District of Illinois, and upon numerous affidavits. In *Warren Bros. Company v. City of Owosso* (C. C. A.) 166 Fed. 309, the invention, claimed under the patent, is thus described:

"The invention relates to an improvement in that class of street pavements consisting of a foundation of mineral matter and a top surfacing, or wearing surface, made of graded mineral matter intimately associated and united by means of asphalt or coal tar. The inventor claims as his discovery that the best condition of this top or surface of a mineral roadbed is that this top or wearing surface of such pavements 'must be made as dense, as free from voids, as possible, and also stable and nonliable to displacement.' Under the art, as practiced theretofore, the inventor says that the mineral matter united by plastic material has generally been fine gravel or sand or broken stone, not exceeding pieces of stone or other ground material above one-tenth of an inch in diameter; that the smallest percentage of voids under that method was 21 per cent. of the aggregate. He declares that to secure stability there must be a departure from this method, and that by the employment of larger-sized pieces, 'say up to those which will pass through a two-inch ring, and employing with these larger grains proper quantities of the smaller sizes down to an impalpable powder, it is possible to reduce the voids of the mineral base below 10 per cent. of its bulk.' Such an assemblage, he says, 'compacted together, will form a dense, solid, homogeneous, compact body, with the smallest percentage of voids, and possessing the highest degree of stability, and one in which the largest and smallest pieces are associated with each other indiscriminately throughout the structure, and one which, because of the sizes of the pieces and their arrangement with respect to each other, offers the smallest areas of surface for the attachment of the plastic composition to them, so that not only is a superior binding effected, or union obtained, by the plastic composition, but a smaller quantity of it is necessary for the purpose of obtaining the superior result or product.' The specifications lay stress upon the fact that the stone components of different sizes are not to be used in layers of corresponding sizes, but mixed together, the large, the small, and the dust in one aggregate, with the asphalt or other plastic composition permeating the whole mass and uniting the particles by filling in the voids and making a solid surface. This composition is spread uniformly over the top of a roadbed foundation, preferably a macadam, and is intended to form only the top or wearing surface of such a roadbed. This top section, he adds, may, if desired, be smeared over 'with a surfacing of clear asphalt or other bituminous composition of any desired nature.' Accompanying the specifications are two figures, 1 and 2, which serve as a convention illustration of a horizontal section of a roadway made on the Warren plan. These are set out below:

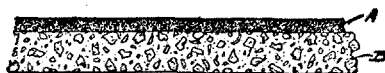


Fig. 1.

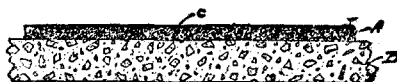


Fig. 2.

"A represents the portion of the roadbed to which the patent relates, and which the patentee calls the 'wearing section' of a roadbed, and is the part which rests upon a macadam or other foundation, represented by the letter B. The letter C in Figure 2 represents the thin surfacing of clear asphalt, or bitumen, referred to above as useful, if desired. The mixture preferred

by the inventor is described by the inventor in his specifications as follows: 'I prefer to use from 1 to 3 per cent. of impalpable powder, from 10 to 30 per cent. of material between impalpable powder and one-fourth of an inch in size, and from 50 to 80 per cent. of material larger than one-fourth of an inch in size. I have found that these ingredients, when associated together, produce a mass or body having less than 20 per cent. of voids. I prefer to use as the uniting or plastic composition one which comprises asphalt and an oil flux heated to a moderate heat to provide the requisite fluidity; but I do not confine myself to any special form of artificial or natural asphalt.' This mineral part of the composition, the patentee says, is to be 'intimately associated with the plastic asphalt composition, which is then spread uniformly upon the prepared foundation, and which in settling becomes very dense, solid, and freer from voids than any pavement of which I have knowledge.' Among the advantages claimed in the patent specifications are: First, that the percentage of mineral matter employed is increased, and that of the bitumen decreased, thereby cheapening the cost; second, that the wearing qualities of the pavement are much increased, due to the fact that 'a very rigid and stable effect is obtained, which reduces strain and wear upon the uniting medium, more of the wear being borne by the mineral base and less by the uniting medium'; third, that the reduction of voids formed by the mineral constituents, in that they are larger and fewer, the plastic fluid filling such spaces with a cellular structure, which, it is claimed, adheres better to the surface of the stone pieces than when the interstices of the composition are smaller and more numerous."

Among the claims are the following: Nos. 5, 6, 7, 8, 9, 10, 11, 12, and 13.

"5. In a street pavement, a bituminous mineral structure, the mineral ingredients of which are mixed and of several grades, so graded as to give the structure an inherent stability.

"6. A bituminous street pavement structure, containing mixed mineral ingredients of such grades as to give the structure an inherent stability.

"7. A bituminous street pavement mixture, comprising a binder in combination with a mineral structure of inherent stability composed of wearing material of several grades uniformly mixed.

"8. A street paving mixture, comprising a bituminous binder in combination with a mineral structure of inherent stability.

"9. A street pavement wearing section, composed of a mineral structure of inherent stability formed of several grades of material so proportioned as to have a per cent. of voids less than 21 per cent. of the whole, in combination with a comparatively soft bituminous binder, filling said voids and rendering the whole permanent in nature and elastic and waterproof in character.

"10. A mixture for street paving purposes, composed of a bituminous binder and a mixture of mineral ingredients of several grades having less than 21 per cent. of voids, the binder sufficient in quantity to fill the voids.

"11. A street paving structure, composed of a mixture of mineral or wearing ingredients and a plastic binder, the space between the mineral ingredients being less than 21 per cent. of the whole, and the plastic binder occupying said space.

"12. A mixture of mineral or wearing ingredients of several grades, the ingredients of the descending grades in size and quantity being so proportioned to each other and to the voids existing in the larger grades as to fill the voids and impart to the structure an inherent stability in combination with a bituminous cement or binder.

"13. A mixture, to be used as a pavement, having an inherent stability composed of mineral or wearing ingredients of several grades, the grades being thoroughly mixed and thereby uniformly distributed throughout the mass, and being of sizes and quantities so proportioned that ingredients of the same grade are uniformly in contact with each other."

The specifications under which the mineral rubber pavement in controversy was contracted to be built, are as follows:

"Specifications for Mineral Rubber Pavement.

"This pavement shall consist of a concrete base, a wearing surface of mineral rubber asphaltic concrete, a skim coat of pure mineral rubber asphalt,

and a top dressing of coarse torpedo sand, fine, clean gravel, or stone chips free from dust.

"Foundation.

"On top of the subfoundation, prepared as heretofore stated in sections 31 and 32, there shall be laid a foundation of five (5) inches of Portland cement concrete made and composed as follows: Five (5) parts of good, clean, coarse, screened gravel; three (3) parts of clean, sharp sand, that will pass through a No. 14 and be retained by a No. 25 screen; and one (1) part of Portland cement, of a brand acceptable to the engineer. The concrete, after mixing, will be placed in the roadway and thoroughly tamped until free mortar shows on the surface of the bed, and the depth of the same shall then show five (5) inches. In other words, the concrete foundation shall be five (5) inches deep after the same has been thoroughly tamped and brought to a finish, and shall show a true and level surface. The concrete foundation shall be protected from the weather when deemed necessary by the engineer. Samples of the cement to be used are to be furnished to the engineer and subjected to the tests prescribed by the American Society of Civil Engineers, to the satisfaction of the engineer, before any work of concreting is done.

"Wearing Surface.

"On the base, constructed as specified, a wearing surface of mineral rubber asphaltic cement shall be laid, with a minimum thickness of 2 inches after compression, made up of crushed stone of various sizes, with a sufficient amount of sand, screenings, and stone dust to fill the interstices and reduce the voids to a minimum, and with enough mineral rubber asphaltic cement to coat all the particles and make a well-filled and water-tight paving mixture. The proportions of stone and sand shall be such as to produce the densest, practical mixture, and shall be approximately as follows: Crushed stone (so varying from $\frac{3}{4}$ inch to $\frac{1}{4}$ inch in size as to produce a mixture of approximately $\frac{1}{3}$ each of $\frac{1}{4}$ inch, $\frac{1}{2}$ inch and $\frac{3}{4}$ inch sizes), $\frac{2}{3}$; fine stone screenings, $\frac{1}{6}$; torpedo sand, $\frac{1}{12}$; fine sharp sand, $\frac{1}{12}$. Samples of stone to be used to be submitted to the engineer, to be subjected to tests as to satisfactory degree of hardness. If the crushed stone, as it comes from the crusher, is fairly well divided between the sizes specified, it will not be necessary to separate them; but all dust and screenings below $\frac{1}{4}$ inch must be removed and afterwards added in order to procure the specified quantities. The crushed stone and screenings must be made from hard, sound limestone, granite, or trap rock, and must be free from clay, loam, or other objectionable material. The sand shall be a clean sand, of the two grades specified above, and may be a lake shore, river, or bank sand, but shall be free and clean from loam or clay, and must not be coated with any foreign matter.

"Mineral Rubber Asphaltic Cement.

"The mineral rubber asphaltic cement used in the wearing surface shall be Sarco Road Compound No. 251, manufactured by the Standard Asphalt & Rubber Company, of Chicago, or any asphaltic cement equal thereto. Samples of the asphaltic cement the contractors propose to use must be furnished to the engineer with all bids, and must be shown by analysis to comply with the following requirements, such analysis to be made by a chemist experienced in the analysis of hydrocarbons: The asphaltic cement shall be 99.5 per cent. pure bitumen, soluble in carbon disulphide (CS_2). Such bitumen shall contain from 73 per cent. to 76 per cent. petroleum, soluble in petroleic ether of 86 degrees Baume, and from 24 per cent. to 26 per cent. asphaltene, soluble in chloroform and not soluble in such petroleic ether. The melting point of the asphaltic cement shall be not less than 180 degrees F., nor more than 190 degrees F. Using the Dow penetration machine, the asphaltic cement shall not vary more than 5 millimeters in penetration from the following standard: 42 Mil. at 32 degrees F., with 200 grams weight on No. 2 needle for 1 min. 62 Mil. at 77 degrees F., with 100 grams weight on No. 2 needle for 5 sec. 114 Mil. at 115 degrees F., with 50 grams weight on No. 2 needle for 5 sec. The asphaltic cement shall be of a specific gravity of 98.5 at 77 degrees F., and weigh 8.2 lbs. per gallon, U. S. standard. When 20 grams of the asphaltic cement are heated in a dish $2\frac{1}{4}$ inches in diameter, $1\frac{5}{16}$ inches deep, for seven hours in an

oven, the interior of which is maintained at a constant temperature of 325 degrees F., it shall not lose in weight more than one-half of 1 per cent. The mineral rubber asphaltic cement shall be used in the proper quantity to thoroughly coat all the particles of the mineral aggregate, bind them together, fill the voids remaining after compression, and make a water-tight paving mixture. The quantity of asphaltic cement necessary to produce these results will vary somewhat, according to the character of the aggregates used, but will not in any case exceed 10 per cent., or be less than 8 per cent., by weight, of the total mixture. After being rolled, the surface shall present a granular appearance, showing that the structural body of the pavement is crushed stone. The asphaltic cement shall be in sufficient quantity to bind and fill the mixture as specified above, but not to flush to the surface as free cement under the roller.

"Method of Mixing.

"The stone, sand, and screenings shall be placed in proper proportions in a properly designed dryer and thoroughly dried before combination with the mineral rubber asphaltic cement. The dryer shall be of the revolving type, or some other type which thoroughly agitates and turns the material during the process of drying, thereby preventing any caking of the material or adherence of dust to the surface of the stone. During the process of drying the aggregates shall be thoroughly mixed and heated to a temperature of from 300 degrees to 350 degrees F., and before cooling or exposure to moisture shall be mixed with the mineral rubber asphaltic cement, as further specified. The mineral rubber asphaltic cement shall be melted in a properly designed tank arranged so the heat can be properly and easily controlled and regulated. When melted and raised to a temperature of from 300 degrees to 350 degrees F., it shall be combined in the proper proportions with the hot stone and sand, and immediately mixed in a properly designed mixer with revolving blades until a thorough and intimate mixture of the ingredients has been accomplished, and the mineral particles evenly and thoroughly coated with the mineral rubber asphaltic cement. The mixer shall be arranged so as to retain the heat during the process of mixing, but shall not be exposed directly to the action of the fire. The materials entering into the paving mixture may be either measured or weighed, but in either case the means of obtaining the proper quantities shall be simple and positive, and easily controlled, so that even results may be obtained.

"Method of Laying.

"While still hot from the mixer, the paving mixture shall be spread on the macadam or concrete base, and, edges having been tamped as hereinafter described, compressed with a 500-pound hand roller. The best results are obtained by spreading and rolling at as nearly the mixing temperature as possible. Therefore, if the paving mixture is hauled in wagons any considerable distance, tarpaulins must be used to cover the loads. The drying and mixing plant shall be placed as near as possible to the work, and, if practicable, immediately on the street itself. The material may be laid by the method employed in laying sheet asphalt pavement, or as follows: At distances apart of 6 or 7 feet, measured along the length of the street, set forms or leveling strips, the tops of which are to be the grade and crown of the finished pavement. These strips consist of planks 10 or 12 inches wide, of a thickness to give the desired thickness of pavement, held in place by long spikes driven through into the concrete base. These strips should be in as long lengths as practicable to handle easily, as they will then bend more readily to the crown of the street. The asphaltic concrete is then dumped between the first pair of leveling strips, roughly spread with rakes or shovels, and then struck off to a true surface with a straight edge, the edges tamped, and the mixture compressed while hot with a 500-pound hand roller. The strips are then moved forward and reset for the next spaces, and the spreading and straight edging of the asphaltic wearing surface continued. The 5-ton steam roller shall then be brought on freshly leveled material as soon as it is sufficiently cooled to bear the weight. The rolling shall be continued in both directions as long as any compression can be obtained. As the leveling strips are moved forward the leveled and rolled surface of the pavement may be used to guide the rear

end of the straight edge. Where the rolling is done up to the leveling strip, before it is removed and the next section spread, the edge of the rolled material shall be roughly cut and broken down and painted with a coat of pure mineral rubber asphaltic cement before the newly spread material is joined to it. Along the gutter lines, around manhole covers, and other places where the roller cannot reach the material, the compression shall be gotten by the use of hot iron tampers.

"Skim Coat.

"As the rolling is finished, and while the surface is still fresh and clean, a skim coat of pure mineral rubber asphaltic cement shall be applied by pouring, and shall be spread with rubber squeegees; the object being to even up the slight depressions and irregularities in the surface of the asphaltic concrete, and provide a topping of pure asphaltic cement, into which the top dressing of sand or gravel is to be rolled. The skim coat shall be poured on at a temperature of 300 degrees F.

"Top Dressing of Sand or Gravel.

"While the skim coat is still warm, a top dressing of coarse torpedo sand, fine, clean gravel, or stone chips, free from dust, which shall previously have been heated to a temperature of about 300 degrees F., shall be spread thickly enough to well cover the surface, and rolled with a 5-ton steam roller, more of the material being added, and the rolling continued, until the skim coat is thoroughly filled and no more of the material adheres to the surface. The surplus sand and gravel shall be left on the street surface for at least two weeks after the street is opened to traffic, and then any surplus not taken up by the skim coat may be swept off.

"Patents.

"All fees for any patent, invention, article, or arrangement, or other apparatus that may be used upon or in any way connected with the construction, erection, or maintenance of the work herein provided, or any part thereof, embraced in the contract on these specifications, or any claims for damages arising out of or by reason of any infringements, shall be included in the price stipulated and in the contract for said work, and the contractor must protect and hold harmless the city against any and all demands for such fees or claims. The bond required of the contractor herein shall stand and be regarded as specially covering this clause, and if deemed necessary by the mayor and aldermen of the city of Montgomery the contractor shall stand ready and hereby agrees to execute other and further bond to a satisfactory amount conditioned specially to hold the city of Montgomery safe and harmless from the claims and demands of any and all persons whatsoever arising out of any claims for damages of royalties arising from patents."

A number of affidavits were introduced regarding a section of pavement laid in Washington City, which it is claimed showed that the Warren patent had been anticipated.

Jas. M. Head and Steiner, Crum & Weil, for complainant.

Chas. K. Offield, Coleman, Dent & Weil, and C. P. McIntyre, for defendants.

JONES, District Judge (after stating the facts as above). This patent has been sustained by the Circuit Court of Appeals for the Sixth Circuit in *Warren Bros. Co. v. City of Owosso*, 166 Fed. 309. Warren Bros. Company, the complainant in that suit, sought an injunction to prevent the infringement of the same patent in the Circuit Court of the United States for the Eastern District of Illinois, in which the Metropolitan Engineering & Construction Company intervened. In that case a preliminary injunction was refused. No opinion was rendered, and there is no statement of the reasons in the order denying the preliminary injunction there. Afterwards Warren Bros. Company

brought their suit in the Circuit Court of the United States for the Middle District of Alabama against the Metropolitan Engineering & Construction Company to prevent infringement of the same patent in the construction of a block of pavement on East Jeff Davis avenue, in the city of Montgomery.

It is insisted, as these last two suits present the same issues regarding the same patent, and the complainant and the main defendant in both cases are the same, that the Circuit Court in Alabama should follow the Circuit Court in Illinois and refuse a preliminary injunction. This insistence carries the doctrine of comity quite too far under the circumstances. It ignores altogether the comity due to the Circuit Court of Appeals of another circuit, which has rendered a final decision on the merits, and would exact more consideration for the mere refusal of the Circuit Court to grant a preliminary injunction, which does not necessarily decide anything on the merits, than for the decision of the Circuit Court of Appeals upholding the validity of the patent. If the ruling of the Illinois Circuit Court had been a final judgment adverse to complainant, still, with a final judgment the other way in the Circuit Court of Appeals in another circuit, this court would necessarily be compelled to exercise its own independent judgment in passing upon this motion. Here, however, the only judgment which has been rendered on the merits upholds the validity of the patent.

It is true the defendants here were not parties or privies to the litigation with the city of Owosso. It is a familiar rule, however, that:

"Certain matters regarding the validity of a patent are governed by established rules of legal definition and construction, and their determination is the same in every case, without reference to the parties, and sometimes without reference to the testimony. Whether or not the patented invention has resulted from inventive skill, or whether it is embraced in either of the classes protected by statute, whether the patent is formally sufficient, and what it claims as to the invention patented, are points which, once being carefully considered, may be regarded as permanently settled for the purposes of future litigation."

While in these matters judges are not bound to follow the decisions of tribunals of inferior or co-ordinate jurisdiction, the judicial comity which must always prevail in courts representing the same government and administering the same laws requires that judgments upon points like these should not be departed from without grave reasons for declaring them erroneous. *American-Nicholson Pavement Co. v. City of Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312; *Page v. Holmes Burglar Alarm Telegraph Co. (C. C.)* 2 Fed. 330; *Lockwood v. Faber (C. C.)* 27 Fed. 63. The uniform course of decisions in the courts of the United States as to previous decisions rendered by a Circuit Court with regard to the validity of a patent has been to treat it as of the very highest nature, and as almost conclusive on an application for an injunction in another case founded on the same patent. *American Middlings Purifier Co. v. Christian*, 4 Dill. 448; Fed. Cas. No. 307; *Hammerschlag v. Garrett (C. C.)* 9 Fed. 43.

Save in cases where a prior decision operates as an estoppel upon the defendant, on an application for an injunction, all the issues are open to fresh inquiry and determination; the judgments being merely

evidence in favor of the plaintiff, and controlling the decision of the court only when not opposed by more convincing proof. When conflicting judgments have been rendered, the courts must follow those which, in view of all the tests of authority, appear to have the greater value, and if the question is still doubtful, and no other evidence is offered, it must decide in favor of the patent. *United States Stamping Co. v. King* (C. C.) 7 Fed. 860, 17 Blatchf. 55. When there has been an adjudication upholding the validity of the patent, the defendant in another case, who seeks to overthrow it because of new evidence not introduced in the former case, which should have led to a different result, must make good his contention. When the defense is anticipation, it must be shown; and, if there be any reasonable doubt on that point, it must be resolved against the defendant, on a motion for a preliminary injunction. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Bursh v. Condit*, 132 U. S. 39, 10 Sup. Ct. 1, 32 L. Ed. 251; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821. In view of these principles, and after careful consideration of the new evidence regarding the Washington pavement, which was not before the court in the Owosso litigation, but was before the Circuit Court of Illinois, this court holds that the defense of anticipation is not made out.

The substance of the other defenses, leaving out the question of infringement *vel non*, is that the patent does not disclose invention, and that there has been double patenting. On these points the court is of opinion that at this stage of the proceedings it should follow the decision in *Warren Bros. v. Owosso*, *supra*. While that decision does not discuss the question of double patenting, it inevitably overrules that defense. I find, from an examination of the defendant's briefs before the Circuit Court of Appeals in that case, that the defense of double patenting was brought to the attention of the court and relied on. See *Thompson-Houston Electric Co. v. Ohio Brass Co.*, 80 Fed. 712, 26 C. C. A. 107; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 131 Fed. 853, 68 C. C. A. 233.

In *Warren Bros. Co. v. City of Owosso*, *supra*, it is said, on page 312 of 166 Fed.:

"Warren's invention, shortly stated, consists in the discovery that an aggregate of large and small pieces of stone, together with a certain proportion of stone dust, all mixed together and thoroughly permeated with bitumen or asphalt, results, when set, in a compact, stable structure, and is less liable to disintegrate from traffic or weather than any other method of grading or arranging the mineral constituents. Under the evidence, the particles are more compact in their relation to each other, and there is a minimum of friction in their interaction. The larger pieces of stone withstand the tendency of the small grains or dust to slip by each other and change the form of the pavement by disintegration and lumpy spots. The result is, therefore, a stability due to the arrangement of the mineral structure which enables the use of a softer asphalt or bitumen than would be otherwise feasible, inasmuch as a greater proportion of the wear and strain is carried by the mineral elements than by the binding constituent. This is, in substance, stated and claimed as an advantage over any other pavement composition by the patentee in his specifications. The fundamental idea of Warren is, not that the 'density' of his composition gives the stability which he claims, but that the mineral aggregate should of itself resist displacement by traffic. Neither is the utility or intrinsic value of the Warren patent seriously denied, though its superiority over the sheet asphalt, under ordinary conditions, is by no means conceded.

Aside from any sort of concessions as to the utility and intrinsic value of the structure of the patent, its durability and practical value in use is established by a great volume of evidence coming from expert engineers acquainted with the pavement problem, as well from others who speak from observation of the pavement in use in many parts of the country. Its durability under traffic, its cleanliness, its noiselessness, and freedom from undue slipperiness, as compared to most forms of pavement, may be regarded as established."

The court held that the following claims, under the evidence before it, were infringed:

"5. In a street pavement, a bituminous mineral structure, the mineral ingredients of which are fixed and of several grades, so graded as to give the structure an inherent stability.

"6. A bituminous street pavement structure, containing mixed mineral ingredients of such grades as to give the structure an inherent stability."

"11. A street paving structure, composed of a mixture of mineral or wearing ingredients and a plastic binder, the space between the mineral ingredients being less than 21 per cent. of the whole, and the plastic binder occupying said space."

Upon the question of infringement, if the specifications for laying the pavement are adhered to, the court has been favored with the affidavits of some eminent experts, expressing directly opposite conclusions. The negation of infringement is based largely, if not entirely, upon the scope which the expert thinks proper to be allowed the several claims in the patent. If these claims in the patent are valid, as I must hold them to be on this application, it is difficult to hold that infringement will not result if the contract for laying down this pavement is carried out according to specifications. Putting the most favorable construction upon defendant's affidavits, it suffices to say that they do not raise sufficient doubt upon the question to justify a denial of a preliminary injunction, if it be otherwise proper.

The street paving, over the laying of which the dispute arises, will cover the distance of one block only in the city of Montgomery, on a street 50 feet wide and about 100 feet long. So far as the present record discloses, it is not contemplated to connect the pavement on this block with other kinds of paving, or even with the kind of paving for which the contract calls. The amount to be paid for the work is about \$3,500, and the royalty exacted, if it were done under the Warren patent, would amount to a comparatively small sum. Complainant's affidavits show that the defendants were notified that the specifications under which the pavement is to be laid would infringe complainant's patent, and that complainant had offered to let the work be done under its usual royalty. Under the circumstances of the prior litigation concerning this patent, some of which was with the Metropolitan Engineering & Construction Company, it is not at all improbable that the laying of the pavement here was intended as a challenge in this jurisdiction of the patent or the validity of some of its claims. Neither the city nor the other defendant is in the position to set up public inconvenience from the stoppage of the work, which has not yet been begun, since the contract was made with full knowledge of the claims of complainant and that an injunction would probably be sought.

Nothing has been decided in the litigation in Illinois between the complainant and the Metropolitan Engineering & Construction Company which adjudges anything or estops either party from asserting the validity or the invalidity of this patent or any of its claims. If we

concede that comity controls the matter, this court, in view of the final decision of the Circuit Court of Appeals as to the validity of this patent, cannot refuse to entertain the suit brought here by the complainant against the Metropolitan Engineering & Construction Company and another person, not a party to the Illinois suit, to prevent a threatened infringement in Alabama. When an infringement of a patent is committed, or is about to be committed, in another jurisdiction, the complainant, who has brought a prior suit for such infringement in such jurisdiction, is not compelled to go back there to seek a fresh injunction against the same infringer, and another person not a party to that suit, and of whom it has no jurisdiction, to prevent infringement in another district. Complainant has a right under the Constitution and laws to choose either forum as to this particular infringement, and this court has no power to refuse to entertain the suit as to an infringement done or threatened within its jurisdiction. True, this may finally lead to conflicting judgments in the two courts as to the validity of this patent. Such results cannot be avoided under our present system, where no particular court has exclusive jurisdiction, and the validity of a patent may be tested in different courts of co-ordinate jurisdiction at the same time, and even by the same parties, when nothing has been decided in the litigation between them estopping either of them from setting up new evidence on points which may finally overthrow the patent.

Comity cannot prevent such results; but neither of the courts so circumstanced ought to go any further than the necessities of the particular case in its own jurisdiction absolutely require. Neither should attempt to decide upon an infringement committed in the jurisdiction of the other, nor should either court require an accounting between the parties as to an infringement committed in the jurisdiction of the other. The bill here not only seeks to prevent infringements in Alabama, but elsewhere, and also an accounting here for all gains, incomes, and profits which defendants may have gained from like infringements since the transfer of the Warren patent to the complainant. Should this court attempt to give that relief, and the suit in Illinois continue to be prosecuted, the same parties might be bound at the same time by conflicting judgments; the one holding that complainant was not entitled to an accounting and the other holding that it was. This would be a reproach to justice. This court, if it be found on final hearing that the complainant is entitled to relief, will, so long as the suit is pending between the parties about other infringements in Illinois, refuse to entertain any inquiry as to infringements in Illinois, or as to any accounting between the parties, save as to transactions in Alabama.

We repeat, if complainant's patent be in fact infringed, or is about to be infringed, it has a right to complain in whatever jurisdiction that infringement takes place, and it cannot be cut off from this right because it has a suit in another court against the main infringer for a like infringement there, in which nothing has been adjudged; nor can complainant be turned out of the equity court here, on the theory that, having established a royalty, a recovery at law will be adequate compensation, and the injury cannot be irreparable in such sense as to give it a standing in a court of equity. Irreparable injury, in the sense

here used, does not necessarily mean that complainant will be ruined or grievously harmed, if the court of equity does not intervene, but only that some legal right of complainant will be illegally taken from it, which in equity and good conscience it is entitled to enforce, the proper and full enjoyment of which will be impaired or lost, if the court of equity declines to interfere and puts complainant to its action at law for damages.

A large element in bringing a patent into use and giving it a market value is the estimate of the public as to its utility, and whether persons who deal in the process or manufacture believe the same result can be effected under another process, to be had by dealing with other parties at less cost. The completed work here would advertise itself, in most effective form, as a pavement of equal merit to that covered by the Warren patent, laid down and used in defiance of the rights of the patentee, in the capital of the state, where it would inevitably attract attention as the work of a competitor who offers to furnish the process at less cost than it could be had under the patent. At this time, perhaps, more than at any other period, states and municipalities are concerned in building roads and streets and as to the best methods of construction. It is difficult to see how far the failure of complainant to seek injunctive relief to prevent the building and use of such pavement would affect the value of its patents or diminish the number of licenses to use it. The reputation of a patent, like the good name of an individual, is easily injured, and it is hard, no matter how wrongful the injury, to counteract its effect. An ounce of prevention is worth a pound of cure. The full damage which might be inflicted upon the patentee, under such circumstances, if the patent be in fact infringed, is largely speculative, cannot be accurately ascertained, and therefore cannot be recovered at law. Equity alone can give an adequate remedy.

The court has made laborious examination of the records in the litigation concerning this patent in the Circuit Court of Appeals and in the Circuit Court of Illinois, and has carefully considered the points and arguments made by counsel and the numerous affidavits filed in this case. The pressure of other business upon the court prevents any further discussion of them. Under the circumstances of this case, substantial justice will be done between the parties at this time by allowing the work on East Jeff Davis avenue to be undertaken and completed, upon defendants' executing a bond to complainant in the sum of \$1,500, conditioned to pay all such costs and damages as may be awarded against defendants in this suit, if upon final hearing it shall be adjudged that the street paving on East Jeff Davis avenue infringes any claim complainant can lawfully set up under letters patent No. 727,505. If defendants fail to give bond within 20 days, then upon complainant's application a preliminary injunction may issue, forbidding the execution of the contract between the city of Montgomery and the Metropolitan Engineering & Construction Company, under the specifications made a part of the contract for the laying of the pavement, so far as concerns the laying of the top or wearing surface of the street.

All other questions are reserved.

HERZOG et al. v. NEW YORK TELEPHONE CO.

(Circuit Court, S. D. New York. February 12, 1909.)

1. PATENTS (§ 160*)—CONSTRUCTION—SPECIFICATIONS AND DRAWINGS.

While the invention of a patent must be measured by the claims, yet they cannot be considered to the exclusion of the specifications, but claims, specifications, and drawings showing the particular apparatus must be considered together, and must point out the principle by which the invention is practically operated, and, to make out a case of infringement, the apparatus of the defendant must embody such principle of operation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 234, 235; Dec. Dig. § 160.*]

2. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC SIGNALING APPARATUS.

The Herzog patent, No. 628,464, for an electric signaling apparatus and circuit, used principally to enable guests in hotels by means of latent signal transmitters in the rooms to signal the office, is valid, but embodies a system of bi-directional signaling to a limited extent only, it being possible to signal from the office to a room only when the transmitter in the room is set for a signal to the office, and is not infringed by the system of bi-directional signaling in use in a telephone exchange.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Seabury C. Mastick (Wm. Houston Kenyon and Seabury C. Mastick, of counsel), for complainants.

Frederick P. Fish (Edward Rector and Charles Neave, of counsel), for defendant.

HAZEL, District Judge. The patent upon which this action is based is for a useful improvement in electric signaling apparatus and circuits; infringement being charged of claims 11, 12, 13, 19, and 20. The patent No. 628,464 was granted July 11, 1899, to Felix Benedict Herzog on an application filed with the Commissioner of Patents on October 25, 1884. The claims in controversy relate to an arrangement of the circuits and apparatus for attracting attention, or a method of electric signaling or calling and then transmitting a message over the line from a so-called latent signal transmitter with which the signaling instrument is functionally related. The subject of the patent was commonly known by the designation of the "telesome system," and about a decade or so ago it was extensively used in rooms or apartments of guests at prominent hotels to transmit to the clerk of the hotel or to the central office by means of the latent signal instrument the wishes or requests for service of the guests. When the signaling feature of the instrument was operated, the message was automatically transmitted to the central office, not at the precise time when the signal was set by the guest, but subsequently, when the operator at the central office released it. Upon this point the specification says:

"The apparatus retains the signal as set until it is released directly or indirectly from a distant point by the person who is to receive the signal at the moment he is ready for it, when the signal is automatically transmitted to such receiver. These instruments being capable of being set so as to transmit alterable signals or combinations of signals enable the sender to convey any desired information to the receiver, the time of receiving such signal, however, being entirely under the control of the receiver."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A reproduction of the device as shown in the drawing attached to the patent in its normal condition follows:

Fig. 1.

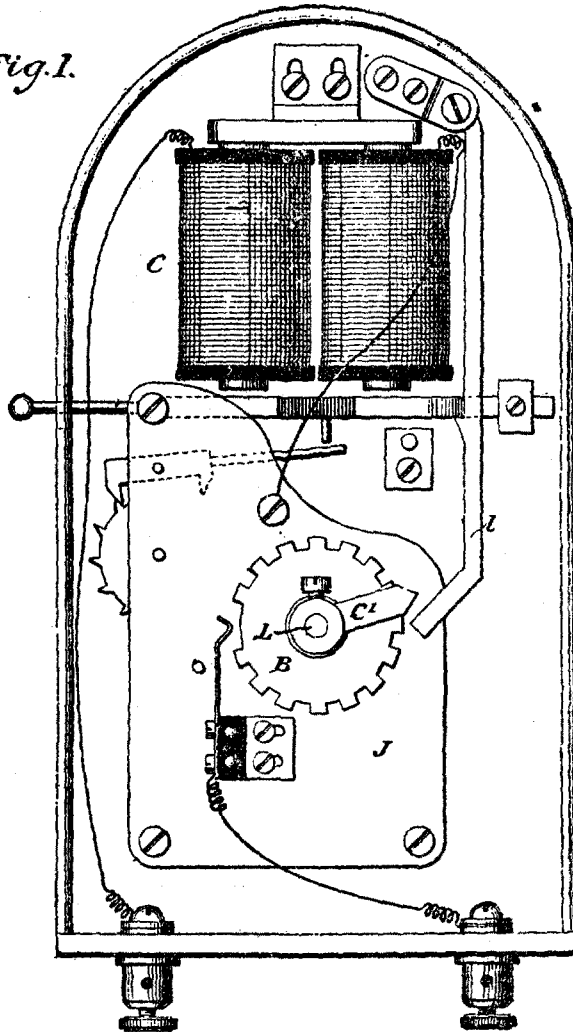
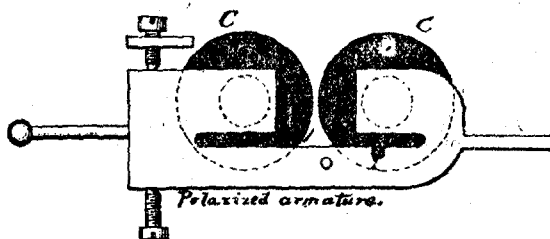
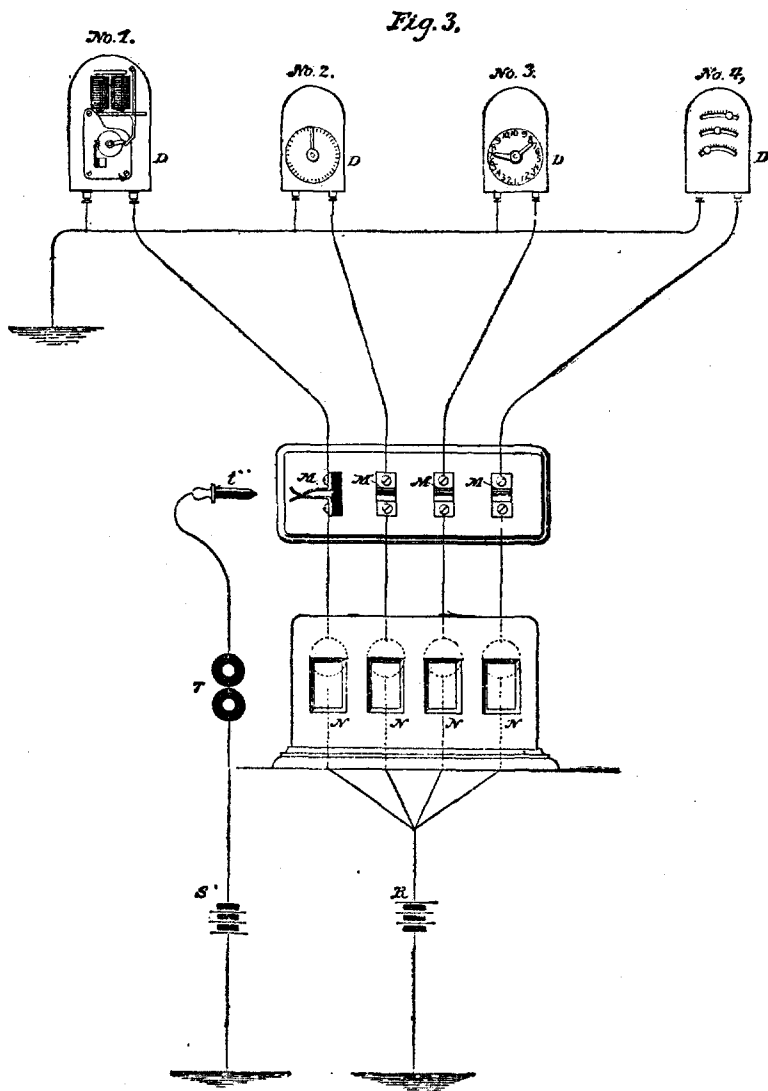


Fig. 2.





The patent shows that the signal, an indicator on the dial of the apparatus, and a means for setting it are combined with means for releasing it from the escapement which is controlled by an electro-magnet in such a way that, when set, the annunciator automatically displayed or sounded at the hotel office notifies the clerk that the indicator has been moved into a desired position by the guest, and that a message has been transmitted. To receive such message, however, the clerk first inserts a plug in the proper springjack. Such action causes a current to flow in a direction opposite to that flowing from the main battery, and the clock mechanism of the instrument is then un-

locked; the indicator going back to its normal position, and giving notice by its sound that the message has been received at the central office. The specification, after describing the means for keeping the escapement locked, says:

"The other device for holding the escapement unlocked except when the instrument is set, which may be used alone or in connection with the first-described device, consists in providing the electromagnet, C, with a polarized armature. I therefore make the armature a permanent magnet mounted in trunnions attached to the frame of the instrument, so that it will be attracted by a current of one polarity only. The armature being permanently magnetic normally attracts itself to the electromagnet when no current is in circuit, so as not to lock the escapement, and consequently during the breaks of the circuit it does not drop down and stop the clockwork."

No message can be received until the receiver upon observing the annunciator in the circuit drop down, or, hearing it ring, inserts in the springjack the connecting plug resulting in a current of opposite polarity to the original current transmitting the signal. To abandon a call the user of the instrument before receiving an answer may manually return the indicator to its original position by means of a projection on the side of the instrument which when moved downward releases the escapement. The apparatus is constructed and the circuits arranged so that there can be no interference of signals with each other. If different instruments are set at the same time, the signals are retained until it is convenient for the receiver to electrically receive them by making the second battery connections and releasing the instruments one after another. It should be clearly understood that it is the reversal of the current which causes the armature to be attracted, in consequence of which the escapement is released. There are no means specified in the patent for the origination of a call or signal from the central office to the room of a guest. The latent signal transmitter concededly cannot be actuated to transmit a message from the central office to the room of a guest unless the instrument has been set, and then only when the operator inserts the plug in the springjack, and causes a current in a separate circuit of opposite polarity to move the indicator on the dial to its normal position. The claims in issue, which are for a combination of elements, are not so essentially different as to require verbatim statement as to each of them. Claim 11 reads as follows:

"11. A signaling system comprising at each of several substations a circuit-closing device having normally-separated terminals during the position of rest and means for joining these and for holding them joined in the position of operation of the device; combined with a magnet and adjuncts so constructed, adjusted and arranged with reference to the condition of a normal current as not to be affected thereby; at the central station an annunciator with a separate element for each of the lines leading separately from the substations; and a separate cut-out switch-terminal between each such element and its circuit-closer; a source of current-supply common to all the lines and of a character adapted to energize the annunciator elements immediately on closure of the terminals at a substation and to continue this energization as long as the circuit remains closed thereat and the said annunciating element is not cut out; together with a common switching-plug arranged and adapted to co-operate with the several switching-terminals; and means for controlling through it, the substation-magnet of the line switched by the plug."

This claim specifically and broadly describes a normally closed circuit device at substations and means for joining the terminals, character of the magnets, the annunciator for each line, the cut-out switch terminal, the source of current to energize the annunciator, together with the switching plug to control the magnet in the instrument. Claim 12 emphasizes the reversed polarity current by means of a second generator to prevent circuit interference from other users of the instrument, and to cause the magnet to unlock the escapement. Claim 13 is for the asserted outward call through the instrumentality of magnet, C. In full such claim reads:

"13. At each of several substations a calling apparatus including a circuit-terminal and a manually-operated element co-operating therewith and constructed to have with respect to the terminal a normal position of rest, and one of action; separate lines from these stations to a central station having a separate annunciator device for each such substation and a common connection to a common source of current arranged to be controlled by the change of position of the substation manual element to begin the actuation of the corresponding annunciator device and normally to continue this actuation until the said substation element is again in its position of rest; a switching connection at the central station for each such line arranged during its operation to interrupt the operation of the annunciator element; and co-operating therewith, a circuit connection arranged and adapted to control current of another character or condition; together with a controlled device at each substation arranged to be controllable by the said changed current and to operate as a notification to the transmitting operator."

In claim 19 the controller device is magnetically controlled, and claim 20 mentions a polarized device. In other respects such claims are substantially similar to No. 13. The complainant contends, first, that the patentee solved the problem of bi-directional signaling as applied to circuits of the class mentioned in the claim, a practicable system of signaling in both directions from a substation to a central and vice versa; and, second, that the defendant telephone company uses and employs in its service the signaling organization described in the patent in suit. The principal defense is noninfringement. The question is important whether the methods of signaling described in the patent and claims are restricted to the patentee's main invention, the latent signal transmitter, or whether they are also adaptable to a telephone system such as the defendant employs. It seems to me to be necessary to describe the scope of the claims in issue. In order to do this, resort must be had to the specification and the state of the art at the date of the application in suit and to the claim of the defendant that the application was amended to cover or include the defendant's system of signaling after it had been in public use. Is the Herzog invention capable of bi-directional signaling, and, if so, does the defendant attain such a result by using the signaling system described in the claims? The broad wording of the claims renders it quite possible to recognize in the defendant's signaling apparatus the essential elements of the patented Herzog combination, but such wording cannot be considered blindly without qualification or consideration of the particular thing the patentee claims to have originated. The claims cannot be considered to the exclusion of the specification, for the claims, specifications, and drawings showing the particular apparatus must be considered together. Such I believe is the holding of the

pertinent decisions. *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Westinghouse v. Gardner, etc.*, Fed. Cas. No. 17,450; *Matthews v. Shoneberger* (C. C.) 4 Fed. 635. While it is true that the claim must measure the invention, as stated by the Supreme Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, yet the description must point out the principle by which the invention is practicably operated, and, to make out a cause of infringement, the apparatus of the defendant must embody such principle of operation. If the signaling in question is foreign to that employed in telephony, or if the prior art discloses an inward and outward call, the claims must be restricted to the particular system described. The specification declares the invention to be equally applicable to telephone exchange systems and other circuits, but it does not point out the specific applicability of Herzog's method of signaling to a telephone system, and the proofs establish that the original intention of the patentee was that his device should also be used as an auxiliary of the telephone system. If the improvement, however, covers bi-directional signaling over a line circuit controlled by a common battery with normally separated terminals as specified in the claims, the system of the defendant if it substantially uses such elements comes within the scope of the claims.

From this point of view the essential feature, namely, the means for an inward and outward call, may now be more fully explained. The inward call consists of simply closing a normally open break in the circuit at the substation, there being a multiplicity of subscribers each having means to call the central office independently of any other subscriber. This may be done by turning the indicator on the dial of the instrument to a desired position, enabling the current from the common battery to energize the annunciator, which then remains energized until the circuit is closed by the operator receiving the message. The outward call depends for its functional result upon separate devices normally operated at the central office. In addition to the common battery supplying current to the circuits arranged parallel to each other so as to energize the annunciator and the apparatus with a normal break, including the magnet, C, at the substation, there is provided at the central office springjacks in each circuit placed outside of the annunciators, but in series with them, together with a plug attached to a wire connected to a second generator of different current. The insertion of a plug in the proper springjack makes connection with the second battery, cutting out the common battery and the line annunciator, permitting a current to flow from the second battery through the magnet, C, so as to attract its armature. This method results in an audible or visual notification at the substation. The magnet, C, is not energized by the current from the common battery to give the inward call, but according to the patentee its polarized armature enables the release of the escapement and the sending in of an outward call. It is not pretended that the ingoing signal on a single line was new at the date of the invention in suit. It was old to signal the substation at a central station with normally open contacts which are joined by inserting a plug in the springjack on a single cir-

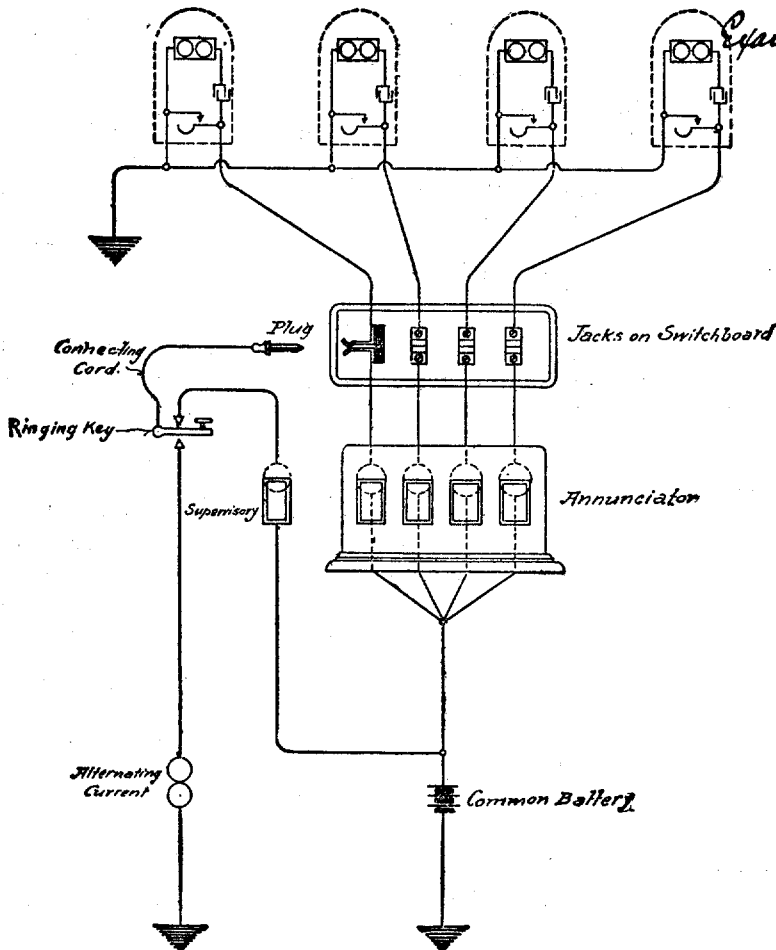
cuit arranged in multiple and fed by a common battery; and the arrangement of the annunciators connected in parallel was also commonly known. Indeed, neither the use of a common battery at central office to feed a multiplicity of lines, a circuit closing device at the substation, a magnet, cut-out switch-terminal, the generator of different current, a switching plug, a springjack, a polarized armature were new contrivances in the art at the date of the Herzog invention. Such elements, however, have by Herzog been so arranged and assembled as to create a new combination for the achievement of a new result. The patentee created a principle of operation which was primarily applicable to the latent transmitter, but the rule is undeniable, though its application is disputed, that if by his mode of operation the plaintiff achieved a bi-directional signaling, assuming the signaling shown in the patent to be such, then, even though he did not know at the time of filing his application that his method was applicable to a telephone exchange, he is nevertheless entitled to the protection of the patent laws. He was not bound to set forth all the known and unknown uses of his discovery. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Pike v. Potter*, 3 Fish. Pat. Cas. 55, Fed. Cas. No. 11,162. The ingoing call and the system by which it operated concededly was understood in the art.

In the Cheever patent, No. 208,463, dated October 1, 1878, which related to a multiple system of circuits, a subscriber upon lifting his telephone from the hook closed a normally open circuit to call the central office. To reply the operator inserted a plug in the springjack, cutting out the common battery and the annunciator, and conversation over the line without further signaling could then be carried on. A talking current having no relation to the common battery was generated; such functional result being due to the energization of the polarized magnet in the receiver which was used at both ends interchangeably for speaking and listening. It will be observed that Cheever employed merely an inward call, and therefore cannot be considered to limit the claims in suit. In the patent to Scribner, No. 245,404, dated August 9, 1881, is shown a normally open contact, which is kept open by the weight of the receiver hanging on the switch hook. Upon lifting the receiver, the terminals are joined, and then a current from the common battery passes from the substation to an annunciator, causing it to drop. The operator replying inserts a plug on a cord in the springjack of the annunciator line, and talks with the subscriber. An outward call, strictly speaking, is not disclosed by Scribner's invention. He employed a different current, but he applied it to an additional circuit to ring a bell when he desired to call the substation. In the Roosevelt patent is shown a system of bi-directional calling of the normally closed type. So also in the Hewett patent, No. 245,494, dated August 9, 1881, the circuit connections are normally closed, and the current from the battery passes continuously and wastefully over the line. The contacts are opened when the receiver hook is raised resulting in the movement of the central office annunciator, while a second battery current was used to ring the bell at the

substation. The continual activity of the battery current and the closed circuits of Hewett and Roosevelt will not admit of their anticipating the patent in suit. Such inventions were doubtless based on a radically different principle at the date of the application for the patent in suit, though at the present time the supposedly insurmountable obstacles to the complete success of the Roosevelt and Hewett inventions could be readily overcome. In the Herzog patent, as already indicated, the circuits are normally open, and the current is shut off or closed against the escapement by the employment of the polarized magnet, which, in combination with a current from the second battery, unlocks the latent device, and operates the signal at the substation. The complainant emphasizes the point that the locking of the escapement in the latent transmitter is functionally independent of the signaling system, that the inward call is unaffected by the magnet, C, but that the magnet is affected by the outward call owing to the employment of a current of different characteristics. The patentee rightly claims that the magnet has different functions, first, to lock the instrument giving the inward call, which is first manually set, as already described; second, to give the outward call by inserting a plug in the springjack to attract the armature as a result of the current flowing from the second battery, and thus giving an audible or visual notification at the substation; third, by attracting the armature to unlock the escapement; and, lastly, to enable a reopening of the circuit. Such a combination is not disclosed in the prior art. But the defendant contends that the Herzog circuit arrangements are of a specific character: applying to a latent signaling instrument, the invention disclosed by the patentee in his patents of a prior date. From my examination of the record, however, I am satisfied that the scope of the claims is of such breadth that they cannot be restricted to Herzog's main invention, but that they in fact cover and include any apparatus which uses the particular method of signaling set forth in the description.

This brings me to the question of infringement. The signaling of the defendant followed by a conversation between two persons at different substations is as follows: Upon the instant that the receiver is lifted from the hook a current from the common battery at the telephone exchange flows through the circuit and through a lamp annunciator at the exchange lighting it. The operator at the telephone exchange then knows that the person whose line lamp is bright wishes to converse with some one at another substation. The operator inserts a plug in the calling subscriber's springjack which without interfering with the battery current extinguishes the annunciator lamp, and she thereupon ascertains the wants of such calling subscriber. If he wishes to converse with another subscriber, he gives a number, and the operator inserts another plug in the multiple springjack of the subscriber corresponding to that number. When the connection is made, a supervisory lamp is lighted, the operator depresses a calling key signaling the called subscriber, and causing an alternating current from a generator at the exchange to pass over the line which rings the bell of the called

subscriber. Conversation may then be carried on directly the called subscriber raises his telephone from the hook switch. By removing the receiver from the hook the contacts are joined, the current flows through the supervisory relay attracting the armature, and the lighted lamp is cut out. To disconnect a line, each subscriber hangs his receiver on the hook, which breaks the flow of the current and lights a lamp, thus giving notice to the operator that the lines may be disconnected. It is not necessary to specify the various parts, the arrangement of the circuits, and the connections together with their functional results. They consist of a complicated mass of instrumentalities, their relations, however, to a signaling system becoming simplified when their presence or absence in a circuit is once understood. The sketches in evidence with their explanations have been helpful. A simplified sketch of defendant's signaling system follows:



The complainant contends that the claims in issue are embodied in the defendant's method of inward and outward calling; that the same result is achieved by defendant, though it has extended the range of the outgoing call by known devices and methods so as to make such call whenever desirable. It is also claimed that the apparatus of the defendant is arranged in multiple with a break, instead of in series, which causes the different currents to operate so that only one of such currents to the exclusion of the other will energize the bell magnet; that the defendant uses what is known as a condenser, which shunts a direct current in its calling branch wire at the substation to allow the alternating current to pass through it so as to achieve the bi-directional calling. It is explained that an alternating current passes through the condenser to give the inward call in the defendant's system when the subscriber lifts his receiver from the hook, and that thereupon the circuit closes while the current from the common battery energizes the annunciator giving notice to the operator of the action of the subscriber. When the operator at the telephone exchange calls a subscriber to the telephone, the alternating current of the generator passes through the line. If the hook is in its normal position at the substation, the current is separated, and passes through the branch circuit to the hook. As the bell magnet and the condenser are in the branch circuit the current passing through it rings the bell. In complainant's organization, as already shown, the magnet, C, is energized by a current from the common battery to repel the armature, and by a current from the second battery to in turn attract it so as to enable the central office to ascertain the requirements of the guest. Is such method an outward call as that term is defined in the art? There is no possible way by which the central office when the instrument is released may call the substation. No messages of any kind can be transmitted from the central office without a message transmission having first been initiated at the substation. I think there is a radical difference between complainant's and defendant's method of bi-directional signaling. The defendant though it has normally open contacts with a common battery current flowing when the contacts are closed, and a multiplicity of subscribers, it nevertheless uses parts having other functions than to merely produce signaling from terminal to terminal. The defendant does not use a polarized magnet to repel the armature, nor is the armature of the magnet attracted by a different current. In fact, the bell magnet does not operate to signal the telephone exchange and then to transmit a reply message. It does not seem to me that a combined result is produced in defendant's inward and outward calling, but each call is separate and independent of the other. No return signal is shown other than the operator's articulated request of the signaling subscriber as to his wants, and, as already stated, that is done by simply inserting a plug in the springjack, then speaking into the receiver, thereby establishing a talking current as shown in the Cheever patent. The later signaling of a called subscriber

by depressing a ringing key and using an alternating current to energize the bell magnet is over a line having no relation to the line of the calling subscriber until the called subscriber moves his receiver from the hook in response to the bell notification. The Herzog patent is not for such a method of signaling. In the patent in suit the forces when set in motion as already indicated accomplish a different result. What Herzog aimed to achieve was due to an adaptation from which emerged an improvement of the latent signal transmitter. The defendant insists, however, that it was old to arrange a bell magnet in multiple with a break, and such an arrangement was the equivalent of a magnet in series with a break. And it is urged that the arrangement of the condenser in the branch line in which is placed the magnet was a substantial equivalent of Herzog's method of achieving the result aimed at by him. From my examination of the questions submitted it is my opinion that, though the parts and instrumentalities combined by the defendant were old, they nevertheless accomplished a different result than is possessed by the Herzog improvement. In *Electric Signal Co. v. Hall Signal Co.*, 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96, the Supreme Court, dealing with a somewhat similar situation, says:

"To constitute identity of invention, and therefore infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function, provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents."

See, also, *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 81 C. C. A. 391. This rule is not inapposite to the case at bar. The complainant further contends that the receiving apparatus, T, in the patent in suit functionally operates as does the supervisory device of the defendant. In this I do not agree, as the specification clearly indicates that the instrument, T, is simply for receiving the message to be transmitted from the substation. In the defendant's system there is no supervisory when the telephone exchange is communicated with by a subscriber. Accordingly, the supervisory of the defendant is not the equivalent of the receiving instrument, T, which evidently signals whenever the circuit is joined or disjoined at the substation.

It is next contended by the defendant that the broad claims in controversy were not filed until after its signaling system had gone into public use, and that such claims were purposely included to cover the system of signaling. This assertion would seem to be not altogether groundless, but I do not deem it necessary to limit the claims for that reason. Herzog omitted to make clear in his description the inward and outward system of signaling used by the

defendant, or its substantial equivalent, and his claims are broader than is warranted by the specification.

There were other propositions argued at the bar, but, having reached the foregoing conclusion, it is obviously unnecessary to discuss them. The Herzog patent, No. 628,464, is valid, but not infringed by the defendant.

Decree for the defendant, with costs.

INTERNATIONAL HARVESTER CO. v. RICHARDSON MFG. CO.

(Circuit Court, D. Massachusetts. August 19, 1909.)

No. 375.

PATENTS (§ 328*)—INFRINGEMENT—MANURE SPREADER.

The Kemp patent, No. 632,124, for an improvement in manure spreaders, consisting of a tailboard placed immediately in front of the beater to prevent it from becoming clogged in loading, means for raising and lowering the same, and a stop device to prevent the wagon bottom and beater from being operated until the tailboard is raised, discloses invention in such means of operation and stop device, but is limited by the prior art to the precise construction shown, with a narrow range of equivalents. As so narrowly construed, it is not infringed by the device of the Brown patents, Nos. 731,539 and 821,779.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Banning & Banning and Thomas A. Banning, for complainant.

Fish, Richardson, Herrick & Neave and Guy Cunningham, for defendant.

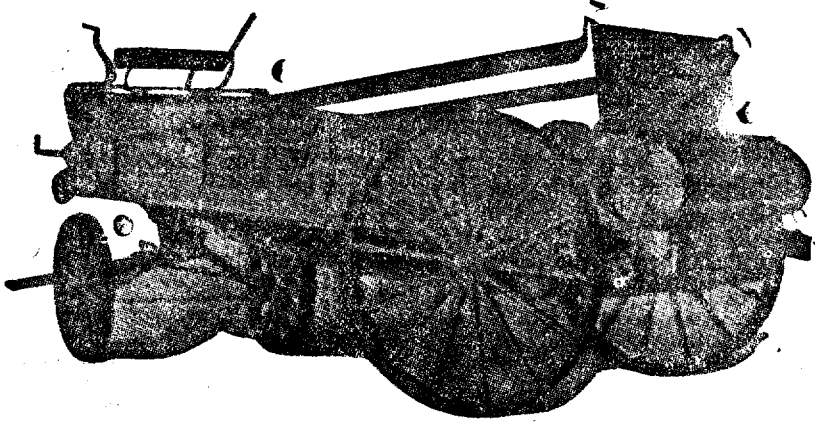
COLT, Circuit Judge. This is a suit for infringement of letters patent No. 632,124, issued August 29, 1899, to Joseph S. Kemp for improvements in manure spreaders. The principal improvement covered by the patent and the only one involved in the present case, relates to a tailboard which is incorporated in the machine for the purpose of "preventing the beater from becoming clogged in loading."

A manure spreader is a wagon much like the ordinary farm wagon, with a movable bottom and a beater or rotatable cylinder with projecting teeth located at the end of the wagon. By the slow rearward movement of the bottom the manure is brought against the rapidly rotating beater and scattered upon the field. The rear wagon wheels give the driving power for the bottom and the beater, and these parts are operated by a lever in front of the wagon. By moving the lever the driver can engage or disengage the connecting gears or clutch mechanism, and thereby set the bottom and beater in operation or cause them to remain stationary.

Kemp took out several prior patents for improvements in manure spreaders, and the patent in suit is for the addition of this tailboard and operating mechanism to the prior Kemp machine.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A perspective view of the Kemp manure spreader with this tail-board addition is illustrated in the following cut:



This board, as shown in the cut, is located at the end of the wagon box directly in front of the beater. Its purpose is to prevent the manure from clogging the beater in loading and transportation to the field; and it accomplishes this purpose by confining or holding back the manure in the wagon box until just before the spreading operation begins. The board is lowered into the wagon box before loading, and is raised bodily and vertically out of the box before starting the machine. This is accomplished by means of the long pivoted arms and connecting mechanism. The board is operated from the driver's seat by a separate lever. This lever is provided with a stop device in the form of a laterally projecting pin, which prevents the raising of the beater and movable bottom lever before the board lever has been raised. In other words, this stop device prevents the machine from starting until the board has been raised. It appears that a similar tailboard was occasionally inserted in the earlier Kemp spreader. This board, however, was a hand board. It was lowered into the box by hand, and was raised out of the box by hand, or by means of a lever. In the machine of the patent in suit Kemp embodied the means he conceived for raising and lowering the board and the stop device for preventing the machine from starting until the board had been raised.

The claims in issue are 1, 2, 3, 5, 6, 7, and 8. Claims 1, 2, and 3 are for combinations of the principal features of the prior manure spreader with the tailboard and the whole or parts of the mechanism for operating the board; while claims 5, 6, 7, and 8 are for combinations of the principal features of the prior manure spreader with the tailboard and a stop device which prevents the machine from starting before the board has been raised.

The Kemp board has proved to be useful. Its use is advantageous where the manure is heavy and soggy. It has not, however, supplanted the old way of preventing the manure from clogging the beater by moving the bottom forward a few inches before starting

the machine, and so drawing the load away from the beater. There is evidence to the effect that the complainant sells more manure spreaders without this additional feature than with it.

The complainant contends that the combination of this tailboard and actuating mechanism with a manure spreader, especially of the Kemp type, is new, useful, and involved invention; that the prior art fails to disclose any like combination; and that the broad claims of the patent which are relied on should receive a liberal construction.

On the other hand, the defendant contends that the claims in issue are void for want of patentable novelty, and that, if held to be valid, they must be limited to the specific tailboard arrangement and mechanism described in the patent. The defendant's brief states these defenses as follows:

"First, that the claims in issue relate only to the addition of mechanism regulating the raising and lowering of an ordinary tailboard in a particular way in a manure spreader, and are void for lack of invention in view of the prior art and on their faces, particularly if the claims are given the broad construction for which the complainant contends; and

"Second, that the defendant does not infringe the claims in issue, but, on the contrary, is making and selling manure spreaders covered by its own letters patent, which resemble the art prior to the patent in suit more nearly than they resemble the complainant's patent."

Upon full consideration I am not prepared to hold that these claims of the Kemp patent are void for want of invention. In my opinion, therefore, the important question in this case is whether these claims can be properly construed to cover the defendant's tailboard, in view of the nature and scope of the Kemp invention, and the differences which exist between the two boards as to structure, mode of operation, and means for raising the board.

This question may be considered under four heads: (I) the Kemp patent in suit; (II) the defendant's tailboard; (III) the prior art; (IV) the alleged infringement of the claims in issue.

I. The specification of the Kemp patent in suit begins by stating the general features of a manure spreader. It then states the "customary way" of preventing the material from becoming embedded in the beater, and then follows a statement of the invention:

"This invention relates to that class of manure spreaders which contain a box mounted on a wheeled frame, and in which the body or charge of manure or other fertilizer rests upon a movable bottom, by which the manure is slowly moved rearwardly in the box against a toothed beater, which removes the manure from the rear end of the body or pile and throws it rearwardly from the machine.

"In loading the box with a charge of manure or fertilizing matter, the latter is loaded directly against the beater, whereby the teeth of the latter become so embedded in the material that breakage is liable to occur when the machine is started. In order to avoid such breakage, it is customary to adjust the movable bottom for loading with its follower board a few inches rearward of its extreme forward position, and to move the bottom forward to its extreme forward position after loading and before starting the machine. This forward movement of the bottom moves the rear end of the pile away from the beater and furnishes sufficient clearance for the beater to start freely. This clearing of the beater before starting is, however, often overlooked or neglected, in which case breakage is liable to result.

"The principal object of my invention is to provide the machine with efficient and convenient means for preventing the beater from becoming clogged

in loading, and this means consists, briefly stated, of a safety board or gate which is arranged in the rear portion of the box in front of the beater, and which is lowered into the box before loading, and protects the beater while loading, and is raised out of the box before starting the machine."

This extract from the patent clearly points out the purpose and scope of the invention: In the prior Kemp manure spreader the customary way of avoiding a breakage, owing to the material becoming embedded in the beater, was to adjust the movable bottom with its following board, so that the bottom could be moved forward a short distance after loading. By this forward movement the rear end of the load is moved away from the beater, and sufficient clearance is furnished for the beater to start freely. Since, however, the driver might neglect to clear the beater in this way, Kemp conceived the idea of a "safety board or gate which is arranged in the rear portion of the box in front of the beater, and which is lowered into the box before loading, and protects the beater while loading, and is raised out of the box before starting the machine."

This conception of Kemp involved three simple elements:

First, a tailboard located directly in front of the beater;

Second, means for raising and lowering the board;

Third, means for preventing the starting of the machine before the board is raised.

We will consider these elements in their order:

1. The Kemp board is an ordinary rectangular board, provided on its rear side with two small cleats or ribs, which help to hold it in position. It is lowered into the box before loading, and is raised vertically and bodily out of the box before starting the machine. It does not co-operate in any way with the spreading operation. It performs simply the function of the ordinary tailboard in a farmer's cart or wagon, which confines the manure in the wagon while loading and in transportation to the field, and is raised bodily out of the way just before the unloading begins.

2. The main feature of the mechanism for raising and lowering the board, as shown in the above cut, comprises long side levers, which are pivoted near their front ends to the sides of the wagon, so as to swing up and down. The depression of the front ends of the levers raises the rear ends, and with them the attached board; and when the pressure on the front ends is released the board descends by gravity, carrying down the rear ends of the levers, and raising the front ends.

The means of attaching the board to the levers, as seen in the cut, comprise short arms which extend outwardly from the board and then downwardly, and which are pivotally connected with the ends of the levers.

The mechanism for depressing the levers, and thereby raising the board, comprises cam arms, which are operated when the driver raises a hand lever. These cam arms are secured to the end of a rock shaft arranged above the front portion of the box and above the front ends of the levers. Each of the side levers is provided at its front end with a shoe, and with upward projecting side flanges by which the displacement of the parts is prevented. The cam arms are provided

with a curved lifting face and a straight locking face. The patent says:

"As the cam levers are swung down their curved faces press down upon the shoes of the side levers and depress the same, while the straight locking faces bear against the shoes when the front ends of the levers have been sufficiently depressed and lock the levers in this position."

3. The device for preventing the machine from starting before the board is raised is a transverse pin on the board hand lever near its front end, which projects laterally over the clutch hand lever and prevents the latter from being raised. This stop device is described in the patent as follows:

"When the hand lever, P, is in its lower position, in which the bottom and beater clutches are disengaged and the hand lever, T, stands also in its lower position, in which the board stands in front of the beater, the front end of the board hand lever, T, stands slightly above the clutch hand lever, P, as shown in Fig. 1. The board hand lever, T, is provided near its front end with a transverse pin or stop, t, which projects laterally over the clutch hand lever, P, and prevents the latter from being raised. This prevents the clutches from being engaged, and the bottom and beater from being started, so long as the board is down, and compels the operator to raise the board before starting the bottom and beater."

The claims in issue read as follows:

"1. In a manure spreader, the combination, with the box having a movable bottom and the rotary beater arranged over the rear portion of said bottom, of a safety board or gate arranged over said bottom adjacent to the front side of said beater and capable of vertical movement bodily toward and from said bottom, and mechanism whereby said board can be raised to expose the front side of the beater and lowered to cover the same, substantially as set forth.

"2. In a manure spreader, the combination, with the box having a movable bottom and the rotary beater arranged over the rear portion of said bottom, of a safety board or gate arranged over said bottom adjacent to the front side of said beater and capable of vertical movement bodily toward and from said bottom, side levers pivoted to the sides of the box to swing vertically and connected at their rear ends to said board or gate, and means whereby the front ends of said levers are depressed to raise said board or gate, substantially as set forth.

"3. The combination, with the box having a movable bottom and the beater, of a vertically movable safety board or gate arranged adjacent to the beater, side levers connected at their rear ends with said board or gate, and rocking cam arms bearing upon the front ends of said side levers, substantially as set forth."

"5. The combination, with the box having a movable bottom, the beater, and the bottom-actuating mechanism, of a movable safety board or gate arranged adjacent to the beater, and a stop device which prevents the bottom-actuating mechanism from being thrown into gear before the safety board or gate has been raised, substantially as set forth.

"6. The combination, with the box having a movable bottom, the beater, and the beater-actuating mechanism, of a movable safety board or gate arranged adjacent to the beater, and a stop device which prevents the beater-actuating mechanism from being thrown into gear before the safety board or gate has been raised, substantially as set forth.

"7. The combination, with the box having a movable bottom, the beater, the bottom-actuating mechanism and its clutch, and the shifting mechanism whereby said clutch is engaged or disengaged, of a vertically movable safety board or gate arranged adjacent to the beater, mechanism whereby said board or gate can be raised or lowered, and a stop device which prevents said clutch from being engaged before the safety board or gate has been raised, substantially as set forth.

"8. The combination, with the box having a movable bottom, the beater, the bottom-actuating mechanism and its clutch, the beater-actuating mechanism and its clutch, and the shifting mechanism whereby said clutches are simultaneously engaged or disengaged, of a vertically movable safety board or gate arranged adjacent to the beater, mechanism whereby said board or gate can be raised or lowered, and a stop device which prevents the clutches from being engaged before the safety board or gate has been raised, substantially as set forth."

The important elements in these claims are:

First. A safety board arranged over the bottom of the wagon adjacent to the front side of the beater and "capable of vertical movement bodily toward and from said bottom."

Second. Mechanism in whole or in part for raising and lowering the board.

Third. A "stop device," which prevents the bottom and beater from being thrown into operation before the board has been raised.

It may be observed that the first two claims are limited to a safety board having a vertical bodily movement. This limitation was the result of proceedings in the Patent Office, in which the original claims, which did not contain any such limitation, were rejected on reference to the prior Crandall and McDonald patents.

From this review of the Kemp patent it is clear that the only invention covered by the claims in issue resides in the means described in the specification and shown in the drawings for raising and lowering the tailboard and in the stop device which prevents the starting of the machine before the tailboard is raised.

II. The defendant was a licensee under the earlier Kemp patents, and made and sold Kemp manure spreaders under its license until the expiration of the patents.

The spreader now made by the defendant is covered by two patents, Nos. 731,539 and 821,779, granted to Theophilus Brown for improvements in manure spreaders. These patents are of later date than the patent in suit, and they cover an improved form of tailboard.

We will now consider this tailboard under three heads: (1) Structure and operation; (2) means for raising and lowering the board; and (3) means for preventing the machine from starting before the board is raised.

1. The defendant's board is composed of two rectangular pieces, an upper and a lower, hinged together horizontally. It is arranged in front of the beater, but at some little distance from it. In other words, it is not placed directly against the beater, as in the Kemp arrangement. This board has two curved movements when it is raised. The upper section has a curved movement towards the front of the wagon through an arc of about 120 degrees, while the lower section has a curved movement towards the beater. Neither section, in my opinion, has a vertical movement in the sense of the Kemp tailboard. Again, the lower section of the defendant's tailboard co-operates in the spreading operation. Its purpose is to level and to pulverize the manure as it passes to the beater. The defendant's tailboard, therefore, has two functions: (1) To hold back the manure in loading, and (2) to assist in a better distribution in spreading.

Both sections of the defendant's board are held and guided during their whole movement, while the Kemp board is free to swing on its pivot.

2. The means for raising the defendant's board are as follows: There are short arms, which are rigidly attached to the top of the board. These arms extend towards the front of the wagon, and are then bent so as to rest in bearings on the top of the wagon side, and to form the axis about which the board rotates. This axis is again bent so as to form a short crank arm, which stands in an upright position when the board is lowered. A long rod is attached to each crank arm, which extends to the front of the wagon. When these rods are drawn forward the crank arm is drawn forward and downward, thereby turning the position of the arm attached to the upper section of the board, so that this section is turned from a vertical position to one which is nearly horizontal. The rods are attached to a rock shaft in front, which is reached by means of a lever near the driver's seat, thereby raising or lowering the board. A goosenecked arm is attached to each side of the lower section of the board near its center. The other end of this arm is pivotally attached to the inside of the wagon near the top. By this arrangement the lower section of the board is moved backward as the upper section is raised. In other words, the lower section must conform its movements to the turning radius of the goosenecked arm, as well as to the turning radius of the upper section.

3. The defendant's board has no stop device within the meaning of the Kemp patent. There is no projecting pin on the board lever which stops the operation of the bottom and beater mechanism before the board has been raised. In the defendant's organization there is but one lever, and the upward movement of this lever raises the tailboard, and starts the bottom and beater. Under the arrangement of crank arms with lugs on defendant's rock shaft, it is probably true that the tailboard begins to rise before the bottom and beater start. It may also be true that the worm and gear are so organized in the bottom mechanism that there is a slight further delay in starting the bottom. Conceding this to be so, the most that can be said is that the starting of the bottom and beater is delayed until after the board has begun to rise. If, however, we should go further, and assume that the board is entirely raised before the movements of the bottom and beater begin, we should still have an organization which is essentially different from the Kemp stop device.

III. The prior art may be said to start with that which is a matter of common knowledge, namely, the old tailboard in the farmer's cart. This board, as we have already said, was used for the purpose of confining the manure in the wagon box while loading and transporting to the field. It was lowered into the wagon box before loading, and raised bodily out of the wagon box before unloading. In structure, function, and use the Kemp board does not differ in any material respect from the ordinary tailboard of the farmer's cart.

Again, the evidence shows it was not uncommon in the earlier Kemp machine to use a hand tailboard similar to that described in the Kemp patent in suit for the purpose of holding back the manure in the wagon

box until just before the spreading operation. The only difference between this earlier Kemp machine so equipped and the machine of the patent in suit is the absence in the former machine of the special means for raising and lowering the board and the stop device for preventing the machine from starting before the board has been raised.

Further, all the prior patents for manure spreaders upon which the defendant relies describe tailboards. Some of these boards were operated by a lever near the driver's seat, and were so organized that the board was released or raised before the bottom and beater were started.

In the McDonald 1875 patent for a manure spreader there is disclosed a tailboard located at the end of the wagon in front of the beater, and which is operated by a lever in front of the wagon. This board is pivoted to the sides of the wagon, and swings on its pivots. A latch at one side is provided, which holds the board in a vertical position. To this latch is attached a long rod, which is connected with the lever in front of the machine. By moving the lever the driver releases the latch, and at the same time sets in operation the movable bottom and the beater. The movement of the manure causes the board to swing upward on its pivot. In the McDonald organization the bottom and the beater cannot start until the board is released and made free to swing on its pivots.

The Crandall 1884 patent for a manure spreader also shows a tailboard which is operated from the front of the wagon. This board is pivoted at its upper edge, and in operation it swings on its pivots. Means are also provided for adjusting this board, so that the opening will only permit the desired quantity of manure to pass. This board not only operates as a tailboard, but co-operates with the spreading operation.

The Merrill 1891 patent for a manure spreader discloses a tailboard in front of the beater. This board is pivoted so as to turn on arms which have a short radius. It is forced bodily upward by the pressure of the manure against it. This board also co-operates with the spreading operation, having the function of packing the manure on its way to the beater. Mechanism for raising the board is not shown in the specification or drawings. The specification says:

"The simplest form is a board or plank set vertically edgewise and somewhat inclined with its bottom rearward or toward the beater, as illustrated in Fig. 1 of the drawings. It is to be arranged movable vertically to allow the manure to pass onto the beater after the manure has been packed to the proper degree, and, if desired, it may be arranged to be moved at will by the person in charge of the machine; but I prefer to arrange it to move automatically."

The Wetter 1895 British patent for a manure spreader shows a tailboard. This board is arranged over the bottom adjacent to the front side of the beater, and one of its objects is to protect the beater in loading. The specification says:

"The lowering of the guard plate prevents the manure from entering the roller, L, when the receptacle is being filled."

To this board are attached side arms, which are pivoted to the same axis as the beater. A hand lever extends from this board backwards,

by which the board may be raised to expose the front side of the beater or lowered to cover it. This board is curved like the segment of a circle concentric with the beater. The Wetter board moves up and down bodily in a curved line.

These prior patents are important as showing that it was common to employ a tailboard in a manure spreader and to provide mechanism for operating the board from the front of the wagon and also to guard against the starting of the machine before the board was released.

We do not find, however, in the prior art, any tailboard and actuating mechanism like that covered by the Kemp patent in suit; nor do we find in the prior art any tailboard and actuating mechanism similar to the defendant's.

Since the mechanical problem of raising or releasing a tailboard from the front of the wagon and of so arranging the parts that the board must be raised or released before the machine starts is not a difficult problem, and since before the date of the Kemp invention this problem had already been solved in different ways, the most that Kemp can cover by his patent is the particular arrangement or means he has devised for accomplishing this result. The nature of the problem and the condition of the art is such that he is not entitled to a broad patent.

The range of equivalents depends upon the nature and extent of the invention (*Miller v. Eagle Company*, 151 U. S. 186, 209, 14 Sup. Ct. 310, 38 L. Ed. 121), and where the invention, as in the present case, is a narrow one, it cannot be enlarged by a liberal application of the doctrine of equivalents.

IV. With respect to the infringement of claim 1, the special features which call for consideration are a safety board—

"capable of vertical movement bodily toward and from said bottom, and mechanism whereby said board can be raised to expose the front side of the beater and lowered to cover the same, substantially as set forth."

This claim is limited to a board capable of vertical movement. The defendant's board, as we have seen, has a compound curved movement. The movements, therefore, of the two boards are substantially different; and these movements cannot be considered the equivalent of each other, in view of the nature and scope of the Kemp invention. It is also important in this connection to bear in mind that this claim was rejected by the Patent Office until it was limited to a board having a vertical movement. Again, the term "mechanism" in this claim cannot properly be construed to cover every form of mechanism for raising and lowering the board, but must be limited to substantially the special arrangement and means described in the specification and shown in the drawings. It was these special means which Kemp invented, and this invention cannot be enlarged by framing a broad claim. Either this claim should be held void by reason of its breadth, or it must be construed in connection with the specification, and so limited to the particular way devised for accomplishing the desired object. For these reasons the defendant's board does not infringe this claim.

As to the infringement of claim 2, the special features are a safety board—

"capable of vertical movement bodily toward and from said bottom, side levers pivoted to the sides of the box to swing vertically and connected at their rear ends to said board or gate, and means whereby the front ends of said levers are depressed to raise said board or gate, substantially as set forth."

This claim is not infringed, for the reason that the defendant's board does not have a "vertical bodily movement" within the meaning of the Kemp patent, and for the further reason that in the defendant's organization there are not found the "side levers" and the "means for depressing the front ends of the levers" which constitute the special arrangement of the Kemp invention.

As to the infringement of claim 3, the special features are:

"A vertically movable safety board or gate arranged adjacent to the beater, side levers connected at their rear ends with said board or gate, and rocking cam arms bearing upon the front ends of said side levers, substantially as set forth."

Claim 3 is not infringed, for the reasons just stated with respect to claim 2.

As to the infringement of claims 5, 6, 7, and 8, the special feature in all these claims is "a stop device," which prevents the bottom and beater from being actuated before the board is raised. There is no stop device in the defendant's board in the sense of the Kemp patent, and therefore these claims are not infringed.

In conclusion, it may be observed that this is not a case in which the defendant has sought to evade infringement by constructing a board like the Kemp board with simple changes in details. Nor has the defendant taken the substance of the Kemp organization and sought to improve upon it. On the contrary, the defendant's board, in my opinion, is different in structure, mode of operation, and in the results secured.

The complainant having failed to make out a case of infringement, it follows that the bill must be dismissed.

A decree may be entered dismissing the bill, with costs.

ARANOW v. J. CHEIN & CO.

(Circuit Court, S. D. New York. August 12, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—DRUM.

The Oschatz patent, No. 772,743, for a drum, construed, and, as limited by the prior art, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for infringement of letters patent No. 772,743, granted to Hermann Oschatz, October 18, 1904, for means for securing heads of drums.

Joseph L. Levy, for complainant.

Foulds & Galland, for defendant.

HAND, District Judge. I do not think that the defendants' drum constitutes an infringement. Whatever may be the validity of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant's patent, it at least contemplates the "securing" of the head by "clamping" it between the inside of the stretching rim and the insertion rim. I do not mean to decide that the defendants would escape an infringement by using a device which clamped the head between the inside of the stretching rim and the lower end of the insertion rim, or even between the inner side of the lower bead and the outer side of the insertion rim. It is not because the defendants do not carry the edge of the drumhead up between the inner side of the insertion rim and the inner side of the stretching rim that I differentiate their drum from the patent, but because they do not "clamp" the head between the two rims at all. The lower end of the insertion rim does impinge upon the flange or edge of the rigid head, and so permit its being pressed firmly against the drum body; but that does not constitute a clamping of the head between the rims. The lower bead of the stretching rim does also engage the under side of the flange of the head, so as to make the head and the two rims one piece which lock together; but that is not a clamping of the head between the rims either.

The complainant very naturally insists that so to limit his patent to the exact disclosure is not in accordance with law, and that to use a part of his invention for another purpose is an infringement. That depends upon just what was his "invention," and how far he advanced the art. Of course, the patent is not primary, and the claim must be limited by the prior state of the art of doing what many had previously done in somewhat different ways. In just what respect are those means different which the complainant's patent discloses?

That feature of his patent by which a rigid drumhead like the defendants' may be pressed upon the drum body by the impingement of the stretching ring is old, and may be found in the Rawson (No. 151,797), Woodman (No. 438,670), Cox (No. 504,910), and Converse (No. 656,518) patents. The defendants do not cause the stretching rim itself to impinge directly; but in their drums the insertion rim is merely a part of the stretching rim, nonresonant, to be sure, but no different in function from what it would be if the two were in fact the same. It cannot be an infringement to use the two rims for a function which they perform in precisely the same way as the single rims do in the older patents. The insertion rim is used merely as a shoulder to bear directly upon the flange of the rigid drumhead.

That feature of the defendants' drum by which the stretching rim is locked with the drumhead into one piece by the bending around of the lower bead is also anticipated in the Woodman patent (No. 438,670); for in that case the two rims, together with the head, could be removed together. Indeed, in that patent there is a perfect functional analogue to the insertion rim in the strip, *f* (Fig. 3), at least, so far as this "knockdown" feature is concerned.

There remains of novelty to the Oschatz patent only the fact that when the lower bead is bent over, as described in the specification, it clamps the margin of the head between the two rims, and in particular that the extreme edge of the bead, by pressing directly upon the open or outer side of the insertion rim, exerts a pressure directly against

that rim, which is transmitted to that portion of the edge of the drum-head which runs up between the flat surfaces of the two rims. The added friction created by this rigid embrace of the two rims, which the bead so causes, together with the friction between the inner side of the bead itself and the lower edge of the insertion rim, may perhaps constitute an invention. As to that I need decide nothing. An examination of the defendants' drums shows that they rely on no such thing as has been described. There is no "clamping" of the drumhead; no friction created between the rims. Indeed, there is a play between the head and the two rims, of which the insertion rim merely acts, as I have said, as a bearing shoulder, and the bead as a means of lifting off the head along with the two rims. Perhaps, if there had been no such anticipations, and the patent were not so confined, it might be said that the "means" invented included that part which the defendants use. If, in other words, no rim had been previously invented which impinged upon the flange of a rigid head, or nothing corresponding to the lower bead which kept it as a part of the stretching rim, then the defendants' drum might be held to infringe; but these prior inventions or modifications have left nothing for the complainant's patent as an invention, but the limited novelty of the "clamping" feature as already noticed. Possibly the defendants have adapted a part of the complainant's mechanism to a new use, but they have not used the "invention" at all. At most they have taken some part of the whole, which only as a whole constituted the invention, and they have used that part as a modified means for doing an old thing.

I shall be obliged to dismiss the bill, with costs.

DOWNING & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 13, 1909.)

No. 5,382.

1. CUSTOMS DUTIES (§ 36*)—CLASSIFICATION—"LITHOGRAPHIC PRINTS"—FOLDED POST CARDS—"BOOKLETS."

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1672), relating respectively to "lithographic prints" and to "booklets," articles consisting of several post cards folded together and ready to be detached, with a paper cover pasted thereon, are covered by the former rather than the latter term.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.*]

2. CUSTOMS DUTIES (§ 36*)—FOLDED POST CARDS—"CUTTING SIZE."

The "cutting size" of post cards, imported in a folded, undetached condition, should be ascertained, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1672), by measuring each card by itself, rather than taking the whole series as the unit of measurement.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Brown & Gerry (Everit Brown, of counsel), for importers.
Addison S. Pratt, Asst. U. S. Atty.

PLATT, District Judge. This case requires construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1672), which provides for:

"Lithographic prints * * * exceeding eight one-thousandths of one inch and not exceeding twenty one-thousandths of one inch in thickness, and not exceeding thirty-five squares inches cutting size in dimensions, five cents per pound. * * * All booklets * * * printed in whole or in part by lithographic process, * * * eight cents per pound."

The point to be decided is whether the importation in question consists of "booklets," as held by the collector of customs and by the Board of Appraisers, or of "lithographic prints," as claimed by the importers. Either of these provisions is more specific than that for "printed matter" in paragraph 403, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), as alternatively claimed by the importers. There is no testimony in the record; the case having been submitted on the official sample of the merchandise. This sample consists of six post cards lithographically printed and attached together, so arranged that they may be drawn out in a long strip. Each unit has on its reverse side the printing usual to post cards, and may readily be detached and used as a post card. The article is completed by the addition of a cover, consisting of a piece of paper folded once and attached by some adhesive. The description on this cover indicates that the contents are post cards to be detached for separate use.

I am of the opinion that the importers' contention is correct, and that the goods are lithographic prints, and not booklets. The paper cover is purely incidental, being for the purpose of protection and convenience. I think that the articles have been brought over in this form for convenience in handling, and that their dutiable status is precisely that of 6 detached post cards in an envelope. This view is not in conflict with my former ruling on lithographic wall pockets. *Knauth v. United States* (C. C.) 155 Fed. 144, T. D. 28,184. In that case lithographic prints had been used in making up a complete article called a wall pocket. The prints were a feature of an article which had gone beyond the condition of lithographic prints. In the present case that condition has not been passed. They are still lithographic prints.

In determining the "cutting size" of the prints to meet the conditions of paragraph 400, the size of each card, rather than of the whole series, should be taken, just the same as if they were imported separately. Practically it is an importation of but six separate cards. See *G. A. 3,766* (T. D. 17,832).

Decision reversed.

UNITED STATES v. ASHCROFT MFG. CO.

(Circuit Court, D. Connecticut. June 18, 1909.)

No. 723 (2,041).

CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—GLASS STRIPS—"PRISMATIC FORM."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 110, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), for glass strips "ground or polished on one or both sides to a * * * prismatic form," does not require that the strips shall be in the form of a prism, nor that an entire side shall be in prismatic form; and strips into one side of which parallel incisions have been ground or polished, producing prisms, are within that provision.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of Bridgeport; the decision being rendered on the authority of a former decision. G. A. 6,721 (T. D. 28,774). The case involves construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 100, 110, 30 Stat. 158, 159 (U. S. Comp. St. 1901, pp. 1633, 1635), reading as follows:

"100. Glass bottles, decanters, or other vessels or articles of glass cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

"110. Strips of glass, not more than three inches wide, ground or polished on one or both sides to a cylindrical or prismatic form, and glass slides for magic lanterns, forty-five per centum ad valorem."

John T. Robinson, U. S. Atty.

McLaughlin, Russell, Coe & Sprague (Walter Evans Hampton, of counsel, and Edward P. Sharretts, on the brief), for importers.

PLATT, District Judge. The merchandise in dispute covers strips of glass less than two inches wide. Five parallel incisions have been made upon one side by grinding or polishing, thus forming four prisms. Other grinding and polishing has been done upon them, but not enough to affect their classification. They are intended to form a part of the water gauge on steam boilers, taking the place of the tubular gauges formerly used. They have entered into commerce since the date of the present tariff act.

The government wishes to get this merchandise into the cut and decorated glassware paragraph (100) of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]). To the average intelligence it would seem to be appropriately described as a strip of glass not more than three inches wide, ground on one side to a prismatic form. The government contends that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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language used by Congress does not fit, because the entire side is not ground to a prismatic form. It is admitted that a prismatic form is ground into the side, and the statute does not say that the side shall be ground into a prismatic form. It is the strip that is to be so ground, on one or both sides. Of course the importation is not a prism, and whether it were so or not is immaterial.

My experience in customs cases has never led me to a contention more easily solved than this. Paragraph 110 almost seems to have been written in a prophetic spirit, with such merchandise as this dimly in mind. Paragraph 100, which starts with bottles and decanters and enlarges the scope somewhat by adding "or other vessels," and again "or articles," and then groups them at the end in this wise, "all the foregoing, filled or unfilled," would seem to have definitely and positively eliminated from any possible construction such articles as these prismatic gauges.

Decision affirmed.

PUTNAM v. MORGAN.

(Circuit Court, S. D. New York. August 12, 1909.)

POST OFFICE (§ 26*)—FRAUD ORDER—SUIT TO ENJOIN ENFORCEMENT.

A fraud order issued by a postmaster, excluding complainant from the use of the mails, *held* not so entirely unsupported by evidence as to authorize the court to enjoin its enforcement.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*

Nonmailable matters, see note to Timmons v. United States, 30 C. C. A. 79.]

In Equity.

Frank Harvey Field, for complainant.

Henry A. Wise, U. S. Atty, for defendant.

HAND, District Judge. I am not at all sure that I should have found the complainant's business fraudulent, if it had come before me for an independent decision. I certainly believe that the article sent to customers is a "new safety razor outfit," and that, if they expect more, they have only to thank the delusion of their own cupidity, which a reasonable reflection would have shown them was without just basis. Perhaps it is a misstatement of the seller's intention to say that she gives away a razor "free," if ten cents is more than she ever means in fact to charge for the soap, when it is sold alone. I should think, with the learned Assistant Attorney General, that that might be a material misrepresentation of her existing intent; but I do not see that there is adequate evidence that the complainant never expects to sell her soap alone at ten cents. The fact that she sold it for two cents upon another offer of similar kind would not be enough to satisfy me of the proof of this affirmatively.

But it is of no moment whether or not this case may be an instance of the dangers of this kind of determination by an executive officer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The sole question is whether he has exceeded the functions which the statute gives him. If he has not, he has committed no tort which I may enjoin. I should have thought that it was enough for him to plead that the "fraud order" was the result of his being "satisfied" upon a bona fide inquiry that a fraud was being practiced. The determination was given to him, and his honest decision should be a final answer to any claim based upon the illegality of his act, since the statute gives no one any power to review his decision.

However, in *School of Magnetic Healing v. McAnnulty*, 187 U. S. 95, 23 Sup. Ct. 33, 47 L. Ed. 90, the Supreme Court seems, if I understand that case correctly, to have decided that, if the postmaster has acted without any evidence whatever on which to base his decision, he has exceeded his statutory authority and has committed a tort which a court may enjoin. The cases of *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, limit this rule at least to the extent of giving presumptive validity to the postmaster's decisions, even upon the construction of the law, though I do not feel that I entirely understand just what is the extent of the presumption. As applied to an issue of fact it supplies the place of evidence, but as used here I understand by it rather that it can only be in a clear case of error that a court can overrule the decision of the postmaster, even on the law. His decision on the facts is final, if there be any evidence at all on which he may act.

In this case I cannot say that there was no evidence upon which he might have found that the complainant did not intend ever to sell her soap at ten cents a cake, but that it was a mere fetch for her to represent it as sold at that price with the razor thrown in at first, for an advertisement. If it be a question of law whether the postmaster had any evidence at all to go on, and if I must have a clear case of error upon that question of law, I cannot say that the continued sale of razor and soap together, the trifling cost of the soap, the profit on the transaction, as the postmaster has found it, and the other sales of soap at two cents, do not together make some evidence that the complainant never meant bona fide to sell her soap alone at the figure she put on it, when she gave away the razor "free."

Again, even if the article sent be in fact a "new safety razor outfit," I will not say that the most malign interpretation which can in reason be put on those words would not justify the expectation of much more than what the purchaser actually got. Personally, as I have said, I should not have held the complainant to so strict an interpretation of her advertisement. I think the razor fairly answers the description; but, if a writ is to go, I must go further, and hold that no one can reasonably conclude anything else, and I will not say that.

With the limited jurisdiction which I have, even under *School of Magnetic Healing v. McAnnulty*, supra, I do not think I can do anything else than deny the motion, and therefore I deny it.

UNITED STATES v. STOCKYARDS TERMINAL CO.

(Circuit Court, D. Minnesota, Third Division. July 17, 1909.)

CARRIERS (§ 37*) — CARRIERS OF LIVE STOCK — TWENTY-EIGHT HOUR LAW — LIABILITY OF CONNECTING CARRIER.

Where the initial carrier of live stock has been subjected to the penalty imposed by Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), for confining live stock longer than thereby permitted without unloading for rest, water, and feeding, in a second action against a connecting carrier to recover for the same confinement, the first 28 hours of the confinement, or 36 hours in case it was requested by the owner, which was necessarily included in the period covered by the judgment in the first action, cannot be counted against the defendant.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

C. C. Houpt, U. S. Dist. Atty.

Davis, Kellogg & Severance and Robert E. Olds, for defendant.

WILLARD, District Judge. This action is brought to recover a penalty under the act of June 29, 1906, entitled "An act to prevent cruelty to animals while in transit," commonly called the "Twenty-Eight Hour Law" (34 Stat. 607, c. 3594 [U. S. Comp. St. Supp. 1907, p. 918]). The complaint states two causes of action; but on the trial the case was dismissed as to the second cause of action, and as to the first it was heard upon an agreed statement of facts.

A shipment of five car loads of cattle was loaded at Lavina, Mont., at 11 p. m. July 31, 1908, consigned to the Union Stockyards, Chicago, Ill., was thence carried by the Chicago, Milwaukee & St. Paul Railway Company to Dayton's Bluff, St. Paul, Minn., and there delivered to the defendant at 6:35 a. m. on August 3d. The time intervening between the completion of the loading at Lavina and the delivery of the shipment to the defendant was 55 hours and 35 minutes. The stock was carried by the defendant company from Dayton's Bluff to the stockyards at South St. Paul, a distance of about 11 miles, for the sole purpose of being unloaded, rested, watered, and fed. The unloading was commenced at said stockyards at South St. Paul at 8:40 on the morning of August 3d. The stock was therefore in the custody of the defendant company 2 hours and 5 minutes. It thus appears that the animals were continuously confined without food, water, and rest for total period of 57 hours and 40 minutes. By virtue of a request of the owner of the stock, the time of confinement was extended to 36 hours.

The government brought an action under the statute above cited against the Chicago, Milwaukee & St. Paul Railway Company to recover a penalty for confining this stock, in violation of law, for more than 36 hours. Judgment was rendered in that action in favor of the government, and against the Chicago, Milwaukee & St. Paul Railway Company, for a penalty of \$250, which judgment has been paid and satisfied. The violation of the law for which the Chicago, Milwaukee & St. Paul Railway Company was thus punished related to at least the first 36 hours of the confinement of the stock, and this period ter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

minated on August 2d at 11 a. m. No part of this time elapsed while the defendant was in possession of the stock, and with this violation of the law on the part of the Chicago, Milwaukee & St. Paul Railway Company the defendant had nothing to do. It is true that the act provides that:

"In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without rest, food or water on such connecting road shall be included."

But in this case the first 36 hours elapsed while the stock was in the possession of the Chicago, Milwaukee & St. Paul Railway Company, and cannot be counted against the defendant. For the violation of the act during that time the law has been satisfied; the Chicago, Milwaukee & St. Paul Railway Company having been punished therefor. The only time elapsing while the stock was in the possession of the first carrier which could in any event be charged against the defendant is the time between 11 o'clock on the morning of the 2d of August and 40 minutes past 8 on the morning of the 3d day of August. This is 21 hours and 40 minutes, being less than 28 hours, or in this case 36 hours. There has been no violation of the act by the defendant railway company, and I make a general finding in its favor.

The other questions discussed by counsel on the trial and in their briefs need not be considered, in view of the result hereinbefore reached.

Let judgment be entered in favor of the defendant, and that the plaintiff take nothing by this action.

REED & KELLER v. UNITED STATES.

(Circuit Court, S. D. New York. May 17, 1909.)

No. 5,333.

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—BIRCH BARK—"FIBROUS VEGETABLE SUBSTANCES"—"MOSS, SEaweEDS, AND VEGETABLE SUBSTANCES."

Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 566, 617, 30 Stat. 198, 199 (U. S. Comp. St. 1901, pp. 1684, 1685), relating to "fibrous vegetable substances" and to "moss, seaweeds, and vegetable substances," does not include birch bark.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The merchandise in controversy consisted of birch bark, classified by the collector of customs at the port of New York as an unenumerated unmanufactured article, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). The importers contended for classification under paragraph 566 or 617, § 2, Free List, 30 Stat. 198, 199 (U. S. Comp. St. 1901, pp. 1684, 1685), which provide, respectively, for "fibrous vegetable substances" and for "moss, seaweeds, and vegetable substances." The Board of General Appraisers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

overruled this contention and affirmed the action of the collector, whereupon the importers brought these proceedings for review.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

HARDY v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court, D. Minnesota, Third Division. August 18, 1909.)

1. COURTS (§ 347*)—FEDERAL COURTS—ADOPTION OF PRACTICE OF STATE COURTS.

While the burden of proving contributory negligence is on the defendant in the federal courts, the question as to whether he must plead it specially or not depends on the practice of the state in which the court is sitting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. COURTS (§ 347*)—FEDERAL COURTS—ADOPTION OF PRACTICE OF STATE COURTS.

Under the practice in the state courts in Minnesota, contributory negligence may be proved under a general denial; and in a federal court in that state a general allegation of contributory negligence in the answer is sufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

At Law. On motion to require defendant to make the answer more definite and certain.

Durment & Moore, for plaintiff.

James B. Sheean, for defendant.

WILLARD, District Judge. In an action to recover damages for personal injuries caused by the alleged negligence of the defendant, the latter in its answer admitted certain facts alleged in the complaint, denied generally the other matters contained therein, and alleged "that the injuries sustained by the plaintiff were caused by his own negligence and want of ordinary care." The plaintiff has now moved that the defendant be required to make more definite and certain the allegation in the answer relating to contributory negligence.

While the burden of proving contributory negligence is in the national courts on the defendant, the question as to whether he must plead it specially or not depends upon the practice of the state in which the court is sitting. *Canadian Pacific Ry. Co. v. Clark*, 20 C. C. A. 447, 73 Fed. 76, 74 Fed. 362. In the state courts of Minnesota, contributory negligence can be shown under a general denial. *St. Anthony Falls W. P. Co. v. Eastman*, 20 Minn. 277 (Gil. 249); *Hocum v. Weitherick*, 22 Minn. 152; *O'Malley v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 43 Minn. 289, 45 N. W. 440.

The motion is denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. AMERICAN NAVAL STORES CO. et. al.

(Circuit Court, S. D. Georgia, E. D. May 12, 1909.)

1. CRIMINAL LAW (§ 552*)—TRIAL—CIRCUMSTANTIAL EVIDENCE.

To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must clearly and satisfactorily exclude every other reasonable hypothesis, except that of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

2. MONOPOLIES (§ 29*)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTION.

Where an indictment against a number of defendants charges them with a conspiracy among themselves and with others in restraint of interstate trade and commerce, in violation of section 1 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or to monopolize any part of such trade and commerce, in violation of section 2, to warrant a conviction, it must be found that at least two of the defendants were parties to such a conspiracy.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 29.*]

3. MONOPOLIES (§ 12*)—FEDERAL ANTI-TRUST ACT—COMBINATIONS PROHIBITED—"MONOPOLY."

The size of a business alone does not constitute a "monopoly" in restraint of interstate commerce, in violation of section 2 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but to render a combination illegal thereunder it must intentionally and necessarily prevent other persons from engaging in such business, thereby stifling competition.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

4. MONOPOLIES (§ 31*)—FEDERAL ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTION.

The elements of a combination or conspiracy in restraint of interstate trade and commerce and to monopolize such trade and commerce, in violation of the anti-trust act (Act July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and the facts necessary to a conviction thereunder, explained in a charge to the jury.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.*]

Alexander Akerman, Asst. U. S. Atty., and W. M. Toomer, Acting Asst. Atty. Gen., for the United States.

P. W. Meldrim, Adams & Adams, and Powell & Makall, for defendants.

SHEPPARD, District Judge (charging jury). This case has been long, and necessarily taxing to your patience; but your attention throughout has been marked, demonstrating to the court your interest and deep appreciation of the importance of the issue, both to the government and to the defendants. The issues now rest solely upon an honest and impartial discharge of your duties under the guidance of the law, which it now becomes my duty, as best I may, to give you in charge. In our system of the administration of justice, the judge decides the questions of law, and directs you only as to the law of the case, while it is your peculiar province to pass on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts of the case, and by your verdict you decide the questions of fact involved in this controversy. I shall be as brief as the case admits, and will confine my instructions mainly to what I conceive to be the law applicable to the facts adduced.

The issue which it is your province under our system of government to determine is the innocence or guilt of the accused upon the indictment, which was read to you at the opening of this case. By order of the court, the third count of the indictment was stricken, and you have therefore before you only the first and second counts.

The defendants indicted are the American Naval Stores Company, a corporation of West Virginia, the National Transportation & Terminal Company, a corporation of New Jersey, Edmond S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, Carl Moller, and C. J. De Loach. As to the defendant C. J. De Loach you are directed to find a verdict of "not guilty."

The two counts of the indictment and the government's bill of particulars will be before you, and you should examine them very carefully, in connection with all the evidence in the case and the principles of law I will presently give you, in reaching your conclusions. To the two counts of the indictment all the defendants have pleaded "not guilty." It is necessary that I should present for your consideration certain rules of evidence, which should be borne in mind throughout your deliberations. The plea of the defendants raises immediately the presumption of innocence, and this presumption accompanies them throughout the trial, and until it is overcome by testimony which satisfies your minds beyond a reasonable doubt of the truth of the charge.

The burden of proof is therefore on the government to prove the conspiracy charged in the indictment beyond a reasonable doubt. While this is true, if the weight of evidence does satisfy your minds beyond such a reasonable doubt, the presumption of innocence is removed, and if you should be thus satisfied with regard to any two or more of the defendants it would be your duty with regard to them to find a verdict of "guilty."

Again, if with regard to any one or more of the defendants the evidence should fail to satisfy your minds beyond such reasonable doubt of their guilt, it would be your duty to acquit them. It is important, then, that you should understand what is a reasonable doubt. It is not a mere possible doubt, because in human affairs, which depend upon deductions, there may be possible or imaginary doubts. A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves your minds in such a condition that you cannot say that you feel an abiding conviction, to a moral certainty, of the truth of the charge. By reasonable doubt is not meant strained or whimsical conjecture, but an actual, sincere, mental hesitation, caused either by insufficient evidence or by unsatisfactory evidence? In other words, it has been defined as "such a doubt as a reasonable man would have, and hesitate to act upon in matters of the highest concern for his own welfare." If you have such a doubt, you should give the defendants the benefit of it, and acquit them of whom you have such a doubt; but the government is not required to prove its case beyond all doubt.

In this case the government relies on circumstantial evidence. Now, such evidence has been defined to be that which does not directly prove the issue, but which tends to establish the issue only by proof of the facts, sustaining by their consistency the hypothesis claimed, and from which the jury might infer the principal fact. It is composed of facts which raise logical inferences, and by a chain of such inferences lead to the ultimate conclusion, which is sought to be made. A conviction may as well be had upon circumstantial evidence as upon direct evidence; but to warrant a conviction upon evidence of this character the proven facts must not only be consistent with the hypothesis of guilt, but must do this so clearly and satisfactorily as to exclude every other reasonable hypothesis save that of guilt.

With these general rules of law before you, you should next consider, under the interpretation I shall give, the provisions of the statute approved July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), with the violation of which the defendants are charged by this indictment. It is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Section 1 provides as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be deemed guilty of a misdemeanor," etc.

Section 2 provides as follows:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The first count of the indictment charges a violation under section 1, and the second count charges a violation under section 2. As the latter section is easier defined, it may be well to consider that section and count first. After setting out the relations of the several defendants to each other and their several parts, it is charged that:

"Having already secured to themselves more than half the trade and commerce among the several states of the United States and with foreign nations in the aforesaid articles of commerce, did then and there * * * unlawfully combine, conspire, confederate, and agree together, amongst themselves and with divers other persons to the grand jurors aforesaid unknown, to further monopolize the trade and commerce, to be effected, amongst other ways, as follows."

The count then continues to set forth twelve different means by which the alleged monopoly was to be accomplished. These means will be discussed later in connection with the first count of the indictment. The effect of the second count charges a combination and conspiracy to monopolize interstate commerce in "spirits of turpentine, rosin, and the products of pine forests and turpentine farms, commonly called 'naval stores.'"

To constitute the offense of monopolizing or attempting to monopolize under the act of Congress, it is necessary to acquire, or attempt

to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein. Various definitions of "monopoly" have been given:

"The abuse of free commerce, by which one or more individuals have procured the advantage of selling alone all of one particular kind of merchandise, to the detriment of the public; any combination among merchants to raise the price of any particular merchandise, to the detriment of the public."

The popular meaning of "monopoly" at the present day seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity or at some particular market or place, or of carrying on some particular business. Anything less than this is not monopoly. The results in business or trading combinations may even temporarily, or perhaps permanently, reduce the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reductions in the price of a commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital, whose purpose in combining is to control the product or manufacture of any article on the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.

This will illustrate the fundamental idea to be borne in mind in determining if there was in this case a conspiracy to monopolize—that the essence of the monopoly "is found not so much in the creating of a very extensive business in the hands of a single control." The size of a business is not in itself a violation of this law, and should carry with it no great weight in considering the second count of the indictment. The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in such business, and thereby stifling competition. The evil is not the enlargement of the trade of one person or corporation, but the destruction of the trade of all other persons in the same commodity.

It is sometimes difficult to distinguish between a legitimate business enterprise and an illegal monopoly. From the law as has been interpreted, it may be said, however, that the monopoly is the power acquired over the traffic, sale, and purchase of a commodity, in the course of interstate or foreign commerce, by which the free flow of such commerce and competition in such commodity is necessarily crushed and stifled. Since the size of the business alone is not necessarily illegal, it is the crushing of competition, by means of force, threats, intimidation, fraud, or artful and deceitful means and practices, which violates the law. You will consider carefully all the means which the indictment charges, and inquire (1) whether the defendants, or any two or

more of them, did in fact unlawfully combine, conspire, confederate, and agree together to "monopolize," by acquiring such power over the disposition of rosins, turpentine, and naval stores, which were the subject of interstate and foreign commerce, so that they were capable of forming, and did form, a scheme to crush and stifle competition; and (2) if such scheme of gaining and controlling business was to be effected by illegal methods of force, threats, intimidation, fraud, or artful or deceitful means and practices, which their competitors in such trade were necessarily unable to meet. The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly.

Having, therefore, considered the question of monopoly under the second count of the indictment, you must next consider the element of conspiracy. Before you would be authorized to convict on the second count of the indictment, you must find the existence of such conspiracy, in connection with the charge of monopolizing; and before you would be authorized to convict on the first count you must find such conspiracy in connection with the charge of restraining trade and commerce among the several states of the United States and with foreign nations. It will become necessary and essential, therefore, for you to determine three conclusions in consideration of the second count of the indictment: (1) The fact of monopolizing; (2) the fact of conspiracy; and (3) the fact that such monopolizing and such conspiracy affected interstate or foreign commerce.

In order to constitute a violation of this statute, which prohibits combinations and conspiracies to "monopolize," the monopoly must affect and operate directly upon commerce among the states of the United States or with foreign nations. It is not sufficient that it affects only the commerce within a single state. It must be interstate or foreign commerce. Such commerce includes the purchase and sale of articles that are intended to be transported from one state to another—every species of commercial intercourse among the states and with foreign nations. The term comprehends now intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens residing and domiciled in the different states.

By these tests you will determine whether the transactions which are charged in the indictment directly operated upon and necessarily affected commodities used in interstate and foreign commerce as I have defined them. If you find that spirits of turpentine, rosin, and the products of pine forests and turpentine farms, commonly called "naval stores," were the subjects of intercourse or traffic, I have stated, throughout the transactions charged, it would be your duty to find that they in fact were the subjects of trade or commerce among the several states or with foreign nations, within the meaning of both the first and second sections of the act you are to consider. As I have stated, you are to consider the two counts of the indictment separately.

The second relates to a conspiracy to monopolize, and the first relates to a conspiracy to restrain interstate commerce. What I have already said has related to the second count of the indictment, viz., the charge that the defendants conspired to monopolize interstate and foreign commerce, and in that connection I have defined what is meant by the word "monopolizing" and the words "trade and commerce among the several states and with foreign nations."

In both counts of the indictment the essential ingredient of the offenses is the fact of conspiracy. A conspiracy is defined as:

"A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means."

The conspiracy to which the statute refers here may also be defined as the agreement, confederation, combination, design, scheme, plan, or purpose of two or more parties to accomplish by their concerted action or co-operation an unlawful result by either lawful or unlawful means, or a lawful result by unlawful means. Here it is the unlawful or criminal results which are made punishable, and those results are the monopolizing of trade and commerce among the several states and with foreign nations, and in the first count of the indictment the restraint of trade and commerce among the several states and with foreign nations. The law condemns these two results, and when two or more persons conspire to produce either of these results there is a violation of the statute.

The gist of the offense is the unlawful agreement. A conspiracy cannot be committed by one person alone. There must be two wills acting in co-operation. Since both counts of the indictment charge that certain of the defendants conspired among themselves, I charge you that on either count you must find that at least two of the defendants conspired to commit the acts charged, although divers other persons to the grand jurors aforesaid unknown may or may not have been concerned. On either count a verdict of guilty could not be found against a single defendant. The gist of the conspiracy is that two or more shall form a plan for concerted action. You must, under the rules I have stated and will state, find at least two to be guilty under one or the other count before you would be authorized to convict under either count. The concerted action or co-operation may arise from definite, express, and well-understood agreement or combination, or it may arise as well from a tacit silent understanding.

It has been said that to establish a conspiracy it is not necessary that there should be an explicit or formal agreement for an unlawful act between parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In conspiracy cases, it may be often impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in terms of express language. Hence a conspiracy may be proven by circumstances. The understanding, combination, or agreement between the parties in a given case to effect the unlawful purpose charges must be proved beyond a reasonable doubt, because without corrupt understanding there

is no conspiracy; but circumstantial evidence may be resorted to to show such agreement or conspiracy.

Conspiracies may be entered into in a very informal way; generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country. But if, by any means, by telegraph, or letter, or by any means whatever, they have come to a mutual understanding for committing any offense against the government, that is a conspiracy. The rule in regard to conspiracy, as in regard to all offenses, is that you shall be satisfied in your own mind, beyond a reasonable doubt, of the guilt of the defendants, or any two of them. There must be criminal intent on the part of those who form a conspiracy; but, to constitute a criminal intent, it may not be necessary to show an intent to violate the law. The question is: Did the accused enter into a conspiracy to do the things with which they are charged, and were such things violations of the statute?

You have now before you the tests by which you are to determine the three elements of the offense charged in the second count of the indictment, viz., conspiracy to monopolize interstate and foreign trade and commerce: (1) Was there a monopoly? (2) Did it necessarily embrace a commodity of interstate or foreign commerce? and, (3) as I have defined, was there a conspiracy to monopolize?

What has been said on the subject of what is interstate and foreign trade and commerce and what is conspiracy relates as well to the first count of the indictment as to the second.

The first count charges that the defendants, the American Naval Stores Company, National Transportation & Terminal Company, Edmond S. Nash, Spencer P. Shotter, J. F. C. Myers, George Meade Boardman, C. J. De Loach and Carl Moller, "unlawfully and knowingly amongst themselves combined, conspired, confederated, and agreed together to restrain trade and commerce among the several states and with foreign nations." The count sets forth twelve different means or instruments by which the alleged conspiracy in restraint of trade was to be carried into effect. As to three of these means stated there has been no testimony. Evidence of certain alleged means has been submitted to your consideration for two purposes: (1) As circumstantial evidence that the defendants formed a conspiracy; and (2) that such means naturally and necessarily tended to and did cause a restraint of interstate and foreign trade and commerce. It is the contention of the government that they were parts and elements of a scheme or design on the part of the defendants to restrain trade; and you may consider all of the means on which evidence has been submitted as circumstances merely, from which you may or may not conclude that there was such an understanding—that is, a co-operation and design—on the part of two or more of the defendants as would, under all the rules I have given you, be sufficient to constitute a conspiracy between them; and this, as I have said, must be shown beyond a reasonable doubt.

With this issue in view you may consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy. No evidence as to three of the means has been offered, and you should

not consider them. These are the charges of circulating and publishing false statements, the charge of issuing and causing to be issued, and causing to be circulated and hypothecated, fraudulent warehouse receipts, and the charge of attempting to bribe employes of competitors and factors to obtain certain information.

One of the means charged is the coercing of factors and brokers into entering into certain contracts, which you will recall. It will be well for you to understand the legal meaning of "coercing." The word "coerce" means to restrain by force, especially by law or authority; to repress. In the sense which now prevails, it differs but little from the word "compel," yet there is a distinction between them; "coercion" being usually accomplished by indirect means, as threats or intimidation, physical force being more rarely used in coercing. It imports some actual or threatened exercise of power possessed or supposed to exist or be possessed by the party who, it is claimed, so acted.

As to what constitutes a restraint of trade under the statute, the act prohibits any combination which obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader engaged in business. This includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade or commerce, except on conditions that the combination imposes. But as to the coercion which is charged in the indictment, in coercing factors to enter into contracts, such means alone, if you find that any coercion was exercised, would not be sufficient to make a restraint of commerce, unless you find that the parties stated made the contracts with the defendants, because the defendants actually possessed such power over the products to be traded in that the parties honestly and truly felt and believed that if they did not make the contract they would suffer some serious and appreciable financial loss.

The burden of proof is upon the government to show beyond a reasonable doubt that, if the defendants conspired, the means which they were to employ, and the natural and inevitable result of those means, would necessarily tend to burden and restrain interstate and foreign commerce. The gist of the offense under the first section is the conspiracy to effect a restraint and burden upon such commerce. The alleged conspiracy need not result in a total suppression of trade, nor in a complete monopoly; but it is sufficient if the necessary operation of certain means tends to restrain interstate commerce and to deprive the public of the advantages flowing from free commerce and competition.

It is not necessary for the government to prove that all of the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be reasonably shown beyond a reasonable doubt that some of those means charged were a part of the common scheme or design or understanding by two or more of the defendants, and that those same means were of themselves sufficient to cause an essential obstruction of the free and untrammelled flow of trade and commerce between the states and with foreign nations. Both of these ingredients, I charge you, it is necessary for the government to show beyond a reasonable doubt

before you would be authorized to convict two or more of the defendants: (1) The common design, scheme, or understanding; and (2) the restraint or burden upon free flow of commerce between the states and with foreign nations. Before these inferences may be made from the operation of any one or more of the means charged, the fact that these means were employed, and the fact that they were employed as the purpose of the conspiracy of two or more of the defendants, must be proved beyond a reasonable doubt.

However, it is true that, even if the separate elements of a scheme are unlawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize or to restrain interstate and foreign trade or commerce, the plan itself may make the parts unlawful. It is the illegal results, viz., the monopoly or the restraint of commerce, which makes a conspiracy criminal within the purview of the anti-trust act. If there was a conspiracy, and that tended necessarily to impose the restraints prohibited, the constituent elements, whether legal or not, are enough to give the scheme a body. A series of acts, each or any of which may be innocent in itself, may be wrongful, if the direct object, purpose, or result thereof be to carry into effect a previous agreement, or conspiracy, whereby the free flow of trade or commerce between the states and with foreign nations, or the liberty of the trader to carry on such business, be obstructed.

I charge you, further, that the prohibitory provisions of the act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. The government need not show that a conspiracy is entered into for the direct purpose of restraining trade or commerce, if such restraint is its necessary effect, and if this, with the other elements stated, be shown beyond a reasonable doubt. All the means and all the illegal acts which the indictment charges must have been done within three years prior to the finding of the indictment. Any acts beyond this period you should not consider.

If you should find under these principles laid down that any of the alleged means were employed, and the necessary effect of those means was to restrain interstate and foreign commerce, in considering whether those means or acts were a part of the purpose of the several defendants toward those means and acts and towards each other, if you should find beyond a reasonable doubt that certain acts were done or means employed, you may inquire who were responsible for those acts, and whether any two or more of the defendants were responsible, and whether such acts were the result of a preconceived plan for concert of action on the part of any two or more of the defendants.

A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual, and is entitled to the same rights of protection as an individual. A corporation acts through its officers, directors, and agents. While a corporation may not conspire with its own officers, directors, or agents, it may conspire with another corporation. Corporations may conspire with individuals. As well as individuals may conspire with one another, they may conspire with another corporation. But you

must bear always in mind that a corporation is only responsible for the acts of its agents while acting within the scope of their employment, or for such acts only as may have been authorized.

You may consider all the evidence of the relationship, if any, of the defendants toward each other, and their connection, if any, with any of the acts charged. You may consider the acts and declarations of persons not named in the indictment, if you find that they were done and said in the presence of any one of the defendants, and if they were made in carrying a conspiracy or common scheme into effect. The indictment charges that the defendants conspired with divers other persons to the grand jurors unknown. If you find that any two or more of the defendants conspired with any person not named in the indictment to commit the offenses charged, you would be authorized under the rules laid down to find any two or more of the defendants guilty under either or both counts. If, on the other hand, any of the elements of the offenses are lacking, and no two or more of the defendants did so conspire, it would be your duty to acquit them.

A private corporation or an individual is liable for the wrongful acts of its agents, when those agents are acting in the general line of their duties, or if such corporation ratifies those acts in some active way, other than merely passive acquiescence.

Evidence has been introduced to the effect that two other corporations, which were distinct from the defendant companies, existed in the state of New York at the time of the alleged acts. The defendant companies are the American Naval Stores Company of West Virginia and the National Transportation & Terminal Company, alleged to be organized under the laws of New Jersey. The New York corporations were known as the American Naval Stores Company of New York, and the National Transportation & Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring at the yards in Brooklyn, N. Y. The witness O'Keefe testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at the yards in question. Their witness Dill testified that he was the president of the National Transportation & Terminal Company of New York, that he employed O'Keefe for the National Transportation & Terminal Company of New York, and that the yards belonged to the National Transportation & Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered the yards.

If you find that the acts alleged were by certain employés of New York corporations, and that these corporations were separate and distinct from the two defendant corporations, and that such New York corporations did not conspire, as charged, with two or more of the defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corporations, or the acts of employés or agents thereof. But if, on the other hand, the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was in fact so owned, controlled, dominated, and operated by one or both of the defendant corporations, that had the same officers, and it was in fact, in its business

transactions, for all practical purposes identical with one or both of the defendant corporations, the New York corporation which you find so connected you may consider in connection with the defendants. If you further find that two or more of the defendants conspired as charged with one or both of the New York corporations to monopolize or restrain interstate commerce, you would be authorized to find a conviction as to such defendants; or if you find that the employes or agents of such New York corporations were in fact, as I have stated, employes or agents of one or both of the defendant corporations, such corporations, if you find them so identical, would be responsible for the acts of such employe or employes, if they authorized them, or if they clearly ratified their wrongful acts subsequently. But you must consider this evidence in connection with all the other evidence in the case; that is, whether there was any conspiracy between any two of the defendants with either or both of the New York corporations or their agents, or whether said New York corporations, or their agents or employes, were dominated, directed, or controlled by any two or more of the defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were authorized or ratified by any two of the defendants.

You are the sole and exclusive judges of all questions of fact. When there is a conflict in the testimony, it is your province to reconcile that conflict, if you can; but, if you are unable to reconcile it, then you are at liberty to discard such parts or so much of it as you may think unworthy of belief, and credit that which you believe to comport more with reason and common sense and your own experience in the common affairs of everyday life. You have had an opportunity of seeing the witnesses and observing their manner of testifying on the stand, as well as any interest or bias they may have shown in the transactions about which they have testified. These are matters for your consideration in weighing the evidence, and which may aid you in arriving at a fair, just, and impartial conclusion from all the testimony. It is your province to look to the interest which any witness may have in the result of the trial, in determining the weight to be attached to his testimony.

In your deliberations, you will not lose sight of the main fact that the specific offenses with which the defendants are charged are (1) a conspiracy to restrain interstate trade, and (2) a conspiracy to monopolize interstate trade. All that is charged as the means to effect such conspiracy may be proved as alleged, yet if you are not satisfied that such things tended to restrain interstate trade or commerce, or tended to the monopoly of such trade or commerce, and, further, that such things done were the result of some previous tacit or express understanding between two or more of the defendants, they could not be convicted of the conspiracy charged. If, on the other hand, you believe from all the evidence that the things charged in the indictment as means adopted and effecting the restraint of trade were done by the defendants, and that said means naturally or necessarily tended to such restraint, and, further, that such means adopted were the result directly of a previous express or tacit understanding between two or

more of the defendants, such ones as you believe to have been so connected in such agreement or understanding you should find guilty. If you have a reasonable doubt of such an agreement or understanding, you should give them the benefit of the doubt and acquit them.

You may find all the defendants guilty, or any two of them, on one or both of the counts of the indictment, or you may acquit them all.

STEPHENS et al. v. SMARTT et al.

FINLEY v. WILLIAMS et al.

(Circuit Court, E. D. Tennessee. August 9, 1909.)

Nos. 1,043, 1,046.

1. EQUITY (§ 213*)—PLEADING—PLEA—SETTING DOWN FOR HEARING.

Where a complainant has set a plea down for argument, not having taken issue thereon, all material and pertinent statements of fact therein are admitted, however inconsistent they may be with the allegations of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 486; Dec. Dig. § 213.*]

2. COURTS (§ 317*)—JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—REALIGNMENT OF PARTIES.

Complainant, a citizen of Georgia, as a member of a church corporation of Tennessee, brought suit in a federal court against the corporation, its governing officers, and other members, alleging that the latter, by reason of an attempted merger of the church with another organization, to which they did not consent, claimed to be entitled to control the corporation and its property, to the exclusion of the officers, and that such officers refused to bring suit to protect the church and its property rights. The bill prayed a decree adjudging that defendant officers were entitled, as representatives of the majority of the membership, to sole control of the church and its property. *Held*, that the real controversy was between such officers and their codefendants, all of whom were citizens of Tennessee, and that, when the officers were aligned as complainants, as required by their interest, the court was without jurisdiction for want of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 317.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mann v. Dullaghan*, 27 C. C. A. 298.]

3. COURTS (§ 316*)—JURISDICTION OF FEDERAL COURTS—COLLUSIVE ARRANGEMENT OF PARTIES.

Where the arrangement of parties to a suit in a federal court is merely a contrivance between friends having no real antagonism, to give the court jurisdiction and avoid the effect of state decisions, the suit will be dismissed as collusive, although, if the controversy were real, it would have jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862; Dec. Dig. § 316.*]

In Equity. On pleas to jurisdiction and motions for preliminary injunction.

Wheeler & Trimble, for complainants.

Brown & Spurlock and Pritchard & Sizer, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANFORD, District Judge. These consolidated causes were heard on the pleas in abatement, which had been set down for argument by the complainants under the thirty-third equity rule, and on the complainants' motions for preliminary injunctions.

Finley v. Williams et al.

The bill in this case was filed by Finley, a citizen of Georgia, against Williams and 14 other individuals, all citizens of Tennessee, and the First Cumberland Presbyterian Church of Chattanooga, Tenn., a corporation under the laws of Tennessee. It avers:

That complainant is a member of said church, and a regular attendant on its religious services; that said church is the owner of a house of worship and parsonage in the city of Chattanooga, which, with the lot upon which they stand, are worth as much as \$25,000; that the defendant Smartt and six others of the individual defendants are the ruling elders of said church, charged with maintaining the spiritual government of the congregation; and that the defendant Smartt and four others of the individual defendants, including two others of said elders, are the trustees and directors of said church, and as such are its representatives as respects its relation as a body to the civil law and charged with the preservation and assertion of its legal rights.

That prior to 1904 said church was a congregation of the religious denomination known as the "Cumberland Presbyterian Church," which had been organized and formed in the early part of the last century by reason of a schism in and secession from the general church known as the "Presbyterian Church in the United States of America"; that, the said Presbyterian Church in the United States of America having some years hence adopted certain modifications or interpretations of its "standards"—that is, of its constitution and laws—which removed all the differences concerning interpretation of "standards" which had kept said church and the said Cumberland Presbyterian Church apart for nearly a century, said two churches were thereafter, through the action of their respective constituted authorities, reunited in one organization exactly as they had existed before the breach, such reunited church bearing its ancient name, and its highest judicature being called the "General Assembly of the Presbyterian Church in the United States of America."

That a majority of the members of the defendant church, and all its officers except the defendant F. A. Seagle, who was an elder, acquiesced in said reunion, and have continued to attend upon said church; that the defendant Smartt and said other seven defendants are now, as they were before, its lawful elders and directors; that all persons who have been admitted to its membership and have not withdrawn or been dismissed therefrom, including the complainant, who was admitted to membership after the reunion, are the true and only First Cumberland Presbyterian Church of Chattanooga, and the equitable and beneficial owners of its real estate, entitled to have it preserved and protected for their use as heretofore, and as a residence for their minister.

That after the adjournment of the last General Assembly of the separate Cumberland Presbyterian Church a minority of its former dele-

gates or commissioners met and organized themselves into a body which they called the "General Assembly of the Cumberland Presbyterian Church"; and that after the formation of this new Cumberland Presbyterian General Assembly the defendant Seagle and four other individual defendants, with other persons, seceded from said First Cumberland Presbyterian Church at Chattanooga and formed a congregation which has since conducted religious services in another building, and which claims to be the First Cumberland Presbyterian Church at Chattanooga, and to be connected with said new Cumberland Presbyterian General Assembly, and refuses to recognize the authority of the General Assembly of the Presbyterian Church in the United States of America.

That while neither the defendant Seagle nor his associates are officers or members of the defendant church, or recognized as such by its ecclesiastical authorities, and have no right to interfere with or control its properties, the defendant Seagle and the four defendants associated with him are refusing to recognize the defendants, who are the sole ruling elders of said church, and pretending without right to be officers of the defendant church, and threatening to take unlawful possession of its house of worship, parsonage, and grounds, and prevent its rightful pastor from ministering therein, and, when they have obtained such possession, will oust the pastor and elders of said church, and those who have a right to attend upon their ministrations, and will divert its property from the use of its congregation and members, and turn it over to the use of a different congregation and pastor.

That while it is the duty of the defendant Smartt and the other defendants who are officers of the defendant church, as its elders, trustees, and directors, to protect its property and the rights of complainant and the other members of the church from the unlawful acts threatened and about to be done by the defendant Seagle and others, by such proceedings in the courts as will prevent the same, and while complainant has demanded and repeatedly urged that they take such legal action as may be necessary to that end, they have refused to take such action, answering complainant that, because of a decision in the Tennessee courts in another case not concerning this property or these parties, such steps are useless and the case hopeless, and that a compromise or adjustment is desirable; that it has been announced in alleged newspaper interviews with some or all of said officers of the church that they intend to submit to the intended wrongful acts of the defendant Seagle and others, without any effort to protect either their rights or those of their cestui que trust, the complainant, and all others in like situation with him; that the defendants Smartt and other officers further caused a meeting of said church congregation to be held, at which they recommended that no legal steps be taken to protect their rights, but that, on the contrary, efforts of compromise be made, and that the members of the congregation passed a resolution in accordance with such recommendation, all present either voting for such resolution or remaining silent, except the complainant, who publicly notified said officers and members that he insisted upon action being taken, and intended to take such legal steps as were in his power to protect the rights of the members

and the property of the church; and that, notwithstanding the demand and notice of complainant, and the evident fact that the defendants Seagle and others will not agree to any compromise, the defendant Smartt and other officers have taken no action, and indicate that they do not intend to make any defense, should suit be brought against them.

The complainant prays: That it be decreed that the defendants Smartt and other trustees and directors of said church, and the defendant corporation, hold title to the church property for the exclusive use and benefit of the congregation of said church which adheres to said United Church, and that its session, consisting of its pastor and the defendants Smartt and other ruling elders, has the exclusive right to control the possession and use of its property, and its pastor the sole right to occupy its pulpit and conduct its services; that the defendants Seagle and associates, all persons acting under their authority, and all members of the other congregation whom they represent, be enjoined and restrained from taking any steps, by forcible entry, legal proceedings, or otherwise, to take possession or control of the church property, from resisting or obstructing complainant and others in like situation with him from free access to and use of said church property for the purpose of religious worship and all its former uses and purposes, from attempting to interfere with its pastor in the conduct of its religious exercises or other pastoral functions, or with the defendants Smartt and other elders, trustees, and directors, in the control and management of said property for the use and benefit of complainant and others in like situation, from disturbing or interfering with complainant and the pastor, congregation, officers, or members of the defendant church in the possession, use, or enjoyment of the church property, and from bringing any other suit in relation to the title or possession of said property; and that the defendants Smartt and other officers of said church be enjoined and restrained from surrendering possession or control of said property to the defendants Seagle and others, or any of their associates.

The plea in abatement of the defendant Seagle and the four other defendants associated with him alleges that there is no such diversity of citizenship of the parties as is necessary to give this court jurisdiction of this cause, and avers:

That at the time of the attempted merger of the Cumberland Presbyterian Church in the Presbyterian Church in the United States of America, whose validity was denied by many members of the Cumberland Presbyterian Church, they were members of the Cumberland Presbyterian Church and of the congregation of the defendant church at Chattanooga, and refused to assent to said merger, and denied its validity, while the defendant Smartt and six of the other defendants described in the bill as the officers of said church, who were also members of said church and congregation at that time, acquiesced in said merger and asserted its validity.

That in the controversies growing out of said attempted merger those members of the Cumberland Presbyterian Church who denied its validity contended that they continued to be members of the Cumberland

Presbyterian Church, notwithstanding the attempted merger, and as such were entitled to the possession, use, and control of its property, and that those who had united with the Presbyterian Church had lost and surrendered all their right, claim, and interest in such property, while those who asserted the validity of the merger contended that it had obliterated the Cumberland Presbyterian Church, and transferred and merged all of its property and membership in the Presbyterian Church, and that those who denied its validity had ceased to be members of the Presbyterian Church and had organized themselves into a new religious denomination.

That as a result of the attempted merger and of these contentions litigation arose in the state courts of the different states in which the properties of the church were located, involving the rights of the different factions to the possession, control, and use of such properties; that, among others, two suits were brought in the chancery courts of Tennessee by members of the faction asserting the validity of the merger against members denying its validity, to recover the possession of church properties at Fayetteville and Jackson, Tenn., in each of which the validity of the merger was asserted by complainants as a source of their title and was denied by the defendants, and that in each of these cases it was held by the Supreme Court of Tennessee, on appeal, that the proceedings whereby it had been sought to unite the two churches were not effective to merge the Cumberland Presbyterian Church into the Presbyterian Church in the United States of America, that the Cumberland Presbyterian Church remained an independent organization, with which the defendants were truly identified, that the complainants were not so identified, but had united themselves with another and different ecclesiastical organization, and that the defendants were entitled to the church property and the complainants had no interest therein.

That the claim of complainant to the possession, control, and use of the properties described in the bill is based on said alleged merger or union of churches, and he has no other right, title, claim, or interest to said property, or any right to interfere with or disturb the defendants in its possession, use, and control, except by virtue thereof; that the complainant is identified in interest, sentiment, and legal status with the defendant J. P. Smartt and six of the other defendants alleged in the bill to be the officers of the defendant church, and there is no hostility or conflict of interest between complainant and said defendants; that complainant by his bill is suing to enforce an alleged right of action vested primarily in said defendants; that complainant must be arranged on the same side of the controversy with said defendants, all of whom are citizens of Tennessee, and that when so aligned citizens of Tennessee are found on both sides of the controversy and this court has no jurisdiction thereof; that the institution of this suit in the name of complainant and the placing of his colleagues and sympathizers on the defendants' side of the controversy is a collusive device and a mere contrivance between friends to found jurisdiction in this court, in the hope of avoiding the effect of said decision of the Supreme Court of Tennessee, and in order to reopen in this court a controversy which has been finally decided in the state courts; and

that the complainant has recently moved from Chattanooga to Ross-ville, Ga., a suburb of Chattanooga, just across the state line, in order to ostensibly become a citizen of Georgia, so that he might bring this suit in this court—it being, however, stated at bar by the solicitors for the defendants Seagle and others that this last averment in the plea was not made or intended as a denial of the citizenship of complainant as alleged in the bill, but only as bearing on the question of collusive joinder of parties.

The complainant not having taken issue on the plea in abatement, but having set it down for argument, the truth of all statements of fact contained in the plea, material and pertinent to the issue raised by it, is thereby admitted (*Kellner v. Insurance Co.* [C. C.] 43 Fed. 623), however inconsistent with or contradictory of the allegations of the bill (*United States v. Telephone Co.* [C. C.] 29 Fed. 17, 33; 1 Beach, Mod. Eq. Pract. p. 348, § 36).

Upon the facts thus admitted I am of the opinion that the plea is sufficient in law and should be allowed.

It is provided by Judiciary Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511):

"That if, in any suit commenced in a Circuit Court * * * It shall appear to the satisfaction of said Circuit Court * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit. * * *"

It is well settled that in a case where the jurisdiction of the Circuit Court depends solely upon diversity of citizenship, in determining whether it really or substantially involves a dispute or controversy within the jurisdiction of the court, under section 5 of the act of 1875, the court may ascertain the real matter in dispute, and, disregarding the arbitrary arrangement of the parties made by the pleader, may arrange them upon the side where their interest in and attitude to the controversy really places them, and that if, upon such realignment, citizens of the same state are found to be upon opposite sides of the controversy, so that the necessary diversity of citizenship does not exist, the suit should be dismissed for want of jurisdiction. *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Pacific Railroad Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Harter Tp. v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666; *Steele v. Culver*, 211 U. S. 26, 29 Sup. Ct. 9, 53 L. Ed. 74; *Pittsburg Ry. Co. v. Baltimore R. R. Co.*, 61 Fed. 705, 10 C. C. A. 20; Act March 3, 1875, § 5, 18 Stat. 472.

And in determining such jurisdictional question, while the citizenship of merely formal and nominal parties, having no substantial interest in

the controversy, will not defeat jurisdiction otherwise attaching over a controversy between the real litigants having the requisite diverse citizenship (*Browne v. Strobe*, 5 Cranch, 303, 3 L. Ed. 108; *McNutt v. Bland*, 2 How. 15, 11 L. Ed. 159; *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963), yet a stakeholder or active trustee, having a duty to perform which the court may enforce, is not a mere formal or nominal party whose citizenship can be disregarded in determining such jurisdictional question (*Wood v. Davis*, 18 How. 467, 470, 15 L. Ed. 460; *Wilson v. Oswego Township*, 151 U. S. 56, 64, 14 Sup. Ct. 259, 38 L. Ed. 70; *Shipp v. Williams*, 62 Fed. 4, 7, 10 C. C. A. 247; *Tug River Coal Co. v. Brigel*, 67 Fed. 625, 628, 14 C. C. A. 577). And in a suit to recover the possession of property the one in possession is a necessary and indispensable, and not merely a formal, party. *Construction Co. v. Cane Creek*, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152.

Furthermore, in a suit involving the original jurisdiction of a Circuit Court—as distinguished from a removal case involving the question of a separable controversy—the citizenship of a party who is not merely a formal party, but a proper party having a material interest in the question in dispute, although not an indispensable party, cannot be disregarded in determining the jurisdictional question. *Pittsburg Railway Co. v. Baltimore & Ohio R. R. Co.*, 61 Fed. 705, 712, 10 C. C. A. 20. See, also, *Stewart v. Mitchell* (U. S. C. C., W. D. Tenn., Mem. Op., May 24, 1909) 172 Fed. 905. So, where a proper, though not a necessary, party, not having the requisite diverse citizenship, has joined as complainant in a suit, this likewise destroys the federal jurisdiction. *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 7 Sup. Ct. 1010, 30 L. Ed. 1020.

And where in an equity cause in the Circuit Court a party, whose original alignment as a complainant would have defeated the federal jurisdiction, has been impleaded as a defendant because of his refusal to join in the suit or to take other necessary action, but it appears that the real interest of such defendant is on the side of the complainant, and that he is not in actual antagonism to the complainant, or acting adversely to him in subservience to some illegal or fraudulent purpose (*Doctor v. Harrington*, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606; *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666), or in good faith opposed to the bringing of the suit on account of its supposed injurious effects on his own interests (*Chicago v. Mills*, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504), such defendant, although refusing to join in the suit or take other action, is nevertheless, in the absence of such antagonism or opposition, to be realigned upon the same side of the controversy with the complainant, in accordance with his real interest, and the suit must thereupon be dismissed for want of the requisite diversity of citizenship.

Thus a federal court has no jurisdiction of a bill brought by a non-resident beneficiary under a trust deed against the debtor and trustees, for the purpose of foreclosing the trust, when the debtor and trustee are all citizens of the same state, even although the trustees were made defendants because, after being twice enjoined in the state chancery court from selling the property in execution of the trust, they had

refused to further exercise their duties as trustees or to allow their names to be used for purposes of foreclosure, since they are nevertheless to be aligned on the same side of the case with the beneficiary, according to their interest, and the requisite diversity of citizenship is thereby destroyed. *Shipp v. Williams*, 62 Fed. 5, 10 C. C. A. 247. And for like reason a federal court would not have jurisdiction of a bill brought by a nonresident bondholder against the debtor and trustee for the sole purpose of foreclosing the trust deed, where the debtor and trustee are citizens of the same state, even although the trustee had for personal reasons determined not to execute the trust and declined to join as a party bringing suit, as this would "be insufficient to show any real antagonism" between the complainant and the trustee, and would require that he be treated as on the same side of the controversy with the complainant, although, where the bill goes further and seeks a decree excluding all other bondholders from equal benefits of the trust, this presents a controversy in which the trustee, as representing all the bondholders, must stand in antagonism to the exclusive claim set up by a single beneficiary, and should not be treated as upon the same side with him (*First Nat. Bank v. Trust Co.*, 80 Fed. 569, 574, 26 C. C. A. 1); this last situation being obviously entirely different from that in the case at bar, in which the defendant Smartt and other officers of the church represent only the complainant and those associated with him in the church dispute, and do not represent or owe any duty to the defendant Seagle and others, who refuse to recognize their authority and claim to be the real officers of the church in their stead. And where a bill is brought by a nonresident mortgagee of a water company against the company and the city in which it is located, both being corporations of the same state, to enjoin the enforcement of unjust demands to which the company is subjected by the city and to which it has yielded, so as to render its right to recover at law contestable, but no act of hostility on the part of the company toward the complainant is alleged, the water company and the complainant must be aligned on the same side of the controversy according to their real interest and the suit dismissed for want of jurisdiction. *Boston Safe Deposit Co. v. City of Racine* (C. C.) 97 Fed. 817.

A federal court is likewise without jurisdiction of a suit brought by a nonresident legatee against the executors of the will and other legatees who are citizens of the same state, where the interest of such other legatees in the matter in controversy is identical with those of the plaintiff, and they are made defendants only on the allegation that they refuse to join as plaintiffs. *Johnson v. Ford* (C. C.) 109 Fed. 501. So, "in a suit in equity instituted by a stockholder in his own name, but upon a right of action existing in his corporation, the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by the complaining stockholder, and * * * when such opposition does not appear, the stockholder's corporation will be aligned with the complainant in the suit." *Groel v. United Electric Co.* (C. C.) 132 Fed. 252, 263.

And in a suit by bondholders to foreclose a mortgage, trustees who are made defendants upon the mere allegation that, being requested to

take proceedings to foreclose the mortgage and doubting their right so to do, they preferred not to take such proceedings, and who voluntarily arrange themselves on the same side of the controversy with the complainants, no antagonism on their part being alleged or appearing, are to be considered as on the same side of the controversy with complainants in determining the question of federal jurisdiction. *Pacific R. R. Co. v. Ketchum*, 101 U. S. 289, 299, 25 L. Ed. 932. And, in general, a federal court has no jurisdiction of a suit where jurisdiction depends on a diverse citizenship alone, and citizens of the same state are parties on opposite sides, "with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute." *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 7 Sup. Ct. 1010, 30 L. Ed. 1020.

Furthermore, even in cases where, if the controversy were real, the requisite diversity of citizenship would exist, yet if it appear that the arrangement of the parties is merely a contrivance between friends having no real antagonism, for the purpose of founding a jurisdiction in the federal court which otherwise would not exist, and solely to reopen a controversy already decided in the state courts, the device cannot be allowed to succeed, and the suit must be dismissed as collusive under the second provision in section 5 of the act of 1875. *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 181, 25 Sup. Ct. 420, 49 L. Ed. 713, and cases cited. See, also, *Detroit v. Dean*, 106 U. S. 537, 541, 1 Sup. Ct. 500, 27 L. Ed. 300, *Kemmerer v. Haggerty* (C. C.) 139 Fed. 639, and *Stewart v. Mitchell*, *supra*.

Applying the foregoing principles to the facts admitted under the pleadings in this case, I am of opinion:

(1) That independently of any question of collusion, the real matter in dispute in this case is whether the properties of the defendant church are to be controlled by the officers representing those members who have recognized the validity of the merger between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, and for the use and benefit of such members, or by the officers representing those members who deny the validity of such merger and for their use and benefit; that in determining such dispute the defendant Smartt and other officers of the defendant church, who are in possession of its properties and controlling them for the use and benefit of the members who recognize the validity of the merger, are necessary parties, and, if not indispensable parties, are at least proper parties, having a material interest in the controversy, both as officers and as members of the church; that in determining such dispute they must be aligned on the same side of the controversy with the complainant, with whom they are identified in interest, sentiment, and legal status, who is one of the class of members for whose use and benefit they are controlling and using the church properties, and to whom they have no hostility or conflict of interest, and on the opposite side of the controversy from the defendant Seagle and others, who claim to be the real officers of the church in their stead, and to be entitled to control and use its properties for the benefit of another and antagonistic class of members; that such realignment is not prevented by the fact that, properly recognizing the binding effect of

the decision of the Supreme Court of Tennessee upon the state courts, they have in the exercise of a sound discretion declined to bring suit in such courts, and have evidently likewise realized that their own citizenship prevented them from maintaining or joining in an action in the federal court, although they do not appear to be opposed to such suit if it can be maintained by others; and that, as such realignment places the defendants Smartt and other citizens of Tennessee on opposite sides of the real controversy from the defendant Seagle and other citizens of Tennessee and the requisite diversity of citizenship is thereby destroyed, it must be held that the suit does not really and substantially involve a controversy properly within the jurisdiction of the court, and the plea in abatement must for that reason be held sufficient in law; and—

(2) That as the complainant, by setting down the plea for argument, has likewise admitted for the present purpose its averments that the institution of this suit in the name of the complainant and the placing of his colleagues and sympathizers on the defendants' side of this controversy is a collusive device and a mere contrivance between friends to found jurisdiction in this court, in the hope of avoiding the effect of the decision of the Supreme Court of Tennessee and reopening in this court a controversy finally decided in the state courts, which must be deemed averments of fact, just as the converse averment that a suit was not collusive was inferentially treated in *Doctor v. Harrington*, 196 U. S. 579, 588, 25 Sup. Ct. 355, 49 L. Ed. 606, it follows that under such admission the plea in abatement must be held sufficient in law for that reason also.

The conclusion thus reached is not in conflict with the opinions in *Watson v. Jones*, 13 Wall. 723, 20 L. Ed. 666, and *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917. While before the act of 1875 the federal courts would dismiss suits for want of requisite diverse citizenship appearing upon the face of the record (*Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Coal Co. v. Blatchford*, 11 Wall. 172, 178, 20 L. Ed. 179), yet under the old law the pleadings only were looked to, and the rights of the parties determined solely according to the position they occupied as plaintiffs or defendants in the suit (*Removal Cases*, 100 U. S. 457, 469, 25 L. Ed. 593), and it was not until after the passage of the act of 1875, which "imposes the duty upon the Circuit Courts of dismissing a suit at any time after it is brought if it appears that it does not really and substantially involve a controversy of which it may properly take cognizance" (*Morris v. Gilmer*, 129 U. S. 315, 326, 9 Sup. Ct. 289, 32 L. Ed. 690), that it was held by the Supreme Court in the *Removal Cases*, *supra*, in 1879, that under the new law the mere form of the pleadings might be put aside and the parties placed on different sides of the matter in dispute according to the facts; this rule of realignment being subsequently extended, in *Pacific Co. v. Ketchum*, 101 U. S. 289, 299, 25 L. Ed. 932, to original suits brought in the Circuit Courts under the first section of the act of 1875, as well as to suits removed from the state courts under the second section.

The case of *Watson v. Jones* was decided in 1871, four years before the act of 1875. The only objection raised to the jurisdiction

of the court was that the plaintiff had no such interest in the subject-matter of litigation as would enable him to maintain a suit, and the want of the requisite diverse citizenship of parties upon a proper realignment was not raised by plea in abatement, or otherwise suggested, or in any manner considered by the court. In the case of *Hotel v. Wade*, the bill had been filed in 1873, two years before the act of 1875. The only jurisdictional question which was raised was one of equitable jurisdiction, namely, that proper parties were not named in the bill to enable the Circuit Court to decree the relief prayed for, and the want of requisite diverse citizenship upon proper realignment of the parties to vest federal jurisdiction was neither raised by plea in abatement, or otherwise, nor considered by the court. Obviously, therefore, neither of these cases has any application to the present question as to whether the requisite diversity of citizenship exists under the now well-established rule of alignment first announced by the Supreme Court at a later date in the Removal Cases and in *Pacific R. R. Co. v. Ketchum*.

The conclusion reached in this case is furthermore in substantial accord with that of Judge McCall in the case of *Stewart v. Mitchell*, supra, in which, upon a realignment of the parties, he held good a plea in abatement in a suit arising out of this same church controversy, involving the properties and use of a church known as the Greenfield Presbyterian Church, or First Cumberland Presbyterian Church, at Greenfield, Tenn.

This result, furthermore, reaches, I think, the substantial merits of this question, so far as the jurisdiction of the federal courts is concerned. There can be no doubt but that, in its broad aspect and essential features, when stripped of technicalities, the controversy arising in Tennessee out of the merger of the two churches is really and substantially a controversy between large classes of the citizens of Tennessee on opposite sides of that controversy, in reference to the beneficial interest in church properties located in the state in which the interests of nonresident members of the church are, relatively speaking, slight; and it would, I think, be an unfortunate result if, after the Supreme Court of the state has carefully determined the property interests involved in this controversy between representatives of these large classes of the citizens of the state, a nonresident member of the church, having a relatively insignificant interest in the controversy, should be permitted, under technical rules of pleading, by the alignment of parties in opposition to their real interest, to invoke the jurisdiction of the federal court in this controversy between citizens of the state, in order to reopen the controversy in this court in the hope of avoiding the effect of the decision of the Supreme Court of the state, with the result that if the federal court should take jurisdiction of the case, and should feel constrained to differ with the Supreme Court of Tennessee upon the merits of the controversy, the beneficial title to the various church properties in Tennessee involved in this general controversy would be made to depend, first, upon the accident whether a particular church contained in its membership a citizen of another state who would be willing to bring suit

in the federal court, and, next, whether such nonresident could succeed, in a race of diligence, in bringing his suit in the federal court before the resident members on the opposite side of the controversy could sue in a state court, the natural and appropriate forum in such controversies; a result destructive of that conformity to state decisions which is desirable in matters affecting title to real estate, and to that uniformity of decision which is so essential to the administration of justice, especially in the just and harmonious relationship of state and federal courts in their joint labors under our dual system of governments. As remarked by the Supreme Court in *Bernards Township v. Stebbins*, 109 U. S. 353, 3 Sup. Ct. 252, 27 L. Ed. 956, it has been the consistent effort of Congress and of that court to prevent the discrimination in respect to suits between citizens of the same state and suits between citizens of different states, established by the Constitution and laws of the United States, from being evaded by bringing into the federal courts controversies between citizens of the same state. *Shreveport v. Cole*, 129 U. S. 36, 44, 9 Sup. Ct. 210, 32 L. Ed. 589; *Anderson v. Watt*, 138 U. S. 694, 701, 11 Sup. Ct. 449, 34 L. Ed. 1078. This evasion should be prevented wherever possible, not merely in the letter, but in the spirit.

An order will accordingly be entered allowing the plea in abatement, and, in consequence, denying the motion for an injunction, without consideration of the merits. 1 Beach, Mod. Eq. Pract. p. 348, § 327.

Stephens et al. v. Smartt et al.

This case presents essentially the same question as that in *Finley v. Williams et al.* This suit involves the controversy in reference to the properties of the same defendant church. The bill is filed by Stephens, a citizen of the Republic of Mexico, and Morrison, a citizen of California, who allege that they are members in good standing in said church, against substantially the same defendants, including the defendants Smartt and others, alleged to be the directors and elders of the church, and the defendants Seagle and others, alleged to be claiming to be such elders. The essential averments in this bill are similar to those in the *Finley* bill, except that by an amendment to the bill it is expressly stated to be brought for the use and benefit of complainants and all other members of the defendant church who adhere to and assert the validity of the merger of the church, except those who are named defendants as elders and trustees. The plea in abatement of the defendants Seagle and others is in all essential respects similar to that in the *Finley* Case. I do not think that the fact that the defendants Smartt and others are excluded from the class for whose personal benefit the suit is brought—however this might impair the validity of the bill as a proper class bill, when considered as a matter of equity pleading—changes materially the result reached in the *Finley* Case; and for the reasons above stated in reference to that case, except in so far as relates to the personal membership of such defendants, an order will also be entered in this case allowing the plea in abatement and denying the motion for an injunction.

NELSON v. SOUTHERN RY. CO.

GASTON v. SAME.

(Circuit Court, N. D. Georgia. June 21, 1900.)

REMOVAL OF CAUSES (§ 19*)—FEDERAL QUESTION—ACTION BASED ON FEDERAL STATUTE.

An action against a railroad company for an injury to an employé, brought under and in reliance upon the employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65), where the declaration contains no statement or suggestion that the result of the suit will depend upon the construction of the act, is not removable on the ground that it is one arising under a law of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 37; Dec. Dig. § 19.*]

On Motion to Remand to State Court.

Arnold & Arnold, for plaintiff.

J. J. Strickland and McDaniel, Alston & Black, for defendant.

NEWMAN, District Judge. In this case, counsel, by permission of the court, have reargued the question considered and determined in the case of *Albert Miller v. Illinois Central Railroad Company*, 168 Fed. 982; the question being whether a suit, brought in a state court, under the recent employer's liability act of Congress (Act April 22, 1908, c. 149, 35 Stat. 65), which is not removable because of the citizenship or residence of the parties, is removable under the acts of Congress of 1887-88 (Act March 3, 1887, c. 373, § 2, 24 Stat. 553 as amended by Act August 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509]) providing:

"Any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States, are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

The question is, where a suit is brought by an administrator under the employer's liability act, relying on the act in the declaration, and the declaration containing no statement, or any suggestion even, that the result of the suit will depend upon the construction of the act of Congress, whether or not such cause is removable upon the ground that it arose under a law of the United States.

In the *Miller Case*, decided a few weeks ago in this court, the same question was presented, and it was held that the case was not removable. In view of the importance of the question and the earnestness of counsel in presenting their views in the present case, I have given the question a thorough re-examination, and will again state my views with some additional authorities.

As I gather the law from the decisions of the courts, and especially from the decisions of the Supreme Court, the fact that a suit is brought

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on a law of Congress, and that its application may be necessary in the progress of the case, does not justify removal under section 2 of the act of 1887-88, unless the construction of the act be involved, and unless the final determination of the case depends upon such construction. In Rose's Code of Federal Procedure, vol. 1, § 133, what the author considers the correct rule is briefly stated in these words:

"A suit is not removable simply because an act of Congress is to be construed or applied. There must be a dispute as to the construction of the act."

I have referred to some of the authorities on this question which show fully and clearly to my mind that the courts have determined against the right of removal in a case like this. In *Fitzgerald v. Missouri Pacific Ry. Co.* (C. C.) 45 Fed. 812, in the opinion on page 819, Circuit Judge Caldwell presented the question as follows:

"But this is not enough. The answer or petition for removal would have to go further, and show that the construction of the act of Congress relating to the mode of procuring the right of way was in dispute between the parties, and this must be done by stating facts that prove it. A simple averment that the fact is so is stating a conclusion, and is not enough. *Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656. If there is no dispute between the parties as to the meaning of an act of Congress, there is no federal controversy between them, and no cause for removal. The Supreme Court has settled the rule on this subject. The court, speaking through Chief Justice Waite, says: 'A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part, at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.' *Water Company v. Keyes*, supra. The facts in that case and Mr. Justice Bradley's dissent show the question was fully considered, and that the opinion expressed the deliberate and well-considered judgment of the court on this point. The Circuit Court cases are to the same effect. *Trafton v. Nougues*, 4 Sawy. 178, Fed. Cas. No. 14,134; *Austin v. Gagan*, 39 Fed. 626, 5 L. R. A. 476; *State v. Railroad Co.*, 33 Fed. 391; *Rothschild v. Matthews* (C. C.) 22 Fed. 6."

In the case cited by Judge Caldwell of *Trafton v. Nougues*, Fed. Cas. No. 14, 134 (vol. 24), Circuit Judge Sawyer says:

"Only suits involving rights depending upon a disputed construction of the Constitution and laws of the United States can be transferred from the state to the national courts, under the clause 'arising under the Constitution and laws of the United States,' of section 2 of the 'act to determine the jurisdiction of the United States courts,' passed March 3, 1875."

In *Theurkauf v. Ireland* (C. C.) 27 Fed. 769, which is a case concerning the pre-emption of public lands under the statute of the United States, Judge Sawyer says in the opinion:

"But it does not appear that there is any disputed construction of any statute of the United States involved. It does not appear but that both parties agree upon the construction of the pre-emption laws. For all that appears from the facts alleged, the whole controversy may turn on the proof of the facts. There is nothing to show that any disputed question of construction will arise, and this must affirmatively be shown, in order to make it affirmatively appear that the court has jurisdiction. It might as well be claimed that it is a proper cause for jurisdiction by alleging that the plaintiff claims title by virtue of a patent issued by the United States, without stating that there is any question arising upon a disputed construction of the patent, or any dispute as to its validity. The authorities are numerous to the effect

that the record in this case does not affirmatively disclose a case over which the court has jurisdiction, and that it is insufficient to sustain its removal."

So, in the case now before the court. For all that appears here, there may be no difference whatever between the parties as to the proper construction of this act of Congress. So far as can be seen from an examination of the declaration, the case is one where its determination will depend upon the application of the facts to the law. There is not a suggestion in the declaration that there will be any difference between the parties as to the proper interpretation of the act in any of its phases. The whole question seems to be: Has the plaintiff stated, and can he prove, a cause of action coming up to the requirements of this act of Congress, and entitling him to recover under it?

In *State of Iowa v. Chicago, M. & St. P. Ry. Co.* (C. C.) 33 Fed. 391, Judge Shiras states the correct rule on this question as follows:

"The motion to remand presents the question whether it is a removable case, and as the state is a party, and jurisdiction in the federal court cannot be had by reason of diverse citizenship, it follows that to sustain the jurisdiction it must appear that the case is of a civil nature, wherein the matter in dispute exceeds \$2,000 in value, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. In determining when the Supreme Court has jurisdiction to review the decisions of the highest tribunal of a state, on the ground that it involved the construction of the Constitution, laws, or treaties of the United States, the Supreme Court has uniformly held that it must clearly appear from the record that the question arising under the federal Constitution, laws, or treaties was in fact passed upon or necessarily involved in the conclusion reached. In *Crowell v. Randall*, 10 Pet. 368, 9 L. Ed. 458, it was said that it was 'not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case.' In *Bridge Proprietor v. Hoboken Company*, 1 Wall. 116, 17 L. Ed. 571, the rule is stated to be that: 'The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In *Brown v. Colorado*, 106 U. S. 95, 1 Sup. Ct. 175, 27 L. Ed. 132, it is said: 'Certainly, if the judgments of the courts of the states are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the court either knew or ought to have known that such a question was involved in the decision to be made.' It certainly will not be claimed as to the jurisdiction of the Circuit Court.

"When it is sought to deprive a state court of the right to hear and determine a cause properly and rightfully brought therein, by removing the same to the federal court, on the ground that the controversy involves in its determination a question arising under the Constitution, laws, or treaties of the United States, it must be made to appear, clearly and unmistakably from the record, that the cause or controversy necessarily, in its determination, involves the consideration and determination of such federal question. It is not sufficient for it to appear that such federal question may possibly arise. Jurisdiction to 'wrest' the case, if I may use that term, from the state court, cannot exist unless a federal question is certainly involved. If the record simply shows that possibly, during the trial, some federal question may be presented, that will not confer the jurisdiction and entitle the defendant to the right of removal. If it were otherwise, and upon the showing that a federal question might arise, the case could be brought into the Circuit Court of the United States. The jurisdiction would then exist, not of the federal question, but of the case; and yet, upon the trial, the decision might be rested upon questions of fact or law not arising under the federal Constitution or

laws, and thus the state court would have been deprived of its jurisdiction wrongfully.

"The jurisdiction of this court either by original process, or by removal, in the class of cases under consideration, depends solely upon the fact that the controversy between the parties requires, for its final determination, the construction of some provision of the Constitution, laws, or treaties of the United States, and the application thereof to the facts of the particular case, in such sense that the ruling thus made will materially affect the conclusion reached upon the controversy between the adversary parties to the litigation. Unless from the record it clearly appears that the federal question must be met and decided, before the issue in the particular case can be finally disposed of, it cannot be said that the matter in dispute arises under the Constitution or laws of the United States, within the meaning of the statute. In each case, no removal can be had, and the cause must be heard and decided in the state court. If, during the trial, in fact a federal question does arise, and is decided adversely to the party claiming the protection of the federal Constitution or law, the party aggrieved can, by proper proceedings, carry the question from the court of final resort in the state to the Supreme Court of the United States."

In *Austin v. Gagan*, 39 Fed. 626, 5 L. R. A. 476, Circuit Judge Sawyer states his views in the present question in this way:

"One ground of the motion is that the petition does not present a case, which appears from the facts stated, to arise under the laws of the United States. One party claims the land in dispute as a homestead, and the other that the land is mineral, and therefore not subject to be entered as a homestead; but it does not appear from any facts stated that there is any disputed construction of either statute under which the respective parties claim. For anything that appears, both parties may agree as to the construction of the statutes, and the whole case turns upon a question of fact, as to whether the land is mineral land or not, or whether either party has performed the acts conceded to be necessary to give the right claimed. Indeed, I infer from the facts stated in the petition that the contest will really be upon the facts, and not the law. In my judgment the record does not present a case for removal under the decisions," etc.

In *California Oil & Gas Co. v. Miller*, 96 Fed. 12, Judge Wellborn, in the Circuit Court for the Southern District of California, says in the opinion:

"Where there is no dispute between the parties as to the meaning of any federal law, but the case involves issues of fact solely—as, for instance, which of two mining locations was first made, or whether or not the boundaries of either were marked upon the ground, or whether or not assessment work has been performed—the case is not one arising under the Constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through such Constitution, law, or treaty."

Further along in the opinion this expression is used:

"Before inquiring whether or not the two essentials above named to a federal question, namely, a dispute as to the meaning of a federal law and its materiality to a determination of the cause, are found in the present case," etc.

And still further:

"The possibility, or even probability, that a federal question may arise during the progress of the cause, will not support original jurisdiction in the Circuit Court; but the plaintiff's statement of his own claim must show that such a question is necessarily involved, and must be determined," etc.

The first headnote of this case states the substance of the decision on this question in this way:

"Two things are necessary to the existence of a federal question which will confer jurisdiction on a Circuit Court of the United States: First, an actual dispute between the parties as to the meaning of some constitutional provision or law of the United States; and, second, materiality of the construction of such provision or law to a determination of the cause. And it is now well settled that these matters must appear from the plaintiff's statement of his own claim in the form required by good pleading."

In *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656, in the opinion of Chief Justice Waite, the Chief Justice says:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction."

The dissenting opinion of Mr. Justice Bradley really emphasizes the effect of the opinion of the court, since his dissenting opinion says, "This question depends upon the construction of the title given by the United States," and therefore he considered the case removable.

Myrtle v. Nevada, C. & O. Ry. Co. (C. C.) 137 Fed. 193, was a suit for injuries to the plaintiff by the negligence and carelessness of the defendant, and its failure to provide suitable couplings on its cars. An amendment was filed to the complaint setting out the fact that the defendant was engaged in interstate commerce, and thereupon petition for removal was filed on the ground that the liability of the defendant, if any existed, was under the provisions of the Constitution of the United States, and an act of Congress entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers" (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and acts amendatory thereof. The petition for removal showed that both the plaintiff and defendant were citizens of the state of Nevada. Judge Hawley, in delivering the opinion, after stating the facts as just outlined, says:

"The law is now well settled that an amendment to a complaint in a state court, which transforms a nonremovable case into a removable one, allows the suit to be removed into the Circuit Court if the defendant acts promptly"—citing *Powers v. Chesapeake & Ohio Railway*, 169 U. S. 92, 100, 18 Sup. Ct. 264, 42 L. Ed. 673.

He then says that the petition for removal was filed in time if the amended complaint presents such a federal question as to authorize a removal under the act of 1887-1888, and proceeds:

"Does the mere fact that the plaintiff for the first time in his amended complaint asserts that the defendant, in running its cars at the time of the injury, was engaged in interstate commerce, justify the removal of the action from the state court? To entitle the defendant to removal, it must be shown that the action arises under the act of Congress; that the plaintiff claims a legal right thereunder, which legal right is controverted by the defendant. The controversy must be one as to the construction of the statute, as distinguished from the question of fact. It does not appear in the present case that there is any controversy between the parties as to the construction of the law. That question has been settled by the decision of the Supreme Court in *Johnson v. Southern Pacific Railroad*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

"Is there any federal question involved in this case? A federal question which will confer jurisdiction upon a United States court, either by original process or by removal, must be a question of law as stated by the plaintiff in his complaint, and not a question of fact. Where the facts only are in dispute, the United States court cannot take jurisdiction. When a legal question arising under the Constitution or a law or a treaty of the United States is decided by the Supreme Court, it ceases to be a federal question. *State v. Bradley* (C. C.) 26 Fed. 289; *Austin v. Gagan* (C. C.) 39 Fed. 626, 5 L. R. A. 476; *Montana Ore P. Co. v. Boston Co.*, 85 Fed. 867, 26 C. C. A. 462; *California Oil & G. Co. v. Miller* (C. C.) 96 Fed. 12; *Peabody G. M. Co. v. Gold Hill M. Co.* (C. C.) 97 Fed. 657, 660. The question of fact as to whether the defendant was engaged in interstate commerce, and whether, if so engaged, its cars were coupled as provided for in said act, can be tried and determined in the state court, as well as here. In *Railroad v. Bell*, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486, the suit was brought in the Circuit Court of the United States. It was claimed that a federal question was involved, under a declaration of the plaintiff that they claimed title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Fla., etc. The court said: 'In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, presents no question which of itself confers jurisdiction on a Circuit Court of the United States.' And, because the plaintiffs' declaration disclosed no federal question, the suit was dismissed for want of jurisdiction."

Judge Hawley then cites the opinion of Mr. Justice Brewer, in *Shoshone M. Co. v. Rutter*, 177 U. S. 505, 507, 20 Sup. Ct. 726, 44 L. Ed. 864, as follows:

"We pointed out in a former opinion that it was well settled that suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clause."

Further on in the opinion in the *Shoshone Case*, in addition to the language quoted by Judge Hawley, Mr. Justice Brewer says:

"So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States, that the federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the federal courts."

The former case referred to in the *Shoshone Case* was *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276. Mr. Justice Shiras, in closing the opinion, says:

"Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly, where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations, and customs in the mining districts in which the lands are situated. In a case therefore like the present, where the federal jurisdiction does not arise because the parties are citizens of different states, and where no question is made as to the meaning and construction of the statutes of the United States, the state courts are to be regarded, within the letter and meaning of section 2326, Rev. St. (U. S. Comp. St. 1901, p. 1430), as courts of 'competent jurisdiction to determine the right of possession.'"

Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052, was a suit in equity by the Western Union Telegraph Company in which Act Cong. July 24, 1866, c. 330, 14 Stat. 221, was invoked on behalf of the jurisdiction, and the opinion of Chief Justice Fuller, after stating that the telegraph company had no rights in the connection in which they sought to establish them, under the act of Congress, states the law pertinent to this case as follows:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground"—citing *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276.

In *Devine v. Los Angeles*, 202 U. S. 313, 332, 26 Sup. Ct. 652, 50 L. Ed. 1046, Chief Justice Fuller again states the recognized rule on the subject involved here in this language:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends; and this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defense which might be interposed."

Some of the authorities cited above were referred to in the case of *Miller v. Illinois Central Railroad Company*; but they are so clearly in point and plainly decisive of the question involved here that they may well be repeated.

In view of the foregoing authorities and those cited in *Miller v. Illinois Central Railroad Company*, I do not see how it can be said that this case is removable on the ground that it arises under the Constitution or laws of the United States. What I deduce from the authorities is this: To justify a removal, under the provisions of the act of March 1887-88, invoked here, the final determination of the case must depend upon the construction of the act of Congress—here the employer's liability act of 1908. It is not sufficient that the inquiry will be, as the trial progresses, do the facts measure up to this law of Congress? nor that, in the trial of the case, the application of the law to the facts will be often necessary; but it must appear that the final decision of the case will be controlled by the construction of the act. The meaning of the law must be in question, and not merely the sufficiency of the facts.

The contention of learned counsel seems to be that, because it is a case in which the right to recover is based on an act of Congress, therefore the construction of the act is necessarily involved. As stated by Mr. Justice Brewer in *Shoshone M. Co. v. Rutter*:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses."

A suit, as has been pointed out, may well be based on a law without involving, in any way, the construction of the law. This may be, and, so far as the declaration shows, is, such a suit.

If, in the course of the trial in the state court, the defendant claims any right, privilege, or immunity under this act, and the same is denied, it may have the adverse decision reviewed by the Supreme Court of the United States on a writ of error to the highest court of the state.

In a recent work, entitled "The Employers' Liability and Safety Appliance Acts," by W. W. Thornton, the author says:

"If an action be brought under the statute, by an employé, in a state court, there is no serious doubt about its removal into a federal court. The liability is one given by a federal statute, and the defendant has the right to insist that that liability be determined by the courts of the nation that created it."

With all due respect to the author, this would seem to be directly opposed to the views of the Supreme Court of the United States in many cases, to a number of which I have referred above. It seems to be in direct opposition to the language of Mr. Justice Brewer in *Shoshone M. Co. v. Rutter*, which I have just quoted.

The colloquy between Senators Clay, Hepburn, and Culberson, referred to in a footnote by Mr. Thornton, although the opinions expressed came from so eminent a source, cannot be properly considered in construing this statute.

In *United States v. Freight Association*, 166 U. S. 290-318, 17 Sup. Ct. 540, 550, 41 L. Ed. 1007, in the opinion of Mr. Justice Peckham, it is said:

"There is, too, a general acquiescence in the doctrine that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79, 23 L. Ed. 224; *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469 (Taney, Chief Justice); *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653, Fed. Cas. No. 9,662; *Queen v. Hertford College*, 3 Q. B. D. 693, 707. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not agree with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

In the fourth edition of Foster's Federal Practice, just issued, the author states the law on the subject under discussion here, gathered from the authorities (volume 1, § 17), as follows:

"A suit arises under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. It has been said: 'That a suit cannot be removed, from a state court to a federal court, simply because, in its progress, a construction of the Constitution or a law of the United States may be necessary, unless it, in part at least, arises out of a controversy in regard to the operation and effect of some provision in that Constitution or law upon the facts involved. In order to remove a cause, on the ground that it arises under a statute of the United States, the record

must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision. When the contest is about the facts only, there can be no removal. A cause removed to a federal court, on the ground that the suit arose under the Constitution or laws of the United States, will be remanded when the record fails to show that there will arise some contested point of law depending upon the Constitution or laws of the United States, what the question is, and how it will arise.' It has been said: That a cause is not removable simply because an act of Congress must be construed or applied; but that there must be a dispute as to the construction of the act, and facts to show the dispute must appear in the record."

I am compelled, after the most careful examination of and reflection upon this question, to adhere to the conclusion reached in *Miller v. Illinois Central Railroad Company*, and the result is that this case must be remanded to the state court from which it was removed.

What has been stated above applies also to the case of *James C. Gaston v. Southern Railway Company*, which was argued and submitted at the same time with the *Nelson Case*, and an order may be taken remanding that case also.

THE STANLEY H. MINER.

(District Court, E. D. New York. August 4, 1909.)

1. CONTRACTS (§ 93*)—WORK AND LABOR (§ 10*)—VALIDITY OF ASSENT—MUTUAL MISTAKE.

Where two parties enter into a contract to perform specific work, neither having knowledge of the facts actually existing, and the contract proves to involve work essentially different from that which the parties had in mind, it will not be enforced by a court; but if the work is proceeded with after knowledge of the facts, under circumstances from which a contract may be implied, a recovery may be had therefor on a quantum meruit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 415; Dec. Dig. § 93; * *Work and Labor*, Cent. Dig. § 25; Dec. Dig. § 10.*]

2. ADMIRALTY (§ 1*)—JURISDICTION—SUIT INVOLVING EQUITABLE ISSUES.

A court of admiralty may entertain a suit for salvage, in which the claimant pleads a contract under which it is alleged the services were performed, but which libellant seeks to avoid on the ground of fraud or mistake; such court having equitable jurisdiction, in the sense of applying rules of equity to questions incidentally arising in a suit within its general jurisdiction, at least where no objection is made prior to the hearing.

[Ed. Note.—For other cases, see *Admiralty*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Jurisdiction as to matters of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Boutin v. Rudd*, 27 C. C. A. 536.]

3. SALVAGE (§ 36*)—CONTRACTS AS TO COMPENSATION—VALIDITY.

Claimant purchased a wrecked schooner, lying on her side, partly submerged in Cape Fear river, and contracted with libellant, through its representative, who made an examination of so much of the vessel as could be seen, to raise, pump out, and deliver her and her cargo in New York for the sum of \$3,750. On righting her, it was found that the underside, on which she lay, and her keel, were seriously damaged, necessitating quite extensive repairs before she could be pumped out and towed. Libellant notified claimant of such facts, stating that it would do the work, but should expect additional compensation, to which claimant replied, in ef-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fect, that he considered the contract binding. Libellant delivered the vessel in New York at an expense largely exceeding the contract price, and brought suit to recover as for a salvage without contract. *Held* that, as no fraud, misrepresentation, or concealment of known facts was shown on the part of claimant, but both parties contracted with reference to what appeared from inspection, both were bound by the contract, and, the services rendered by libellant being within its terms; there could be no recovery therefor beyond the contract price.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 87; Dec. Dig. § 36.*]

In Admiralty. Suit for salvage.

Robinson, Biddle & Benedict (E. G. Benedict, of counsel), for libellant.

Hagen, Goodrich & Coughlan (Henry W. Goodrich, of counsel), for claimant.

CHATFIELD, District Judge. The four-masted schooner Stanley H. Miner was sold by the United States marshal at Southport, N. C., as she was lying upon the shoals opposite Battery Island, in a part of the Cape Fear river where the ebb tide runs with exceeding swiftness. This sale was had in a salvage proceeding, and at the time of sale a considerable portion of the deck load of lumber carried by the schooner had been removed to a lighter, but was sold with the schooner as if a part of her cargo. It appears from the testimony in this case that the vessel had been wrecked outside of the Capes, and when brought in by the pilots, claiming salvage, had been left, and had remained in the possession of the marshal, in an upright position, but with her deck load and rails awash. Between the time of her arrival and sale by the marshal, the effect of the mud coming down the river, and of further settling upon the bottom at low tide, was to cause the vessel to careen to starboard, and when prospective bidders at the time of sale attempted to make a visual inspection, as she lay upon the mud flats, they were able to examine above water a portion of the port side alone. The starboard rail was under water several feet, and the masts stood at an angle of about 45 degrees from the horizontal. In this condition, and with nothing more than a superficial examination of all above water, which was uninjured, except for a slight break near the bow, the claimant secured the vessel by a bid of \$10,100, and is shown by the testimony to have bought the vessel from the appearance of her port side alone; it being said by the witnesses to follow, in 99 cases out of 100, where no collision or similar accident has occurred, that in a vessel wrecked by a storm one side will be injured substantially no more than the other.

The claimant is an extensive shipowner, with a great deal of experience in purchasing, repairing, and rebuilding sailing vessels. He says in his testimony that he has owned shares in more vessels on the Atlantic Coast than any other man in the United States for within a period of 15 years, and has made greater personal inspection of such repairs than probably any other owner of vessels during a like period. It appears from the testimony that immediately after the purchase of the vessel he arranged by telephone for the services of a diver, one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Smith, who arrived at Southport within a few days and went to work, as he and claimant's witnesses say, to examine the condition of the vessel under water, and to patch up what he found. This diver describes the muddy condition of the water and the difficulties of the current, which rendered work during ebb tide substantially impossible, and states as his method of operation a progressive system of inspection, with attempts at repair as fast as he found anything wrong, rather than a complete survey of the vessel before going to work. An uncle of the claimant, one Guilford Pendleton, was sent for from his home in Maine, and upon his arrival was put in charge of the operations and work of the diver, pending a trip of the claimant to New York, from which he returned upon Monday, the 27th day of May, 1907. Upon his arrival he obtained a report from his uncle and from the diver of what had been found and done, namely, that the keel of the vessel was missing from the sternport, which was in place, to a point where the deadwood terminated at the junction of the timbers with the keel of the vessel; that from the stem for some 18 or 20 feet aft the keel was missing, and that this had been patched with canvas and timbers; that for some 75 feet aft of this point the keel was present; that the injuries upon the port side had been temporarily repaired; that nothing had been done on the starboard side; and that the vessel had gone over substantially flat upon her beam ends the night before in a storm.

The result of this consultation seems to have been a determination upon the part of the claimant to immediately proceed to right the vessel as a step necessarily precedent to pumping out. The diver in his testimony states that righting was the next step which had to be taken, inasmuch as it was impossible to get at the starboard side while the vessel rested upon the bottom, and that it was also inconvenient and inadvisable to attempt to then do anything more to the keel, which could not be reached without staging. It also is stated by the claimant and by the diver that they reached the conclusion (from an inspection of the keel, showing it to be substantially intact for a further distance of some 70 feet aft of the break near the stem, and from the fact that the deadwood, and as the diver reported, part of the keel, was present at the stern) that the rest of the keel would be found in place and would not require much repair before the vessel should be hauled out upon the dry dock. The river at the point in question is said to have been so muddy that the diver could see nothing, but was dependent entirely upon what he could learn by investigation with his hands, and his testimony agrees with that of the claimant to the effect that no inspection was made by him, nor reported by him, as to the actual condition of the keel for the 60 or 70 feet remaining.

The claimant proceeded to Wilmington, N. C., some 25 miles up the Cape Fear river, on Monday night, the 27th of May, got into communication with the revenue cutter Seminole and with the Astral, a large tug belonging to the Standard Oil Company, obtained the services of the lighter upon which the deck load had been piled, and two small tugs belonging in the neighborhood, and arranged to have them at the wreck as soon as possible, where they were all to give assistance, including the Seminole and the Astral, if soundings showed that they

could get in a position to aid in an attempt to right the vessel by exerting force with tackle upon her masts, and by raising these masts upon lighters. In fact, some attempt was made to do this with the boats at hand upon the Monday when the claimant was at the wreck; but the power was insufficient to accomplish anything. While at Wilmington the claimant also succeeded in getting in communication with Capt. Tooker, superintendent of the Merritt & Chapman Derrick & Wrecking Company, at Norfolk, the Southern headquarters of that concern, with the result of getting him to leave some work in the Chesapeake region and to proceed to Southport to assist in the operations, under an agreement that his compensation would be determined later. Capt. Tooker joined the claimant at Wilmington upon the evening of Wednesday, May 29th, and they proceeded together upon one of the boats to Southport, where they arrived at about 2 a. m. Thursday, the 30th. On this morning the various vessels above named were preparing to proceed with the operation of raising the vessel, were arranging their hawsers and taking soundings, when the claimant and Capt. Tooker proceeded to the schooner, and both climbed upon the projecting port side, where, in the presence of Mr. Guilford Pendleton, one Weeks, and the diver, Smith, an examination of the situation was had, and the claimant entered into a negotiation with Capt. Tooker, upon the suggestion of Capt. Tooker that the Merritt & Chapman Company contract with the claimant to raise the vessel and deliver her at New York under a contract. The conversation with respect to this is testified to by both the claimant and Capt. Tooker, and some portions of the conversation were heard by the witness Weeks. Capt. Tooker also talked with the diver, Smith, and with Mr. Guilford Pendleton, and the result was that Capt. Tooker made a proposition of \$10,000 for the contract, which offer was refused by the claimant, and both men started ashore. Later further negotiations were had, resulting in an offer by Capt. Tooker to do the work for \$4,000, and by the claimant to give \$3,500, and an ultimate agreement to split the difference. Thereupon both men proceeded ashore and to a grocery store, where a contract was written by the claimant upon a sheet of paper, which agreement was signed by the claimant and by Capt. Tooker for the Merritt & Chapman Company, and which is as follows:

"Memorandum of agreement between Merritt & Chapman Derrick & Wrecking Co., of the first part, and F. S. Pendleton, of New York, owner of the Schr. Stanley H. Miner and her cargo, to wit: The said party of the first part agrees to raise the said Schr. Stanley H. Miner, pump her out, and deliver her, hull, tackle, apparel, and fittings, together with her cargo of lumber now on board of her, at New York or Phila. for the lump sum of thirty-seven hundred and fifty dollars (\$3,750.00) in cash, payable upon proper delivery of vessel and cargo at either New York or Phila. Port of destination to be named by party of the second part when vessel is ready to leave Southport."

Capt. Tooker then directed that claimant call off the various vessels which were present, and the Merritt & Chapman Company took charge of the wreck, succeeded in righting the vessel, suspended her alongside a Merritt & Chapman Company boat, and proceeded up the river to Wilmington, in order to obtain a satisfactory berth where further work could be done. The result of this work and of the injuries then found caused the writing of a letter, upon the 17th of June, 1907, by

the Merritt & Chapman Derrick & Wrecking Company, to Messrs. Pendleton Bros., 130 Pearl street, New York City, as follows:

"Schooner Stanley H. Miner.

"Gentlemen: Our agent, Capt. Tooker, has contracted with you to right, pump out, and deliver, either Philadelphia or New York this vessel, which was on her beam ends at Southport, N. C., for the sum of three thousand seven hundred and fifty (\$3,750.00) dollars. The statement of the diver employed by you, together with the statement made by yourselves, was to the effect that the bottom of this vessel had been patched and made tight, and it was only necessary for us to right the vessel, pump her out, and deliver. In pursuance of this arrangement and understanding, the work was commenced and the vessel righted. It was then discovered that she would not pump. The examination by our own diver then revealed the fact that 18 ft. of the vessel's keel was entirely gone, that the rudder was broken off, and about one-quarter of the deck load on lee side mixed with sand, mud, and rubbish. These conditions have entirely changed the character and extent of our work, and it has become necessary for us to patch the parts under water and remove balance of deck load, which had not been done by those employed by you, at consequent great expense and delay. Notwithstanding our discovery of so much additional necessary work to float the vessel, our agent is instructed to proceed with this work; but we must notify you that in consequence of these conditions we must hold you for the extra expense incurred. We are advised by our people now at work upon the wreck that it will require at least two weeks to complete the work of getting the vessel ready for towage to sea."

Pendleton Bros. replied upon the 25th of June, 1907, in the following language:

"Merritt & Chapman Derrick & Wrecking Co., New York—Gentlemen: Replying to your favor of the 17th, which came while the writer was away, beg to state that we made a contract with your Capt. Tooker to deliver the vessel at New York or Phil. We made no guaranty of condition of vessel. Capt. Tooker was on board the vessel, looked her over, and talked with the diver, whom he had known for years. The writer did not know anything about the vessel's bottom; but Capt. Tooker expected to need the services of a diver in floating her, because he first engaged Mr. Smith, the diver whom we employed, to stay. Then Mr. Smith decided to return home, and Capt. Tooker sent to Norfolk for a man. I inclose herewith a copy of our contract with Capt. Tooker. We hope you will not have the trouble you anticipate, and trust it will prove a profitable job."

The Merritt & Chapman Company continued, after this interchange of letters, to get the vessel into a condition in which she could be towed, and successfully brought her to the Morse Dry Dock, New York Harbor, where upon arrival she was for the first time hauled out of water and placed in a position where her starboard side and keel could be properly examined, with a result that the entire keel was found to be missing for some 22 feet forward of the deadwood at the stern, and a substantial injury, which required the replacing of several planks and two frames, was found upon the starboard side of the vessel. The amount expended upon the job by the Merritt & Chapman Company was shown by the testimony to be \$13,800.22, and, while this evidence was objected to by the claimant, both as to its relevancy and materiality, and also as to the method of proof, nevertheless no question was raised as to the correctness of the figures, and inasmuch as the claim of the libellant is for salvage, and not for the actual amount expended, it is considered that the testimony may be used for the purpose of determining the exact issues in the case.

A diver, Jacobson, testified at the trial that he had been in the employ of the Merritt & Chapman people at Wilmington; that he found that the keel immediately forward of the deadwood (but 18 feet from the sternpost) was missing for some 20 feet, leaving a space where he could thrust his arm up between the frame of the vessel. This injury, and also the extensive break upon the starboard side of the vessel, were discovered while the boat was at Wilmington, and just before the writing of the letter of June 17th above set forth. It is evident that the condition of the keel must have been the basis of discussion at the time the contract was entered into between Mr. Pendleton, the claimant, and Capt. Tooker, for Tooker asked some questions as to what had been learned of the keel. But there is no claim on his part, or on the part of any other person, that he ever sought information as to the starboard side of the vessel, which was down upon the mud at the time the contract was made. The injuries to the keel were much more extensive than had been anticipated, and caused a great deal of the extra expense and work necessary to raise the vessel and get it to New York. But the great injuries to the starboard side also caused a large outlay for work and repairs, and it is hardly possible to determine how much of the increased expense was due to the unknown injuries to the keel, and how much to the injuries on the starboard side, which were certainly a part of the risk taken by the libellant in making the contract.

But it is claimed by the libellant, as a basis for the entire action, that fraud was present, and that the contract itself was thereby vitiated, or void ab initio, or that there was a mutual mistake of fact, in that it is argued that neither Capt. Tooker nor Mr. Pendleton knew of the conditions which were subsequently found, that both depended upon the representations which had been made by the diver, Smith, and that both were dickering for definite services upon the assumption that the only work necessary was to right the vessel, pump her out, and tow her to New York. There is no evidence in the case as finally submitted to indicate deliberate fraud. Capt. Tooker says he was told that the keel was all right so far as they knew. Pendleton had no information at all as to the injuries found, and Smith shows in his testimony later that both the work upon and examination of the vessel only progressed to a certain point, when she was thrown over by a storm into such a position that no further work could be done in that locality until she was righted. In fact, Smith testifies that the vessel was not ready to pump out, but that he and Mr. Guilford Pendleton both agreed that the diver's work should stop until the vessel could be brought into an upright position and into a better place for work.

It can be assumed as a premise that where two parties are entering into a contract to perform specific work, and neither of the parties has knowledge of the facts actually existing, and a contract results which proves to be an agreement involving matters essentially different from the work which the parties had in mind at the time, no agreement can have been reached as to the real contract involved, and hence the agreement which was entered into would not be enforced by a court. The reason for this is that the parties' minds have not come to an

agreement about the matter, which proves to be the subject of the contract, and in such cases either party would be relieved from performance if the mistake were discovered in time. Where the court allows such a contract to be pushed to one side for such a mistake of fact, and where an implied contract can be substantiated, quantum meruit may be made the basis of recovery, if the remedy be pursued in the proper manner and unjust enrichment can be shown.

In the present instance the libelant has claimed a reward for salvage services in uprighting, repairing, pumping out, raising, and towing the Miner to New York City. It has alleged and shown that she was in a wrecked condition, and has based its claim for salvage upon evidence which might have been presented if the facts had allowed a quantum meruit claim. The claimant has answered by setting up a contract which he alleges covered the same services. The libelant has then, in a reply, endeavored to interpose a release from any liability upon the contract, or, rather, an affirmative defense that the contract was never binding, and has reaffirmed his right to recovery for what he did in the way of salvage. It may be incidentally noted that the claimant interposed an indefinite counterclaim for certain damages and delay; but no evidence of any such cause of action was shown, and this can be disregarded in the case. The issue as thus framed was answered "Ready," and upon the trial the claimant moved to dismiss on the ground that the libelant should have brought an action in equity to rescind or reform his contract and to recover upon an accounting, or that he should have brought his action in the state court for fraud and for damages, if he claimed the right to be released from the contract on that ground.

The pleading adopted by the libelant is similar to that approved by the court in the case of *The Silver Spray's Boilers*, 1 Brown's Adm. 349, Fed. Cas. No. 12,857, which calls attention to the fact that admiralty will take jurisdiction where an accounting is incident to the principal cause of action, citing *The Emma B.* (D. C.) 140 Fed. 771, and *Benedict's Admiralty*, § 263a. But, upon general principles of pleading, the parties seem to be properly before the court, and the court would seem to have jurisdiction. The libelant does not ask for damages, but for salvage. It has put in evidence the amount which it expended, not as a basis for computing the amount of recovery, but for showing the value of its so-called salvage service. The claimant has denied that the services can be taken out of the contract, citing *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413, in which it was held that salvage contracts in general will be enforced, and not set aside, "unless corruptly entered into, or made under fraudulent representations, a clear mistake, or suppression of important facts, * * * or under other circumstances amounting to compulsion, or when their enforcement would be contrary to equity and good conscience."

An admiralty court has equitable jurisdiction, in the sense of applying rules of equity. As a matter of legal pleading, such an affirmative defense as was interposed by the libelant to the affirmative allegation of the existence of a contract is like the issue raised upon a

counterclaim, and even under code pleadings is recognized (section 514, Code Civ. Proc. N. Y.); and while an action to reform a contract or for an accounting based upon fraud may be equitable, nevertheless fraud itself is a valid defense, and the court can see no reason why the issue presented in the present action could not be disposed of properly. But in any event the court had jurisdiction of the parties, of the vessel, and of the claim set up by the libelant. The point was apparent upon the pleadings, and, inasmuch as it does not seem to absolutely oust the court of jurisdiction to try the salvage claim, would seem to have been waived by bringing the case on for trial before any objection to the action of the court was made. We must therefore return to the issue shown in the testimony, and decide whether the libelant was relieved from the performance of the alleged contract which it admittedly entered into, and whether such a mistake of fact existed as would compel the court to consider the contract void ab initio.

But first it must be noted that the libelant has urged that the contract is void, not only because of the charge of intentional fraud, but in that the claimant is said to have made representations which he intended to be taken as true, which were in fact not true, and by which he must be held bound to an equal extent as if he had known them to be false at the time. An examination of the testimony, however, shows that anything of this nature was merely in the way of argument or inducement, and was merged in the written contract, and the testimony of the libelant's witnesses themselves, especially that of Capt. Tooker, negatives the idea that positive statements were made by Mr. Pendleton which could be construed as guaranties, or propositions of what he asserted were facts, rather than inferences from the conditions which were apparent. No statements false in fact, or concealment of matters known to the claimant, have been shown, which would bring the case within the doctrine of *The Kingalock*, 1 Spinks, 263, or *The Clandeboye*, 70 Fed. 631, 17 C. C. A. 300.

But as to the actual statements of fact upon which the contract was made, and as to the assumptions on the part of each party to the negotiations as to the work to be done, a somewhat different situation exists. If the contract had been entered into, upon the request of the claimant or the offer of the libelant, to perform certain specific acts, and it had been proven that other work was necessary and that a different condition of facts existed, the parties would seem to have entered into the alleged agreement under a mistake of facts upon which the agreement was based, and would have been justified in notifying the claimant that a contract to do what was required had never been made, and would then have been in a position to claim salvage, or to force a new agreement for the work yet undone, with compensation for what had been expended. But in the present instance both parties were viewing the situation from what they knew and could ascertain by inspection.

It is impossible to hold that either the diver or Mr. Pendleton made a definite statement that the entire keel had been inspected, in view of the testimony of the various witnesses as to just what the diver had

done, and the condition of the keel from about amidships back aft to the beginning of the deadwood was a matter of opinion, as was also the work necessary to make the starboard side tight enough to raise the vessel by pumping. This side proved to have the seams open and to have a number of planks thrust out or injured, and yet the work necessary upon this side was certainly included in the proposition to raise, pump out, and deliver the vessel. Capt. Tooker began his negotiations with the proposition to take the contract for \$10,000, Mr. Pendleton offered \$1,500, and the entire negotiation was based upon speculation, rather than upon a definite estimate of performing certain services. Any amount of persuasion and argument, based upon the fair appearance of the port side and the injuries which the diver had discovered, were inducements as to which Capt. Tooker assumed the risk, and which were merged in the contract, which he made to cover everything necessary in raising, pumping, and delivering the vessel.

The libellant, therefore, must be restricted to the admitted liability of \$3,750, and with interest, inasmuch as no tender was made, even though its recovery has been delayed by its own suit. Upon the entire case, however, and in view of the natural deductions of the libellant prior to the taking of testimony in court, no costs to either party will be awarded.

OMAHA ELECTRIC LIGHT & POWER CO. v. CITY OF OMAHA et al.

(Circuit Court, D. Nebraska. July 17, 1909.)

1. CONSTITUTIONAL LAW (§ 205*)—GRANT OF RIGHT TO USE STREETS—"SPECIAL PRIVILEGE OR IMMUNITY.

A franchise or privilege granted by a city to an electric company to use its streets, not being exclusive, is not a "special privilege or immunity," prohibited by Neb. Const. art. 3, § 15.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 595; Dec. Dig. § 205.*

For other definitions, see Words and Phrases, vol. 7, p. 6586.]

2. ELECTRICITY (§ 4*)—ELECTRIC COMPANIES—FRANCHISE TO USE STREETS—DURATION.

A franchise granted by a city to an electric company to use its streets is not necessarily limited in duration to the corporate life of the company.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. ELECTRICITY (§ 4*)—ELECTRIC COMPANIES—FRANCHISE TO USE STREETS—CONSTRUCTION.

A city ordinance, passed in 1884, granting to a company the right to construct and maintain in the streets poles and wires "for the purpose of transacting a general electric light business," does not confer the right to use the streets for the transmission of current for power or heating purposes; such uses being practically undeveloped and little known at that time.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CONTRACTS (§ 170*)—CONSTRUCTION—INTERPRETATION BY PARTIES.

The interpretation given to contracts by the parties, as shown by their acts, can only be considered in construing the contract when it is ambiguous and susceptible of different meanings.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

5. ELECTRICITY (§ 4*)—GRANT OF RIGHT TO USE STREETS—CONSTRUCTION—ESTOPPEL.

A city, which granted the right to a company to use its streets for electric light purposes, is not estopped to deny that the grant conferred the right to use them for the transmission of current for other purposes because, with knowledge that the company was so using them, it passed general ordinances regulating such use, nor because, under an ordinance imposing a gross earnings tax on all companies furnishing electricity for lighting, heating, and power purposes, it accepted taxes from such company based on its income from electricity furnished for power as well as lighting purposes.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.*]

In Equity.

W. W. Morsman, for plaintiff.

Harry E. Burnam, I. J. Dunn, and John A. Rine, for defendants.

W. H. MUNGER, District Judge. In 1884 the city of Omaha was a city of the first class, governed by a legislative charter which gave to the corporate authorities of the city full power, control, and authority over the streets and alleys of the city. In December, 1884, the city council of said city passed an ordinance, which was duly approved by the acting mayor of the city, which ordinance gave to the New Omaha Thompson-Houston Electric Light Company, or assigns, the right to erect and maintain poles and wires, with all the appurtenances thereto, upon or over the streets, alleys, and public grounds of said city, "for the purpose of transacting a general electric light business," under such reasonable rules and regulations as might be provided by ordinance. The provisions of the ordinance were accepted by the New Omaha Thompson-Houston Electric Light Company, and an electric light plant established in the city of Omaha; the electrical current therefor being transmitted over wires strung upon poles erected upon the various streets and alleys within the city. The application of electric power to stationary machinery was not much understood or developed in 1884, and for several years thereafter. As appliances were invented for such purposes, they were used by said electric light company.

Ordinances have subsequently been passed by the city, of a general nature, requiring that all companies using or desiring to use electricity for light, power, and heating purposes should be governed by certain regulations under the direction of the city electrician. A subsequent ordinance was passed, requiring all companies furnishing electricity for lighting, heating, and power purposes to pay a certain percentage of gross receipts to the city. In 1903, shortly before the termination of the corporate existence of said New Omaha Thompson-Houston Electric Light Company, it assigned all its property and rights acquired by virtue of said ordinance of 1884 to complainant,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and for the years 1902, 1903, 1904, 1905, and 1906 complainant paid to the city treasurer of the city of Omaha the percentage upon its gross receipts for electrical energy furnished by it for lighting and power purposes, and complainant and its predecessor have invested a large sum of money in producing the electrical current for power and heat, in addition to what would have been required for lighting purposes only.

The city has also by ordinance required all companies transmitting electricity for heat, light, and power purposes to place within a certain prescribed district within the city all wires so used in conduits under the ground. In May, 1908, the city council, by resolution approved by the mayor, directed the city electrician to disconnect, or cause to be disconnected, on or before July 1, 1908, all wires leading from the conduits or poles of the Omaha Electric Light & Power Company, transmitting electricity to private persons or premises, to be used for heat or power, and to take such steps as would prevent said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes. The city electrician notified complainant of his purpose to carry out the provisions of said resolution. Thereupon complainant instituted this action to enjoin the city and said Michaelson, as city electrician, from enforcing the provisions of said resolution, or otherwise interfering with complainant in its business of furnishing, under the provisions of the ordinance of 1884, electricity for light, heat, and power purposes.

There are no controverted questions of fact, the case presenting simply questions of law. I think the city had authority, in 1884, under the general power given it over the streets and alleys within the city, to pass the ordinance in question, granting to the New Omaha Thompson-Houston Electric Light Company the privilege given by said ordinance. The privilege given by said ordinance, not being exclusive, was not a special privilege or immunity, within the meaning of section 15 of article 3 of the Constitution of the state. *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654; *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736. Nor was the grant to the New Omaha Thompson-Houston Electric Light Company, or assigns, limited in duration to the corporate life of said company. *Detroit Citizens' Street Ry. Co. v. City of Detroit*, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667; *City of Detroit v. Citizens' St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592. The ordinance of 1884 was limited in its terms to a "general electric light business," and did not grant to the company authority for the transmission of an electrical current for purposes other than lighting. *Chicago General Street Ry. Co. v. Elliott* (C. C.) 88 Fed. 941; *City of Toledo v. Western Union Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730. See, also, section 907, 3 Abbott on Municipal Corporations.

It is, however, urged on the part of complainant that the ordinance in question was a contract; that the parties by their acts and conduct have construed the ordinance as giving such authority, and the con-

struction so given by the parties should be adopted by the court. The rule, however, I think, is well settled that the interpretation given contracts by parties, as shown by their acts, can only be considered when the contract is ambiguous and susceptible of different meanings. *Russell v. Young*, 94 Fed. 45, 36 C. C. A. 71; *Railroad Co. v. Trimble*, 10 Wall. 367-377, 19 L. Ed. 948; *Delaware Securities Co. v. Metropolitan Trust Co. (C. C.)* 146 Fed. 600. The ordinance in question is not to my mind ambiguous, but plain and specific, limiting the grant to general electric light purposes. In construing contracts and ordinances of this nature, the general rule is that they should be construed strictly in favor of the public, yet they should receive a just and rational interpretation and the court endeavor to ascertain from the language used the true intent and meaning of the parties. To do this we should place ourselves back to the time of the passage of the ordinance in question, consider the then conditions, and ascertain what the city council at that time intended, and give the ordinance that construction, and not such a construction as "private interests may now desire, nor such as public interest, after the lapse of years, may desire."

The evidence shows, as before stated, that at the time the city council acted in 1884 the application of electric power to stationary machinery was not much understood or developed, and was not for several years thereafter. I cannot think that, in granting in 1884 the right to transmit electricity through the streets and alleys of the city for general electric lighting purposes, it was in the mind of the city council, or any of the parties, or that they for a moment contemplated or intended, that the ordinance in question granted the right to transmit an electric current for all purposes and uses to which the inventive mind might in the future apply it, even though such new uses might be equally beneficial to the public. Had such been the intention, the word "light" would have been omitted. The words "a general electric light business," as used in the ordinance, show clearly an intention to limit the use to which the electric current was to be applied.

No representations or conduct upon the part of the city are shown which would constitute an estoppel. Whether the ordinance granted authority to transmit electricity for other than lighting purposes was as well known to complainant and its predecessors as to the city, and the essential elements to constitute estoppel are not shown. *Crary v. Dye*, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595. Nor do I think the payment by complainant, and the receipt by the city, of a percentage upon complainant's gross income, derived from the sale of electricity for power as well as lighting purposes, constitutes a valid ratification of the assumed authority of complainant. The law is, I think, fundamental that a power required to be given by a city by ordinance can only be modified or enlarged by ordinance. The payments made by complainant were merely voluntary payments, made with full knowledge of all facts and its legal rights, and upon no representations or conduct by the city which estops it from denying that complainant's rights are greater than those expressly stated in the ordinance of 1884.

The conclusion above reached renders it unnecessary to determine whether or not the ordinance of 1884, containing no time limit, consti-

tuted a perpetual, irrevocable contract, or, as said in *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236, was a mere privilege, revocable at will.

The case will be dismissed for want of equity.

CROWLEY v. HURD.

(District Court, D. Massachusetts. July 13, 1906.)

No. 1,441.

1. SHIPPING (§ 47*)—DEMURRAGE—CONSTRUCTION OF CHARTER—CHANGE OF PORT OF DELIVERY.

Where a charter of a vessel to carry a cargo of ties to Boston, to be discharged with customary dispatch, was changed by consent of the parties to make the port of discharge New York, instead of Boston, the other terms of the charter to remain unchanged, the effect was to substitute the customary dispatch of the new port, if there was any difference between that and the old.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 47.*]

2. SHIPPING (§ 47*)—DEMURRAGE—CUSTOMARY DISPATCH IN DISCHARGING.

The rules of a maritime association of a port relating to the time allowed for discharging cargo are not conclusive as to what constitutes customary dispatch at such port, as applied to a charter the parties to which were not members of the association.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 47.*]

3. SHIPPING (§ 177*)—DEMURRAGE—CUSTOMARY DISPATCH IN DISCHARGING.

Customary dispatch at the port of New York for discharging a cargo of railroad ties *held* to require that the vessel be given a berth within 24 hours after she reported, and be discharged thereafter at the rate of 50,000 feet, board measure, each working day.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 582; Dec. Dig. § 177.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

4. SHIPPING (§ 177*)—DEMURRAGE—DELAY IN DISCHARGE—REFUSAL OF BERTH.

A chartered schooner laden with ties *held* within her right to decline a berth at New York, where she would have projected some distance beyond the end of the pier, and thus been in danger from currents and from other vessels, and where the cost of discharging, to be paid by the vessel, would have been increased because of her inability to lie alongside for the whole length.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 581; Dec. Dig. § 177.*]

5. SHIPPING (§ 174*)—DEMURRAGE—PARTIES LIABLE.

Where the consignee of a cargo, named in the bill of lading, which ran to him or his assigns, did not assign the same, and received the cargo, and paid the freight, he cannot avoid liability for demurrage on the ground that he acted only as broker in the transactions.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 571; Dec. Dig. § 174.*]

In Admiralty.

Carver & Blodgett, for libellant.

Russell & Russell, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DODGE, District Judge. Libel for demurrage. A charter party was made July 25, 1902, on behalf of the schooner J. C. Strawbridge, for a voyage from Wilmington, N. C., to Boston with a cargo of cypress ties. The charter party was signed on her behalf by the libellant as her agent. There is no dispute that he was her agent, and duly authorized to act for her owners in the management of the vessel. The charterer was the Hall Tie & Lumber Company, whose name was signed "by J. A. Hurd & Co., per authority," and it was so signed by the respondent, Joseph A. Hurd, of Boston, who then did business under the name of Joseph A. (or J. A.) Hurd & Co., and was duly authorized by the Hall Tie & Lumber Company to sign as above.

The schooner went to Wilmington, there took on board a cargo of ties in accordance with the charter, and her master thereupon gave a bill of lading for it, dated August 22, 1902. This recited that the schooner was bound for Bay Ridge, New York, N. Y., instead of Boston, as agreed in the charter party, and the undertaking on the part of the schooner, as expressed in the bill of lading, was to deliver the cargo "at the aforesaid port of New York" "unto Jos. A. Hurd & Co., or to their assigns," he or they paying freight at 14½ cents per tie, as per charter party, "with all conditions and without prejudice to charter party dated in Boston July 25, 1902." It is admitted by the answer that the substitution of Bay Ridge for Boston as the port of delivery of the cargo was made at the respondent's request. It was agreed to at Wilmington by the master upon the condition that the freight which he was to receive and all the other terms of the charter party should be preserved without change as they stood.

The schooner brought the cargo to New York, and was ordered to deliver it at the wharves of the Long Island Railroad at Bay Ridge. She reported there, and was ready to deliver the cargo, on September 1, 1902. Her discharge was not completed until September 25, 1902. The libellant claims that nine days' demurrage, at least, is due, at the charter rate of \$75 per day.

The provisions of the charter regarding discharge were that the "lay days for discharging" should be, commencing from the time the captain should report his vessel ready to discharge, "customary dispatch for discharging," and also that the above rate of \$75 per day should be paid for each and every day's detention by default of the charterer.

The first question is: Did the schooner have customary dispatch in discharging? If there is any difference between customary dispatch as understood at Boston and customary dispatch as understood at New York, I have no doubt that it is the New York meaning of the term with which this case is concerned. By their agreement, made when New York was substituted as the discharging port, that the other terms and conditions of the charter party should be preserved, I cannot believe that the parties intended that the customs or understanding at Boston were to govern a discharge to take place at New York. Their agreement to change the discharging port must be taken as involving an agreement to adopt the custom of the new, instead of the custom of the original discharging port, if any difference existed

between them. This seems to me the natural and obvious construction of their contract as it stood after the bill of lading had been given.

What, then, was customary dispatch in discharging, at New York, in the case of such a cargo as this? The libellant offered the printed rules of the Maritime Association of the Port of New York, published in 1905, and contended that customary dispatch was as stated in rule 9 of the "Rules Regulating the Delivery and Receipt of Southern Pine Cargoes, etc., in force February 13, 1902," on pages 80 and 81 of said printed rules. Rule 9 is as follows:

"Rule 9.—Regulating the Delivery of Railroad Ties.

"Consignees shall have twenty-four hours (Sundays and legal holidays excepted) after the vessel arrives, and the master or the vessel's agent reports, in which to furnish the vessel with a berth where she can discharge.

"At the expiration of said twenty-four hours vessel's lay days shall commence, except that, in case consignees have given orders within the allotted time, and vessel fails to report at berth before noon, her lay days shall not begin until the morning following.

"Lay days allowed consignees for receiving cargo shall be as follows, viz.:

"Twenty-four hours to furnish a berth as provided in above rule, and one running day (Sundays and legal holidays excepted) for every fifty thousand (50,000) feet, board measure, of the ties."

The above rule was objected to by the respondent, but admitted in connection with other evidence tending to show that it stated a custom prevailing and recognized in New York.

The parties do not appear to have been members of the association, so as to be bound as such by its rules. The mere fact that the association had adopted the above rule does not, of course, suffice to make it part of those customs of the port of New York in view of which contracts for delivery of cargoes there must be assumed to be made. But, on the evidence before me, I think it is sufficiently shown that there is a custom of New York, governing the discharge of cargoes of ties there, which is, to some extent at least, substantially in accordance with the provisions of the rule quoted above.

Three shipbrokers, each of long experience in carrying on their business in New York, and each accustomed to deal with cargoes of ties to be delivered there, testified as witnesses for the libellant that the customs of the port required consignees of such cargoes to find a berth for the vessel within 24 hours after arrival, and did not require the vessel to wait her turn after all other vessels which might have arrived before her with cargoes for the same consignee. And the agent of the Long Island Railroad, in charge of its wharves at Bay Ridge, where this cargo was received, who was accustomed to receive cargoes of ties there, and who was in charge there when this cargo was received, called as a witness by the respondent, admitted on cross-examination that in this respect the rules represented the custom of New York as he understood it, and that he understood, also, that the rules were to govern the discharge of this cargo. The libellant's evidence on this point was not contradicted.

In *Bartlett v. Cargo of Lumber*, 41 Fed. 890, decided in the District Court for the Eastern District of New York in 1890, it was held that the custom of that port in regard to discharging cargoes of lumber required the vessel to wait her turn. A similar decision, involving the

usage at Boston with regard to lumber cargoes, was made in this court in the same year. *Bellatty v. Curtis*, 41 Fed. 479. But in neither of these cases was there any charter party, and the bill of lading, in both of them, contained no provision whatever on the subject of demurrage. An agreement that the vessel should have "customary dispatch," inserted, as was the case here, in the charter party as the agreement of the parties in regard to lay days for discharging, must, I think, be considered as presumably intended to secure for the vessel something more than the mere right to be discharged in turn, which she could claim in any event, without any express agreement. Nor can it be regarded as at all impossible that, with regard to cargoes of ties, a custom may have become established since 1890 different from that which then prevailed with regard to cargoes of lumber in general. I think the agreement of the parties must be construed as requiring the consignee or his representative to provide a discharging berth within 24 hours from the time of report, or on or before September 3d; September 1st being a holiday.

As to that part of rule 9 which requires the discharge to proceed at the rate of 50,000 feet, board measure, per running day, Sundays and legal holidays excepted, after the vessel is in her berth, I am less well satisfied that it can be said to set forth what is a settled custom of the port, because, while the libellant's witnesses referred to testified that such was the fact, and no New York witness was called to contradict them, I think that upon this point there is more reason to apprehend that their testimony may be based only on the fact that charters for such cargoes to be delivered at New York very often adopt the rules by express reference. Nor does it so clearly appear that the railroad considered itself bound by this part of the rule as by that part which requires a berth to be provided within 24 hours. I have no doubt, however, that, once in her berth, the custom of the port requires that a vessel entitled to dispatch must be discharged with reasonable dispatch, and on the evidence, in the absence of any unusual circumstances excusing the consignee, this would require the discharge to proceed, so far as he was concerned, at a rate not less speedy than that prescribed by the rule. This vessel was in fact discharged very nearly at that rate. The discharge began on September 12th and was completed at 2:30 p. m. on September 25th. September 14th and 21st were Sundays, so that a little less than 12 days were actually occupied. As there were 14,885 ties, each of 36 feet, board measure, a discharge at the rate prescribed by the rule would have taken 10.71 days, and it appears that the actual discharge was delayed part of one afternoon while the vessel's stevedore shifted his gear from one hatch to another, and on other occasions by rain, during which both parties appear to have been satisfied to suspend operations. In determining the meaning of the charter party as to the time which it allowed the consignee to occupy in discharging the vessel without becoming liable for demurrage, I think I am justified by the evidence in finding that reasonable dispatch would be at the rate of 50,000 feet per day, and that the lay days, therefore, expired 24 hours after report and 10.71 days thereafter. This makes the lay days expire, not counting Sunday, September 14th, on September 15th, and makes the demurrage days

begin with September 16th, and leaves 9 days at least for which the schooner is entitled to compensation.

It is contended by the respondent that a discharging berth was offered the schooner on September 4th, which she refused to take, and that her refusal prevents her from recovering for any delay thereby occasioned. There is no dispute that the berth offered on the 4th was a berth astern of the Herbert Fuller, a vessel which was being discharged at the wharf when this schooner reported. There was some space alongside the wharf ahead of the Fuller, between her bow and the shore. Into this the schooner made some attempt to get, but found that she could not safely do so unless the Fuller were moved astern, and this was not done on account of objection by the Fuller. There was space alongside the wharf astern of the Fuller, but not enough for the schooner to lie there clear of the Fuller with her whole length alongside the wharf. She could have lain there, clear of the Fuller, with some part of her length projecting beyond the wharf, and this was the berth offered her on September 4th as above. If she had occupied it, her forward hatch would have been the only hatch in such position as to permit discharging from it, and to discharge the deck load the ties would have had to be carried forward on the vessel, instead of being put directly over her side upon the wharf. This would have increased the stevedore's charges, which were to be paid by the vessel. I find, also, on the evidence, that if she had occupied the berth referred to she would have projected astern beyond the end of the wharf sufficiently to raise a reasonable question as to her safety, by reason of currents which ran past the end of the wharf, and from the passage of other vessels. On these grounds the berth was declined. I find that they were sufficient grounds to justify the declination, and that the berth was not, under the circumstances shown, a reasonably safe and convenient one for the schooner to occupy while discharging.

The respondent refused to pay a bill for $8\frac{1}{2}$ days demurrage sent him November 5, 1902, on the ground that, if there was any delay, it was on account of the railroad company, and not on his account, as he had turned the vessel over to them. This he stated in a letter to the libellant dated November 6, 1902 (Exhibit 9). And the answer sets up that the respondent had no interest in the cargo, having acted only as a broker in obtaining the charter party and bill of lading.

Whatever the respondent's interest in the cargo, he and no one else is the consignee named in the bill of lading. By the bill of lading the cargo was to be delivered to him or his assigns, and it is not claimed that he ever assigned it. The delivery is therefore to be considered as made to him, and the railroad company, in receiving it, must be regarded as his agent. There is nothing in the case which is sufficient, in my opinion, to show any notice to the vessel that any consignee other than the respondent himself was accepting delivery of the cargo, or intending to accept it. In an interview, on or about September 3d, between the respondent and the master of the schooner, the respondent, in reply to the master's complaint that no berth was then available, told the master that he would send a representative to New York to see about the matter, and did not in any way intimate that the

delivery was to be to any one other than himself. To letters written him by the master on September 11th and 14th (Exhibits 3, 4), complaining of the delay and warning him that a demurrage claim would arise, he replied by a letter, dated September 16th (Exhibit 5), that he had taken the matter up with the Long Island Railroad and asked them to give the vessel all possible dispatch, again with no intimation that the cargo was to be delivered to or received by any one but himself. Finally, upon the discharge of the vessel, the respondent paid the freight, with no attempt to claim that any one but he was bound to pay it. I should be strongly inclined to hold, on the evidence, that he was the legal owner of the cargo during all this time. But, whether he was owner or not, since he accepted the delivery as consignee under this bill of lading, he is bound by the bill of lading and its reference to the charter party, not only to pay the freight, but any demurrage which may have accrued in the vessel's favor. *The Elida* (D. C.) 31 Fed. 420; *Sutton v. Housatonic R. R. Co.* (D. C.) 45 Fed. 507; *Gage v. Morse*, 12 Allen (Mass.) 410, 90 Am. Dec. 155.

The remaining defense set up in the answer is that the libelant was notified during the discharge that the respondent would not be responsible for any demurrage that might be claimed, should the cargo be discharged free of the vessel's lien therefor; but that the cargo was nevertheless discharged without the assertion of any lien. Such a notice, if seasonably given, might be construed as a refusal by the consignee to receive the cargo at all, unless all claim upon him save for freight should be waived; but upon the evidence I am entirely satisfied that no such notice was ever given. On the contrary, the evidence leaves no doubt in my mind that before or during the discharge both the master and the libelant himself were told by the respondent, in substance, in answer to inquiries by them whether the cargo was to be proceeded against for the demurrage claim, not to hold or delay the cargo, that he did not want any trouble of that kind, and that he would be responsible.

There is to be a decree in favor of the libelant for nine days' demurrage at \$75 per day, or for \$675, with costs.

UNITED STATES GYPSUM CO. v. HOXIE et al.

(Circuit Court, N. D. Iowa, E. D. August 14, 1909.)

No. 265.

1. EQUITY (§ 197*)—CROSS-BILL—RIGHT TO FILE—PERSONS NOT PARTIES.

It is a rule of equity pleading prevailing in the federal courts that one who is not a party to a suit cannot file or join in a cross-bill or other pleading to the merits until he has been made a party by some recognized method of equity procedure.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 458; Dec. Dig. § 197.*]

2. CORPORATIONS (§ 630*)—DISSOLUTION BY ACT OF STOCKHOLDER UNDER IOWA STATUTE—RIGHT TO SUE AFTER DISSOLUTION—SUIT TO SET ASIDE JUDGMENT—PARTIES.

Under Code Iowa, §§ 1617, 1629, which provide that, on the dissolution of a corporation by the voluntary act of the stockholders, notice shall be given as is required on its organization, and that it may nevertheless continue to act for the purpose of winding up its affairs, an allegation in a pleading that prior to the time a corporation commenced an action and recovered a judgment it had been dissolved by the consent of its stockholders, without more, does not state any ground for setting aside such judgment for want of its capacity to sue, nor relieve the pleader from the necessity of making it a party to the suit; there being no allegation that it has transferred the judgment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2482; Dec. Dig. § 630.*]

In Equity. On demurrer to cross-bill.

C. C. Cole, for cross-complainants.

Dawley & Wheeler and Edwards & Longley, for defendants.

REED, District Judge. The original bill is by the United States Gypsum Company, a New Jersey corporation, to establish an equitable right and title to a judgment recovered by the Carbon Plaster Company, an alleged corporation of Iowa, in the district court of that state in and for Blackhawk county, July 13, 1907, for some \$18,500 and interest, against N. J. Berkley and Henry Meyers, defendants in that bill, and John Thee, who is not made a party thereto. The defendants N. J. Berkley and Henry Meyers and said John Thee, without leave of court, have filed a cross-bill against the original complainant, the United States Gypsum Company and A. J. Edwards, Alfred Longley, and Jesse Gouge, defendants in the original bill, in which it is alleged in substance that the judgment against the cross-complainants in the state court, which it is alleged in the original bill equitably belongs to the complainant therein, was fraudulently obtained by the defendants A. J. Edwards, Alfred Longley, and Jesse Gouge, in the name of the Carbon Plaster Company, upon a cause of action alleged to exist in favor of that corporation, when in fact there was no such corporation then in existence, it having been dissolved, as alleged, in February, 1902, prior to the commencement of that suit, by the unani-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mous consent of all of its stockholders; and affirmative relief is prayed that said judgment be canceled and set aside, and that the amount thereof paid by them to the sheriff of Blackhawk county be returned to the cross-complainants. The defendants A. J. Edwards, Alfred Longley, and Jesse Gouge demur to the cross-bill, upon the ground that the Carbon Plaster Company is an indispensable party to the complete determination of the matters alleged in that bill and is not made a party thereto.

A serious, if not fatal, defect in the cross-bill, is that one of the complainants therein is not a defendant or party in any way to the original bill. The rule is elementary that a cross-bill can only be filed by a defendant or defendants in the original bill against the complainant therein, or other defendants, or against both, touching matters alleged in the original bill. Story's Eq. Pl. (8th Ed.) § 389 et seq.; Bates' Fed. Eq. § 374 et seq.; Street's Fed. Eq. §§ 1046-1049. Ordinarily new parties cannot be brought into a suit as defendants in the federal court by a cross-bill. If the interest of a defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or the bill is dismissed. *Shields v. Barrows*, 17 How. 130-144, 15 L. Ed. 158; *Bank v. Carrollton Railroad*, 11 Wall. 624-632, 20 L. Ed. 82; *Smith v. Woolfolk*, 115 U. S. 143-148, 5 Sup. Ct. 1177, 29 L. Ed. 357. This rule is generally followed in the federal courts, though it may not be in the state courts, especially in those states where a statute authorizes third parties to be made defendants to a cross-bill, as is the case in Iowa. Code Iowa 1897, § 3574.

This question, however, need not now be determined; for it does not arise in this case, and it is plain that one not a party to a suit in equity in the federal court is not permitted to file a cross-bill, or other pleading to the merits, therein, until he becomes a party to the suit in some recognized mode of equity procedure. The complainant in the original bill has not seen fit, for some reason, to make the cross-complainant John Thee a party defendant to that bill. It is true that in the body of the bill John Thee is referred to as one of the defendants therein; but he is not in fact named as a defendant, either in the caption of the bill or in the subpoena, and no relief is prayed against him, and no service has been made upon him. He is not, therefore, a party to the original bill and cannot rightly file, or be a party complainant to, a cross-bill therein.

If this difficulty should be overlooked, or if it could be avoided, the question would remain: Is the Carbon Plaster Company, alleged in the original bill to be a corporation of Iowa, and as such to have recovered in the state court the judgment in question against the cross-complainants, an indispensable party to this cross-bill? If the judgment is absolutely void because the Carbon Plaster Company had ceased to exist before its rendition, that fact would be available as a defense to the original bill upon answer of the judgment defendants, or such of them as are defendants to that bill. But are the cross-complainants entitled to the affirmative relief, prayed by them, that the judgment be canceled and set aside, and the amount thereof, paid

by them under duress, as they allege, to the sheriff of Blackhawk county, returned to them, in the absence both of the Carbon Plaster Company, or its stockholders, and the sheriff to whom they paid the judgment? If the judgment had in fact been assigned to the United States Gypsum Company by the Carbon Plaster Company, it may be that neither the latter named company nor its stockholders would be an indispensable party or parties to the suit, inasmuch as the company would then have parted with all of its interest in the judgment; but it would be a proper party, if still in existence. It is not, however, alleged, either in the original bill or in the cross-bill, that the judgment had been assigned to the original complainant. That complainant only alleges that it was the owner, either by assignment from the Carbon Plaster Company of the cause of action upon which the judgment was recovered or by its purchase of all of the stock of that corporation, and that it was therefore the equitable owner of the judgment so recovered, and entitled to the amount that has been paid, or that may be collected, thereon. The Carbon Plaster Company, therefore, under the allegations of the original bill, is an indispensable party to that bill, and it is made defendant thereto.

The cross-bill alleges, in substance, that the Carbon Plaster Company had assigned and transferred to the United States Gypsum Company all of its property and assets of every description (save some specified exceptions not necessary to notice); that its stockholders had transferred their stock to the United States Gypsum Company, and received therefor the stock of that company; and that the Carbon Plaster Company thereby became merged in the United States Gypsum Company, and was by the unanimous consent of all of its stockholders dissolved prior to the commencement in its name of the suit in the state court which resulted in the judgment in question against the cross-complainants. If it is true that the Carbon Plaster Company was dissolved, and had ceased to exist, prior to the commencement of the suit in the state court, the question naturally arises why that defense was not urged by the cross-complainants in that suit. Plainly, the Carbon Plaster Company is, or its stockholders are, vitally interested in the relief prayed in the cross-bill, and the corporation, if in existence, is, and, if not, its stockholders are, indispensable to the full and complete determination of the questions alleged both in the original and in the cross-bill.

But it is said in behalf of the cross-complainants that by the demurrer to the cross-bill it is admitted that the Carbon Plaster Company has been dissolved, and that it cannot, therefore, be rightly made a party thereto, any more than it could rightly sue or have been sued in the state court. If the corporation was in fact dissolved by unanimous consent, as authorized by the statute of Iowa, then its stockholders would, upon such dissolution, become owners in common of the assets of the corporation, including the alleged cause of action upon which the judgment was recovered in the state court against the cross-complainants (*Pewabic Mining Co. v. Mason*, 145 U. S. 349-356, 12 Sup. Ct. 887, 36 L. Ed. 732; *Thompson v. Lambert*, 44 Iowa, 239-243),

and they would be directly interested in the determination of the controversy presented by the cross-bill.

But is the corporation dissolved upon the facts alleged in the cross-bill? The Code of Iowa, under which the Carbon Plaster Company is alleged to have been incorporated, provides:

"Sec. 1617. A corporation may be dissolved prior to the period fixed in the articles of incorporation, by unanimous consent, or in accordance with the provisions of its articles, and notice thereof must be given in the same manner and for the same time as is required for its organization."

"Sec. 1629. Corporations whose charters expire by limitation or the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their affairs."

"Sec. 1640. Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the Attorney General in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

It is not alleged that the corporation was dissolved by a decree of court, as authorized by section 1640, above, in which event it would cease to exist for any purpose, and its property pass to the custody of a receiver, who would protect, under the direction of the court, the interests of both its creditors and stockholders (*National Bank v. Colby*, 21 Wall. 609, 614, 22 L. Ed. 687; *Pendleton v. Russell*, 144 U. S. 640-645, 12 Sup. Ct. 743, 36 L. Ed. 574; *State v. Fidelity Loan & Trust Co.*, 113 Iowa, 439, 85 N. W. 638); but the allegation is that it was dissolved by the unanimous consent or vote of all of its stockholders prior to the commencement of the suit in the state court. The demurrer admits only the facts that are well pleaded, and it may well be doubted if the averment "that the corporation has been dissolved by unanimous consent of its stockholders," without the further averment that notice of such proposed dissolution was given as required by section 1617 of the Iowa Code, is an averment of the necessary facts under that section to dissolve the corporation. Neither would the alleged sale of the entire business and most of the property of the corporation necessarily work its dissolution. That might prevent its continuing to do business, but it would not dissolve the corporation. *Price v. Holcomb*, 89 Iowa, 123-137, 56 N. W. 407.

But, if it should be conceded that the corporation was legally dissolved by unanimous consent, as authorized by section 1617 of the Iowa Code, then under section 1629 it would continue to exist for the purpose of winding up its affairs; and to this end it might rightly maintain actions at law or suits in equity to preserve its property, reduce it to possession, or convert it into money for such purpose, and until its affairs were so settled its property would continue to be the property of the corporation, and it might sue and be sued as such with reference thereto. *Muscatine Turn Verein v. Funk*, 18 Iowa, 469; *State v. Fogerty*, 105 Iowa, 32-36, 74 N. W. 754; *Dillon v. Lee*, 110 Iowa, 156-163, 81 N. W. 245. In *State v. Fogerty*, above, it is said:

"But our statute provides: 'Corporations whose charters expire by limitation or the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their affairs,' Code, § 1629. Under this section the

Skinner Manufacturing Company [the corporation whose property was there involved] continued to live for the purpose of discharging its obligations and disposing of its property. * * * The property continued that of the corporation until it was disposed of in winding up its affairs, and the corporation remained in existence for that purpose."

The conclusion therefore, is that the demurrer to the cross-bill should be sustained; and it is so ordered. The cross-complainants N. J. Berkley and Henry Meyers may answer the original bill, or stand upon their cross-bill, by the September rules, as they may then elect. It is ordered accordingly.

BENJAMIN MOORE & CO. v. AUWELL.

(Circuit Court, E. D. New York. July 30, 1909.)

1. TRADE-MARKS AND TRADE-NAMES (§§ 59, 70*)—INFRINGEMENT—UNFAIR COMPETITION.

The use by a defendant of the name "Murafresco" for a wall finish was not an infringement of complainant's trade-name "Muresco" for a similar product, nor did it constitute unfair competition, where it appeared that a number of very similar names were used in the trade for wall coverings, and that there was no imitation of complainant's packages or labels, or attempt to deceive purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. §§ 59, 70.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. On final hearing.

See, also, 158 Fed. 462.

Clifton V. Edwards (Jacob H. Shaffer, of counsel), for complainant.

Edward C. Davidson (Phillips Abbott, of counsel), for defendant.

CHATFIELD, District Judge. The complainant corporation is a house of established reputation in the business of manufacturing and selling paints, painters' supplies, wall finishes, kalsomines, etc. The firm was in business in New York City prior to the year 1892, and in August of that year made the first sales shown in the record of a certain dry powder, composed of whiting, glue, and Irish moss, to be mixed with hot water and applied as a finish for interior walls and ceilings. The corporation has used the word "Muresco" from the year 1892 as the particular name of this wall finish. The introduction of the product was so successful that it seems to have attained the greatest sale of any one article of the kind in the United States. In the year 1895 or 1896 one of the selling agents of Benjamin Moore & Co. suggested the use of an anchor as a background or device with which to make a design of the word "Muresco," and this suggestion was followed out. On the 30th of August, 1898, Benjamin Moore &

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Co. registered a trade-mark, on a application filed July 18, 1898, of the following design:



—in connection with certain language descriptive of the wall finish or kalsomine, and on June 25, 1907, they registered a trade-mark of similar design, but without limiting it to the wall finish, for use upon "dry and mixed paints and pigment colors," and in the statement accompanying the declaration it is said that the trade-mark had been continuously used since December 18, 1892. Upon the 2d of June, 1908, on an application filed February 10, 1908, and after this action had been started, the said Benjamin Moore & Co. registered a trade-mark of the word "Muresco," declaring that it had been continually used since December 18, 1892, and was appropriated to a dry powder used for a nonwashable wall finish.

It appears from the testimony that the word "Muresco," as used by Benjamin Moore & Co., was the trade-name of this wall covering, and that its use was so general and well known as to furnish a nickname or adjective defining or identifying the entire list of products of Benjamin Moore & Co. as those of the corporation which sold the powder Muresco. After the union of the anchor and the word as a means of advertising as well as identification, all products of Benjamin Moore & Co. bore the design; but in all of such use it is apparent that the word "Muresco" was intended to convey and did convey the idea of connection between the manufacturers of the article bearing the device and the wall covering. Muresco, rather than to apply the word "Muresco" itself to oil paints and colors as a descriptive word for that purpose. We therefore have the situation of a trade design, and eventually a trade-mark, based upon the reputation and advertising qualities of a particular product.

The defendant, Auwell, was for many years a salesman of Benjamin Moore & Co. His literature, when acting as such salesman, made note of the fact that he was agent for Benjamin Moore & Co.'s Mu-

resco, and he seems to have built up a considerable trade in the city of New York prior to 1907, at which time he left the complainant's employment because of certain personal differences. At that time he owed the complainant corporation a considerable sum of money in the same way in which he had had a running account of good size for a long period. This account would have been, and apparently was, paid in the ordinary course of business, and there is nothing to indicate that the mere existence of the debt had any effect upon the issues in this case.

It also appears that the defendant knew of the business of the Muralo Company, a corporation located on Staten Island, which since about 1895 had built up a large trade in kalsomine and wall products, and which not only had upon the market and extensively sold the product called "Muralo," but also made for different dealers similar and even identical varieties of wall coverings for like use, under a number of names, such as "Calcimo," "Muralo," "Muralkote," "Refresco," "Aquareesco," "Muralene," "Muraltint," "Muralo Fresco," "Decoresco," "Tinteresco," etc. At the time of the taking of the testimony the total output of the Muralo Company seems to have been larger than that of any competitor, and competition between the Muralo Company and Benjamin Moore & Co. has been keen.

The defendant also knew of one John J. Moran, who, individually and for the corporations of John J. Moran, Incorporated, and the Pyramid Paint Company, had during the years 1903 to 1906 sold a product manufactured by the Muralo Company, and called "Murafresco," which word was formed from the name of the product "Muralo Fresco" then in use. This product is made principally of whitening, glue, and Irish moss, in proportions not made known in the testimony, and must, in many ways, resemble the complainant's product Muresco as well as Muralo and other of the products of the Muralo Company. Conflicting testimony is given as to the amount of the sales and the success of certain efforts made by the complainant company to locate Mr. Moran, especially during the time when he was in business as the Pyramid Paint Company, at 116 Nassau street, New York. It would seem that Mr. Moran had some business matters which interfered with his success in the selling of Murafresco, and at the time that the defendant left the employment of Benjamin Moore & Co. Moran was in such a position that he was ready to negotiate with Auwell, and as a result of which negotiations the defendant made a contract with the Muralo Company by which they made for him, and have since that time furnished, the product Murafresco, previously sold by Moran, with which the defendant, Auwell, has successfully and to a considerable extent entered into competition with the complainant's Muresco.

The testimony shows that Auwell has gone to his old customers, and in a number of instances has succeeded in selling them Murafresco, and that he has deliberately endeavored to supplant Muresco with his own product. The testimony also shows that there is a difference of opinion as to whether Muresco or Murafresco is the better for the purpose designated, there being some apparent difference in

their properties, although the question has not been gone into, nor is it material to this issue. The complainant has endeavored to show that in some instances the defendant has billed Murafresco to purchasers who thought they were purchasing Muresco; but it would seem that no intentional deception on the part of the defendant has been proven. On the contrary, he has endeavored to obtain the sale of his own product in the place of Muresco, and the complainant must rest its entire case upon the similarity of the products, the purpose for which they are used, and the names under which they are sold.

The question of trade-mark does not control. Similar words, as applied to wall covering, have been used before the earliest application for any trade-mark, and the design of the trade-mark is not in any way copied, unless by the mere likeness of the two words. The word "Muresco" may be admitted to be a material and substantial part of each trade-mark; but the trade-mark cannot be held infringed if the elements of unfair use of the trade-name be not present. The word "Muralo," contained in the name of the Muralo Company, and applied to the same sort of products, is made up of the stem of the Latin "murus," meaning a wall; and the same three letters appear, not only in the words in question, but in many of the other products of the Muralo Company which have been above recited. The termination "sco," being merely a Latin attribute, conveys no further meaning than the termination "lo," while the terminations "fresco," "tint," etc., are of themselves words, and slightly more definite in their identification of the products than the suffix "sco" itself.

It will be seen, therefore, that aside from the use of the word and the similarity of sound the complainant does not make out any case of unfair competition, and we must look further in order to determine whether the defendant was knowingly attempting to deceive those purchasers, and to injure the complainant by such deception, solely through labeling his product in such a way as would be likely to cause mistake and confusion in the minds of those attempting to purchase such a product, in instances where either their own lack of care or of definite information on their part might allow the sale of the defendant's goods to customers who supposed that they were obtaining the product known to them as "Muresco."

The testimony does not show that the word "Murafresco" has been so generally used since the year 1903 as by itself to imply acquiescence on the part of the complainant, nor laches in attempting to prevent its use, except in the general way that the various products made or sold by the Muralo Company all seem to have been openly sold, and to be the result of a direct desire to compete with Muresco, and in the way in which all of these names are more or less derived from the same stems, and bear some resemblance to each other. Various witnesses have testified that the trade generally are careful to observe the distinction of an exact name in getting the product which they wish, and the narrow field which seems to have been made use of in coining such names would indicate both the need of care, discrimination, and carefulness in purchasing, if the tradesman or consumer desires to make use of one material rather than another. The evidence certainly

shows that Murafresco is not such a poor substitute as of itself to import an attempt at deception, and Mr. Auwell had more right to take up the sale of a product already upon the market than to coin the name Murafresco itself; for the entire transaction is capable of a different explanation than would be the case if he had left the employment of the complainant and immediately entered into competition by the use of a word resembling as near as he dared make it the complainant's trade-name for the same product.

In the case of *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149, reversing *Id.* (C. C.) 149 Fed. 783, a somewhat similar situation existed, in that the defendants were putting upon the market locks of similar design, under the name "Yap," which were alleged to be an imitation of the well-known "Yale" lock, and intended to mislead and deceive persons desiring to purchase the Yale lock. Decision at circuit was rendered for the defendants, but was reversed on the ground that the word "Yap" and the resemblance in appearance of the locks could have had no basis and no purpose could have dictated their choice except the intent to make use of the resemblance to the Yale lock, and to profit by the benefits to be derived from the deception of unconscious or unwitting purchasers.

If the defendant, Auwell, had coined the word "Murafresco" for the sole purpose of putting upon the market a similar product with a name which would be confused with "Muresco," the cases would be much alike; but where a number of such names are already existent in the trade, and where all of them are applicable in their etymology to the narrow kind of use to which the substance so called can be applied, and inasmuch as no question can be made in this suit of the right of the defendant to properly and legitimately push his wares in competition with complainant's products, it would seem that the mere slight resemblance of the words is not of itself conclusive upon the question.

It further appears from the testimony that a certain product called "Duresco," and also known as "Onresco," but made in England, has been sold to a considerable extent in this country, and has been advertised since the Centennial in Philadelphia in 1876. The product Duresco is a paste, or semiliquid material, rather than a powder, and is advertised to be "washable," apparently conveying the meaning that it is capable of more or less cleaning or washing without destruction, while the products Muresco and Murafresco are said to be "washable" in the sense of being capable of removal by washing. But since 1895 Duresco has been sold for mixture with water as an interior kalsomine or wall covering, and soon after that date the words "Duresco" and "Muresco" were registered in the United States Patent Office by another agent of the English corporation, who declared that the words had been used since 1895, ignoring at least the sales by the former agent previous to that time. It is satisfactorily established, however, that the word "Duresco" was more or less known to the trade throughout this entire period, and the witnesses in this case all agree that "Duresco" is even closer in sound and appearance to the word "Muresco" than is the word "Murafresco" now in question. The accent up-

on the word "Murafresco" changes the sound more than the insertion of the letters "afr" change the appearance of the written word; but the entire testimony only serves to emphasize the fact that all of these wall products of the same nature have been called by more or less similar terms. The word "Muresco" has not been the sole occupant of the field, and the case is thus far distinct from the Yale Lock Company Case just cited.

The important element of intention to deceive cannot be necessarily inferred in the present instance, as it has been in the many cases where injunctions have been granted, such as *American Grocery Co. v. Sloan* (C. C.) 68 Fed. 539, in which "Momaja" is held to have infringed "Mojava," and *Welsbach Light Co. v. Adam* (C. C.) 107 Fed. 463, in which the word "U-C-A" was held to infringe the word "Yusea," and *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, in which the word "Hunyadi" was held to have become common property, but the defendants were shown to have imitated the packages and labels of the complainant, with the addition of indistinct or immaterial changes, and an injunction was granted against such acts.

In the present case the labels, barrel heads, etc., of the defendant are printed in red, whereas those of the complainant have always been printed in blue. The witness Moran, who first used the word "Murafresco," also used blue ink, and his labels might with more force have been objected to from their similarity of appearance. But the change of color is of itself a substantial change in the appearance of the label, and the various differences shown seem to be sufficient to relieve the defendant of the charge of intended deception, while the narrow field of nomenclature and the accepted usages of the trade seem to justify his employment of the word "Murafresco," even in competition with the product called "Muresco." The mere addition or omission of the anchor shown in the complainant's trade-mark is conclusive neither way, and, as has been said, the case is rather one of the right of the complainant to prevent imitation of the name of its product, rather than a strict determination upon the trade-mark finally registered by him. The taking out of a second trade-mark registration of the word itself has not altered the issue created by the pleadings, which were framed before the application for this second registration was filed.

The defendant may have a decree dismissing the bill of complaint.

BARLOW V. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Iowa, W. D. August 9, 1909.)

No. 466.

1. COURTS (§ 268*)—JURISDICTION OF FEDERAL COURTS—SUITS BETWEEN ALIEN AND CITIZEN.

The provision of the federal judiciary act (Act March 3, 1875, c. 737, 18 Stat. 470), as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 172 F.—33

require that suits of which the Circuit Courts are given original jurisdiction by that act shall be brought only in the district of which the defendant is an inhabitant, or if the suit is between citizens of different states and jurisdiction is founded only on that fact in the district of the residence of either plaintiff or defendant, have no application to suits between an alien and a citizen of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 268.*]

Diverse citizenship as a ground for federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. REMOVAL OF CAUSES (§ 41*)—RIGHT OF REMOVAL—SUIT BY ALIEN AGAINST CITIZEN.

An action brought by a nonresident alien in a state court against a citizen of another state is removable by the defendant where the requisite amount is involved.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 82½; Dec. Dig. § 41.*]

On Petition for Rehearing on Motion to Remand to State Court.
For prior decision, see 164 Fed. 765.

Charles A. Dickson, for plaintiff.

Wright, Call & Sargent and James C. Davis, for defendant.

REED, District Judge. A motion by plaintiff to remand this cause to the state court for want of jurisdiction of this court was denied November 6, 1908, for reasons stated in an opinion filed that day. 164 Fed. 765. Upon publication of the opinion of Judge Pollock in *Mahopoulus v. Chicago, Rock Island & Pacific Ry. Co.* (C. C.) 167 Fed. 165, in which a contrary view to that held by this court is taken of facts identical with those in this case, the plaintiff filed a petition for rehearing, relying wholly upon the opinion in the *Mahopoulus* Case in support of his petition. The great respect entertained for the opinions of that able and experienced judge has led to a re-examination of the grounds of the decision in this case. The facts, as stated in the former opinion, are that the plaintiff at the time the action was commenced, and when it was removed from the state court, was an alien residing in England and the defendant a corporation of Illinois, owning and operating a line of railroad in that state and into and through the county of Woodbury in this state. The suit was commenced in the district court of Iowa in and for said Woodbury county to recover damages of the defendant in excess of \$2,000, exclusive of interest and costs for injuries to plaintiff's land in that county alleged to have been caused by the negligent and wrongful act of defendant in constructing its railroad embankment upon such land. Notice of the suit was served upon the defendant's agent in Woodbury county as authorized by the state statute, and in due time it filed a sufficient petition and bond in the state court for the removal of the cause to this court upon the ground that when the suit was commenced the plaintiff was a nonresident alien, and the defendant an Illinois corporation. The plaintiff promptly objected to the removal upon the ground that the controversy was one of which the Circuit Courts of the United States did not have jurisdiction and the objection was sustained by the state court. The defendant then lodged a copy of the rec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ord in this court and moved that it take jurisdiction of the cause, and the plaintiff seasonably moved to remand it to the state court, and has not invoked the action of this court upon any other question than that of its jurisdiction of the controversy.

That the Circuit Courts of the United States have only such jurisdiction as the Congress has conferred upon them, and that only such suits may be removed thereto from a state court that Congress has authorized to be removed is of course conceded, and neither of such questions need be discussed. The questions for determination then are: (1) Has a Circuit Court of the United States jurisdiction of a suit of a civil nature, in which more than \$2,000 is involved, between an alien and a citizen of one of the United States? If it has, then (2) may such a suit (if brought by a nonresident alien as plaintiff in a state court against a citizen or corporation of any of the states of the Union who is not a resident of the state in which the suit is brought) be removed by the latter to the proper Circuit Court of the United States in that state?

The former of these questions is sufficiently answered by the present judiciary act of (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) section 1 of which provides:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs the sum or value of two thousand dollars, and * * * in which there shall be a controversy, * * * between citizens of a state and foreign states citizens or subjects. * * *"

This clause of the section clearly confers original jurisdiction upon the Circuit Courts of the United States, concurrent with the courts of the several states, of the subject-matter of suits of a civil nature between aliens and citizens of the United States, in which the requisite amount is involved. Where, then, must such a suit be brought in a Circuit Court of the United States? The section of the judiciary act before mentioned further provides:

"But * * * no civil suit shall be brought before either of said courts against any person by original process, or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only upon the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant."

In *re Hohorst*, 150 U. S. 653-659, 14 Sup. Ct. 221, 37 L. Ed. 1211, and again in *Barrow Steamship Co. v. Kane*, 170 U. S. 100-112, 18 Sup. Ct. 526, 42 L. Ed. 964, it is plainly held that the provision of the act in question requiring suits to be brought in the district of which the defendant is an inhabitant has no application to suits by a citizen of one of the states of the Union against an alien, and that such a suit may be brought originally in the Circuit Court of the United States in any district wherein valid service may be obtained upon the alien defendant, though the cause of action upon which the suit is brought may have arisen in a foreign country. If this be true, and it must be so regarded by the lower federal courts, then it must also

be true that the further provision which requires that suits wherein the jurisdiction of the Circuit Courts "is founded only upon the fact that the action is between citizens of different states shall be brought only in the district of the residence of either the plaintiff or defendant" is not applicable to suits between aliens and citizens, for by the very letter of that provision it applies only to suits between "citizens of different states"; and suits between citizens and aliens may be brought in any district where valid service may be obtained upon the defendant, whether he be citizen or alien, subject, of course, to the right of the defendant, if he be a citizen of one of the states, to seasonably object to being sued by an alien in any other district than that of his residence, the same as he might so object if sued by a citizen in a district of which neither the plaintiff nor the defendant was a resident, and, unless he does so object, the cause may rightly proceed to determination in the Circuit Court of the United States, where it was so commenced. *Railway Company v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Shaw v. Quincy Mining Co.*, 145 U. S. 444-448, 12 Sup. Ct. 935, 36 L. Ed. 768; *Central Trust Co. v. McGeorge*, 151 U. S. 129-138, 14 Sup. Ct. 286, 38 L. Ed. 98; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

In addition to these and other cases cited in the former opinion it was recently held by the Supreme Court in *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675, that the clause requiring suits to be brought in the Circuit Courts in the district of the residence of either the plaintiff or defendant when the jurisdiction is founded only upon the fact that the action is between citizens of different states has no application to suits wherein one of the parties is not a citizen of any of the states of the Union; and the same was so held by the Court of Appeals for this circuit in *United States v. Northern Pacific Ry. Co.*, 134 Fed. 715, 67 C. C. A. 269. Each of these cases was brought originally in a Circuit Court of the United States, but in a district other than that of the residence of the defendant, and the right to there maintain the same was denied, on objection of the defendant, upon the authority of *Shaw v. Quincy Mining Co.*, above, and like cases. That this court has jurisdiction of the subject-matter of this controversy and that it might have been brought herein originally by the plaintiff, subject, of course, to the right of the defendant to seasonably object to being sued in a district other than that of his residence, is not open to question under these authorities.

May the plaintiff then prevent the removal of it from the state court by seasonably objecting to such removal? Section 2 of the act of 1887-88 provides:

"(1) That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made * * * under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. (2) Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the

preceding section, and which are now pending or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

Under the first clause of this section as above numbered any suit arising under the Constitution or laws of the United States of which the Circuit Courts are given original jurisdiction by the preceding section, which may be brought in a state court, may be removed to the Circuit Court of the United States for the proper district by the defendant or defendants therein regardless of their residence; and, under the second clause, any other suit of a civil nature of which the Circuit Courts are given original jurisdiction may be removed to the proper Circuit Court of the United States by the defendant or defendants therein being nonresidents of the state in which the suit is brought. The suit in question falls within the very letter of this clause of the section, and its language cannot be made plainer or obscured by any attempt to interpret its meaning. The constitutional grant of judicial power to such courts of the United States, inferior to the Supreme Court, as Congress shall from time to time establish, of controversies between "a state or the citizens thereof, and foreign states citizens or subjects," makes no distinction between controversies in which the alien shall be plaintiff or defendant; nor does the judiciary act of 1887-88 make any such distinction, but only fixes the place where the suit shall be brought. But when it is declared, as it is in the *Hohorst* and other cases above cited, that the provision limiting the place of suit to "the district of which the defendant is an inhabitant" has no application to suits of a citizen against an alien, and when the further provision which limits the place of suit to the district of either the plaintiff or defendant applies, by its very letter, only to suits between "citizens of different states," it would seem that further discussion of the question was foreclosed. If this plaintiff had torn down or destroyed the railroad embankment of the defendant company because of the injury it is alleged to have caused to his land, and defendant had brought suit against him in this court for more than \$2,000 because of his so doing and had obtained valid service upon him within this district, it is plain that the plaintiff, as such defendant, could not have successfully interposed an objection that the court was without jurisdiction either of the subject-matter of the suit or of his person. This is settled by the decision of the Supreme Court in *Barrow Steamship Co. v. Kane*, above. In that case Kane was a citizen of New Jersey, the defendant steamship company a corporation organized under the laws of Great Britain engaged in the transportation of freight and passengers upon its ships between the ports of that country and New York, and the suit was brought against it in the Circuit Court of the United States for the Southern District of New York to recover for an assault committed upon Kane upon one of its ships in a foreign port. Service was made upon an agent of the defendant, resident in New York, who transacted its business at that place, and it was held by the Supreme Court that the jurisdiction of the Circuit Court was complete, though a statute of the state of New York would not have authorized the suit to have been brought in the

courts of that state. Or, if the defendant had sued the plaintiff in the state court in and for Woodbury county for such a trespass and obtained valid service upon him in that county, there would be no doubt that the plaintiff as such defendant might under the very letter of the second clause of section 2 above quoted have rightly removed the cause to this court. It is obvious that Congress did not intend to open the courts of the United States to an alien defendant under such circumstances, and close them to citizens or corporations of a state when sued by an alien in a court of a state of which they are not residents. In *Re Hohorst* above it is said of the restrictive words of the act there under consideration:

"That their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section, and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between citizens and an alien would leave the courts of the United States open to an alien against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the whole section."

This language is as clearly applicable to suits brought into the Circuit Courts of the United States by the process of removal as it is to those brought there by original process.

In *Kinney v. Columbia Savings & Loan Association*, 191 U. S. 78, 24 Sup. Ct. 848, 48 L. Ed. 309, it is held that the removal proceedings are in the nature of process by which a cause is transferred from a state to a federal court; and by *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, as explained in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, that the plaintiff in a suit in the state court, when removal proceedings are instituted, in effect becomes defendant in the removal proceedings. This being true, an alien defendant in such proceedings can no more object to the removal of a suit into a Circuit Court of the United States, which he has brought in a state court, by the plaintiff in the removal proceedings if a non-resident of that state, than he could object to being sued originally in such Circuit Court by such plaintiff if the suit was one of which that court was given jurisdiction by the judiciary act. The only service of the process in the removal proceedings required by the removal act is the filing in the state court by the defendant in that court of a sufficient petition and bond for the removal of the cause to the Circuit Court of the United States, upon the filing of which the plaintiff in the state court must take notice. *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, was not overlooked in the former decision of this motion. That suit was commenced originally in the Circuit Court of the United States for the Western District of Texas by an alien against the railway company which was incorporated under the laws of Texas, but whose principal offices and place of business were in the Eastern district of that state. The defendant seasonably objected to being sued in a district other than that "of which it was an inhabitant," and its objection was sustained upon the authority of *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, and like cases, which are cited

in the former opinion. The question determined by the Gonzales Case is tersely stated by Mr. Justice Brown at the beginning of the opinion, as follows:

"This case raises the question whether a railway company, incorporated under the laws of a certain state, and having its principal offices within one district of such state, can be said to be an inhabitant of another district of the same state, through which it operates a line of road and in which it maintains freight and ticket offices and depots."

And the decision is restricted to that question. If this case has any bearing upon the question now under consideration, it would seem to make against the contention of the plaintiff, for, if the motion to remand is well grounded, it is because this suit was brought in a court of a state in which neither the plaintiff nor the defendant resided. The residence of Gonzales does not appear from the statement of that case nor the opinion of the court, save by the "assumption" that an alien does not reside in the United States. If he had been in fact a resident of the Eastern district of Texas, then the suit would have been rightly brought in that district if the plaintiff's contention is correct. It seems incredible that more particular reference should not have been made in either the majority or dissenting opinions of that important fact if his residence in that district had been regarded as material to the question the court was then determining. *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, only holds that a nonresident defendant sued in a state court jointly with a resident who is a citizen of the same state as the plaintiff cannot remove the cause upon the grounds of local prejudice, for, as one of the defendants was a citizen of the same state as the plaintiff, the suit was not within the original jurisdiction of the Circuit Court. A re-examination of the question but confirms the conclusion reached in the former opinion, viz., that the provisions of the judiciary act of 1887-88 which requires that suits of which the Circuit Courts of the United States are given original jurisdiction by that act shall be brought only in the district of which the defendant is an inhabitant, or, if the suit is between citizens of different states, then within the district of the residence of either the plaintiff or defendant, have no application to suits between an alien, and a citizen of one of the United States, whether the suit be brought originally in the Circuit Court or by process of removal from a state court.

The petition for rehearing is therefore denied.

NOTE.—Since the foregoing opinion was prepared and filed, the decision of the Supreme Court in the Matter of Tobin, Petitioner, has been published in 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061.

In re SHAW.

In re McLAUGHLIN.

(Circuit Court, S. D. New York. January 22, 1909.)

1. WITNESSES (§ 11*)—GRAND JURY (§ 36*)—FEDERAL COURTS—SUBPŒNA.

Under Rev. St. § 877 (U. S. Comp. St. 1901, p. 667), read in connection with section 829 (page 636), providing for the attendance of witnesses by subpoena, the names of as many witnesses in the same cause as convenience of service will permit are to be included in one subpoena, requiring the witnesses to attend and testify generally, i. e., either before the grand jury or petit jury, or both.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 11;* Grand Jury, Dec. Dig. § 36.*]

2. GRAND JURY (§ 36*)—WITNESSES—SUBPŒNAS—FORM.

A subpoena compelling witnesses to appear and testify before a federal grand jury must either disclose the name or names of the persons against whom the inquiry is instituted, or the subject of the investigation.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 36.*]

Applications for Orders Quashing Subpœnas.

De Lancey Nicoll and John M. Bowers, for petitioners.)

Henry L. Stimson, U. S. Atty.

WARD, Circuit Judge. This is a motion to quash and set aside subpoenas served on witnesses Shaw and McLaughlin; the subpoena ticket being in the following form:

"U. S. Grand Jury: By virtue of a writ of subpoena to you directed and herewith shown, you are commanded and firmly enjoined that laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the grand inquest of the body of the people of the United States of America for the Southern district of New York at a Circuit Court to be held at the United States Court and Post Office Building, room 119, fourth floor, in the city of New York in and for the said Southern district on the 18th day of January, 1909, at 10:30 o'clock in the forenoon of the same day, to testify all and everything which you may know generally on the part of the said United States. And this you are not to omit under the penalty of two hundred and fifty dollars.

"Dated this 4th day of January, 1909.

"By the Court, Henry L. Stimson, U. S. Attorney."

There were struck out of the printed form used the words "to give evidence in a certain cause now depending in the said court between the United States of America and," and the word "generally" substituted.

The statutory form of subpoena in the state of New York (section 612, Code Cr. Proc.) contains a similar provision to the one struck out, viz., to appear "as a witness in a criminal action prosecuted by the people of the state of New York against."

The form of subpoena in the federal courts is not prescribed by law. The only regulation on the subject is section 877, Rev. St. U. S. (U. S. Comp. St. 1901, p. 667), which, as Judge Hughes explained in the note to *United States v. Ralston* (C. C.) 17 Fed. 901, is to be read in connection with section 829 (page 636). So read, it is to be construed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as requiring for the purpose of economy that the names of as many witnesses subpoenaed in the same cause as convenience in serving the same will permit shall be included in one subpoena requiring the witnesses to attend and testify generally, i. e., either before the grand jury or the petit jury, or both, as they may be required by the court or the district attorney.

The form used in this district indicates at least a general intention that a witness shall be informed of the matter about which he will be called upon to testify. I think it is proper that he should be. The fifth amendment to the Constitution provides that no one "shall be compelled in any criminal case to be a witness against himself." The Supreme Court has construed this provision largely holding that it is not confined to a criminal case against the witness himself, but extends to any criminal investigation. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights, even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse to testify, and of the way in which to protect himself against giving testimony that might incriminate him.

The United States attorney contends that in this country the grand jury has an inquisitorial power to investigate of its own motion, and that in some instances the utmost secrecy may be necessary to the success of its inquiry, and that the protection of witnesses may safely rest on the presumption that neither the grand jury nor the United States attorney will do anything unfair or oppressive.

It would also contribute greatly to the success and celerity of some investigations if the authorities had an unlimited right to search and seize persons, houses, and papers; but the right of the citizen against such proceedings is not left to depend upon any such presumption. He is guaranteed against unreasonable searches and seizures by the fourth amendment to the Constitution. So it would unquestionably speed the detection and conviction of crime to compel suspected persons to testify; but no principle of our law is better settled than that this cannot be done.

The subpoena being the court's writ, it is the duty of the court, consistently with existing statutes, to regulate the use of it. It is not a question of the nature of the particular subject now under consideration by the grand jury nor of the fairness of the present United States attorney and his assistants and of the present grand jury; but the question is to determine the practice to be followed in this district in all cases by all United States attorneys and grand juries, a matter concededly of the utmost moment.

It is pointed out that the grand jury may often be unable to name any person as connected with the subject that it is investigating of its own inquisitorial power, and, if it cannot subpoena witnesses without naming some person, the inquiry must be altogether abandoned. I think the answer to this is that it can in such a case state in the subpoena the subject of its inquiry and so fix some definition of and limit

to the examination to which the witness may be subjected. This was done in the subpoena issued out of this court in the case of *United States v. Kimball* (C. C.) 117 Fed. 156. It must be admitted that there is a strange absence of authority upon the subject; but Justice Brown, in *Hale v. Henkel*, 201 U. S. 43, 65, 26 Sup. Ct. 370, 375, 50 L. Ed. 652, said:

"We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed, that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against them."

This language indicates that the Supreme Court thinks that witnesses should be informed in the subpoena of the names of the parties with respect to whom they will be called to testify, although it holds it not necessary to disclose the charge brought against those persons. It must be remembered that Justice Brown was discussing the demand of a witness who has been subpoenaed to testify in a case against named persons, to know the specific charge made. It is quite in line with his view that, if the witness cannot be apprised of the name of the person so charged, he should be informed of the subject about which he will be called upon to testify.

It is alleged that these general or John Doe subpoenas have been issued in this district for many years. If so, they seem never to have been challenged. As Justice Bradley pointed out in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, a long practice of issuing general warrants to apprehend persons suspected of the authorship of seditious libels and bring them and their papers before the Secretary of State for examination was relied on in *Emtck v. Carrington*, 17 Howell's St. Tr. 1029. Lord Camden said:

"As no objection was taken to them upon the returns (to writs of habeas corpus) and the matter passed sub silentio, the precedents were of no weight."

A subpoena duces tecum was also served upon Shaw as secretary and treasurer of the Press Publishing Company, World Building. It was held in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, that a subpoena duces tecum might amount to an unreasonable search or seizure within the fourth amendment to the Constitution. The United States attorney consents that its terms in this case may be narrowed to an extent which seems to make it reasonable. Still the fact remains that the witness has been subpoenaed to testify generally, and that he is entitled to know either what person or persons are charged by the United States, or the subject of the investigation. I do not think that the incidental reference to articles relating to the Panama Canal in the paragraph of the subpoena called for receipts is sufficient.

The motion to quash and set aside the subpoenas is therefore granted.

In re KRETSCH.

(District Court, S. D. New York. August 16, 1909.)

No. 30.

BANKRUPTCY (§§ 408, 486*)—DISCHARGE—CONTEMPT OF COURT.

While the perjury of a bankrupt in his testimony on proceedings for his discharge will not prevent the granting of the discharge where the other evidence shows him to be entitled to it, such perjury is a contempt of court for which he may be punished.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 408, 486.*]

In Bankruptcy.

Katz & Sommerich, for bankrupt.

Waldo G. Morse, for trustee.

HAND, District Judge. I have read all the testimony taken on the discharge proceedings and nearly all that taken at the first meeting of creditors, and I agree with the learned master that the discharge must be granted, so that I shall confirm the report and grant a discharge.

In regard to the contempt proceedings, however, I shall make a somewhat different disposition. The master did not believe the bankrupt, and I am not inclined to believe him either. His testimony is full of misstatements, and, while perhaps some of these are to be accounted for by his ignorance of English, it seems hardly possible that some of them do not constitute willful misstatements of fact. Especially does it seem that his testimony that the title to all property was taken in his wife's name must have been deliberately false. It is extremely unlikely that he should have innocently been mistaken about these facts, or that he misunderstood the questions. The testimony was not immaterial, because he was concerned to show that he had never taken any property in his own name. That would have been the best corroboration of his version of the transactions which necessitated all the property being his wife's. Had it been known, as it afterwards was shown, that he had been taking property in his single name or in the joint names of his wife and himself, his story required more explanation. It is quite true that the explanation did subsequently satisfy the master, but that has nothing to do with the truth of his testimony, when he gave it, which is the question here. Now, the bankrupt's perjury in the proceedings for his discharge would not be a ground for depriving him of the discharge itself, at least as I understand the statute. It would indeed be seldom that, when he had perjured himself, the court could be persuaded of enough of the truth of his story to grant him a discharge, but in this case that unusual thing may have happened, and the master has been satisfied that the money transferred to Mrs. Kretsch was, in fact, hers. As I have said, I agree with the master, despite Kretsch's misstatements during the hearing.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

While, however, those misstatements, even if corrupt, will not bar his discharge, they are none the less a contempt of court if they were in fact corrupt, and in that event I shall punish the bankrupt for them. I shall therefore ask the master, who saw the bankrupt, and whose opinion is alone of moment upon the question of his intent, to certify to me whether in his judgment the bankrupt's statements were deliberately and knowingly false which relate to the taking of title in his wife's name on pages 205 and 207 of the testimony, or which relate to his earnings as contained in the excerpts in the moving papers. There is no doubt of the untruth of his statements regarding the taking of title, but as to those regarding his earnings there is some ambiguity. As to both I cannot decide whether he was willfully swearing falsely without seeing him; and upon this issue I should especially like the assistance of the learned master. The bankrupt shall have such further opportunity to explain these statements as he may wish at a hearing, provided that the added cost of any such hearing shall be borne by him, but he must not extend the proceedings beyond two hearings. Upon the coming in of this report, I will dispose of this proceeding, either by dismissing it or by committing the bankrupt for a term, to begin if and when he shall interpose his discharge as a defense to Denofrio's judgment, whether Denofrio shall use it as a counterclaim or otherwise. While I cannot prevent the granting of a discharge, I can punish him for a contempt, if the bankrupt has been guilty of a contempt in his efforts to get it. Of course such an order will not prevent his use of it, for he may prefer to stand committed for the term I shall fix, rather than forego its use. That I cannot help, for I can here only punish him for his contempt. Instead of committing him unconditionally, I shall only do so in case he decides to make use of a discharge, to the procurement of which he has been willing to perjure himself.

Let the objecting creditor prepare an order for such a reference as I have indicated, with the other provisions mentioned above. I will not sign the discharge until the termination of the contempt proceeding.

HEIN v. WESTINGHOUSE AIR BRAKE CO.

(Circuit Court, N. D. Illinois, E. D. August 26, 1909.)

No. 28,067.

1. JUDGMENT (§ 713*)—CONCLUSIVENESS OF ADJUDICATION—SCOPE AND EXTENT OF ESTOPPEL—MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

A decree for the defendant in a suit for the cancellation of a contract is conclusive against the complainant upon every ground for cancellation or avoidance of the contract which existed and was known to him when the suit was brought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ESTOPPEL (§ 90*)—ACQUIESCENCE—INVALID CONTRACT—PAYMENT.

A licensee under a patent is estopped to set up the invalidity of the contract as a defense to an action to recover royalties thereunder, when, after obtaining knowledge of all the facts, he continued to pay royalties for 15 months without objection.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 244; Dec. Dig. § 90.*]

3. PLEADING (§ 349*)—MOTION FOR JUDGMENT ON PLEADINGS—WHEN AUTHORIZED.

A motion for judgment on the pleadings is proper when the defendants' pleadings admit the cause of action, and no assessment of damages is necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067-1069; Dec. Dig. § 349.*]

At Law. Motion by plaintiff for judgment on pleadings.

David S. Wegg, for plaintiff.

Buell & Abbey and J. Snowden Bell, for defendant.

SANBORN, District Judge. The controversy fully appears in the previous decisions. *Westinghouse v. Hein*, 159 Fed. 936, 87 C. C. A. 142; *Hein v. Westinghouse Air Brake Co.* (C. C.) 164 Fed. 79; *Hein v. Westinghouse Air Brake Co.* (C. C.) 168 Fed. 766. In brief, covenant is brought to recover quarterly payments for the sale of patent rights. The chief defense is failure of consideration in that the invention was without utility. Substantially all the technical allegations of the pleas, replications, and rejoinders relate to this defense. The case is complicated, however, by the chancery suit of *Westinghouse v. Hein*, where *Westinghouse* attempted to have the contract of sale rescinded for mistake, but it was held that the rejection of the *Hein* application in the Patent Office was not a final determination of his rights, and that he might still obtain a patent for the claims. This he has done. It is now insisted by his attorney that the chancery suit is now a record estoppel on all questions which *Westinghouse* might then have raised as a ground of rescission, for the reason that splitting a cause of action is not permitted.

The rejoinders take the same course as the replications; that is, in the general one the facts are stated in full, once for all, from defendant's standpoint, and the other rejoinders refer to such statement to sustain its claim that it was not fully informed of all the facts when the contract of sale was made; that it has not received all the benefits it contracted for; that, when the chancery suit was begun, it did not know all the relevant facts, and the equity decree is not therefore *res adjudicata*; that the contract did not create a license; that such decree did not involve the question whether the decision rejecting *Hein's* application was final and conclusive, and the court did not decide it; that a patent has not been issued to *Hein* "in the exact words and figures in which said claims were contained" in the application; that the patent was not obtained by *Hein* without unnecessary or improper delay on his part, to defendant's damage; that defendant did not through the *Hein* patent acquire "all the rights, benefits, and advantages" conferred by the contract, or any thereof; that defendant did not super-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wise the Patent Office proceedings; that there is no such record as that alleged in the chancery suit; that the Patent Office rejection of Hein's claims was conclusive; and that prior to January 1, 1904, defendant did not have full, complete, and accurate knowledge of all the facts.

From the record it now appears that Hein obtained his own patent and also procured an assignment of the Shepard patent, thus giving Westinghouse everything he contracted for. It also appears that no new fact not previously known came to Westinghouse's knowledge after March 1, 1904, so that, when he brought the chancery suit February 1, 1906, he knew all the facts now known. After March 1, 1904, he continued to make the quarterly payments under the contract until July 1, 1905. Westinghouse obtained by contract of sale, therefore, all he bargained for in the Hein and Shepard patents. He knew all the material facts when he brought the chancery suit; and, after he had such knowledge, he continued for 15 months to make the payments called for. These facts are deemed fully supported by the pleadings. Therefore there could have been no failure of consideration. And, if Westinghouse had any right to avoid the contract for mistake or fraud other than the one set up in the chancery suit, he should have presented it. As said by the Supreme Court, in *Stark v. Starr*, 94 U. S. 477, 485, 24 L. Ed. 276:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

"The former adjudication is held to be conclusive in a subsequent proceeding between the same parties as to every matter properly involved and which might have been raised and determined in it." *Haley v. Breeze*, 144 U. S. 130, 12 Sup. Ct. 836, 36 L. Ed. 374; *Columb v. Webster Mfg. Co.*, 84 Fed. 592, 28 C. C. A. 227, 50 U. S. App. 264, 43 L. R. A. 197.

It was also Westinghouse's duty on learning the facts to promptly rescind. For 15 months he retained the benefit of the contract and continued to pay the price, thus irrevocably ratifying the contract, precluding any subsequent attack. *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567; *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317; *Kingman v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; *Sanitary District v. Ricker*, 91 Fed. 833, 34 C. C. A. 91.

It is, however, objected that plaintiff cannot move for judgment on the pleadings, but should demur to the rejoinders. A motion for judgment on the pleadings is proper when the defendant's pleadings admit the cause of action, and no assessment of damages is necessary. *Jones v. Rowley* (C. C.) 73 Fed. 286; 11 Encyc. Pl. & Pr. 1030. By the course of pleading plaintiff's cause of action is admitted or confessed. No issue of fact remains. Plaintiff is shown to be entitled to judgment, and the contract fixes the measure of damages.

Questions of law only are presented, raised by the motion for judgment, which is granted.

THE ALICE.

(District Court, W. D. Washington, N. D. September 1, 1909.)

No. 3,879.

1. SHIPPING (§ 79*)—CARRIAGE OF GOODS—LIEN ON VESSEL.

Where the master of a vessel sold merchandise shipped on his vessel at the termination of the voyage at an Alaskan port, under authority given him by the shipper to do so unless he received further instructions, in so doing he acted as consignee and agent for the shipper, and not for the vessel, and the vessel is not liable for his subsequent embezzlement of the proceeds, having fully performed the contract of carriage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 338; Dec. Dig. § 79.*]

Suit in rem to recover the value of merchandise alleged to have been converted to his own use by the master of a vessel on which the same was delivered for carriage from Seattle to Seward, Alaska. Heard on the merits. Decree for claimants.

James Kiefer, for libelants.

A. W. Buddress, for claimants.

HANFORD, District Judge. The issue raised in this case is whether the carrying vessel is liable for the value of 85 cases of gasoline received as freight to be transported to Seward, Alaska, and there delivered to the order of the libelants, the same having been sold at Seward by the captain and the proceeds converted to his own use. On the hearing of exceptions to the libel, the court ruled that the contract as pleaded is maritime and that the suit is maintainable in a court of admiralty, and now adheres to the same opinion with respect to the case as stated in the libel. On the final hearing, however, the case must be decided according to the facts proved by the evidence.

The court finds that the gasoline was shipped as alleged and a bill of lading was issued, by the terms of which the gasoline was to be delivered at Seward or elsewhere as the libelants should order. Morrill, one of the libelants, has testified that he sent instructions as to the disposition to be made of the consignment to the captain by mail, but his testimony is too vague and indefinite to sustain a finding that instructions were disregarded. I mean by this that his evidence is lacking in particularity as to the time of mailing instructions, and as to the contents of the letter or document alleged to have been mailed, and there is no evidence tending to prove that the alleged instructions were received by the captain. In selling the gasoline he acted under authority given to him at Seattle by Morrill verbally to sell the gasoline in case he should not receive contrary instructions. So far, he did only what he had a right to do, and the only wrong which the libelants may justly complain of is the embezzlement of money.

The obligation of a carrier is to perform the stipulated transpor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tation service—that is, to carry the goods to the designated place of delivery and there deliver the same to the shipper or his consignee—and as security for the due performance of the contract with respect to goods received for transportation a lien upon the vessel attaches in favor of the shipper, and it is a logical and legal sequence of that proposition that the lien is discharged when the carrier's contract has been completely performed by delivery of the goods at the designated place to the shipper or his consignee. It is the opinion of the court that, in view of the facts proved, the captain was constituted by the libelants their consignee and agent at Seward to dispose of the gasoline, and that no lien attached to the vessel for his default as their agent. 20 Am. & Eng. Enc. of Law (2d Ed.) 214; Willard v. Dorr, Fed. Cas. No. 17,680; Waterbury v. Myrick, Fed. Cas. No. 17,253; The Virginia, Fed. Cas. No. 141; The Waldo, Fed. Cas. No. 17,056; Peck v. Laughlin, Fed. Cas. No. 10,890; The New Hampshire (D. C.) 21 Fed. 924; The Maiden City (D. C.) 33 Fed. 715; Gove v. Moses, 1 Wash. T. 7. The statutes of this state create liens for the nonperformance or malperformance of contracts for transportation. Pierce's Code, § 6077. But the gist of this case is the wrongful conversion of the libelants' money, which occurred after the contract for transportation had been fully performed. Therefore there is no ground for complaint because of either nonperformance or malperformance of that contract, and the statutes afford no support for the libelants' case.

Suit dismissed, with costs.

MASON v. NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

(Circuit Court of Appeals, Second Circuit. July 21, 1909.)

No. 279.

1. BANKRUPTCY (§ 159*)—PREFERENCES—ELEMENTS.

It is essential to a voidable preference in bankruptcy that the bankrupt shall have transferred some portion of his own property to the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 159.*]

2. BANKRUPTCY (§ 164*)—VOIDABLE PREFERENCE—PAYMENT BY INDORSER.

The S. Company in January received a bankrupt's note in payment for certain machinery and merchandise, which the S. Company indorsed and discounted at defendant bank. The note was renewed from time to time, being secured by the S. Company's collateral, in which the bankrupt had no interest until on September 26, 1903, before the maturity of the last renewal, the S. Company paid the note to the bank from its own funds, received back its collateral, and charged the amount to the bankrupt's account; the S. Company being then indebted to the bankrupt on such account in a sum in excess of the amount of the note, and within four months the adjudication was entered. *Held*, that such facts did not justify an inference that the note was paid by the bankrupt, or with its property, and hence the payment of the note by the S. Company was not a voidable preference as to the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

3. BANKRUPTCY (§ 154*)—SET-OFF—PURCHASE OF CLAIM BY CREDITOR.

Bankr. Act July 1, 1898, c. 541, § 68b, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), provides that a set-off or counterclaim shall not be allowed in favor of any debtor of a bankrupt which was purchased by or transferred to him after the filing of the petition or within four months before such filing with a view to such use, and with knowledge or notice that the bankrupt was insolvent, or had committed an act of bankruptcy. *Held*, that where an indorser of a bankrupt's paper took it up within four months prior to bankruptcy, knowing that the bankrupt was insolvent, and for the purpose of setting it off against its debt to the bankrupt, it was not available as a set-off as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 454; Dec. Dig. § 154.*]

4. BANKRUPTCY (§ 164*)—PAYMENT OF DEBTS—EVASION OF ACT.

Where an indorser of a bankrupt's paper, well secured by the indorser's collateral, paid the paper to the bank, and charged the amount against its debt on open account to the bankrupt, equity did not require that the payment be held to constitute a preference to the bank by the bankrupt on the theory that the transaction was an evasion of the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

Appeal from the District Court of the United States for the Northern District of New York.

Action by Charles B. Mason, as trustee in bankruptcy of the National Herkimer County Bank of Little Falls. From a decree of the District Court (163 Fed. 920) for complainant, defendant appeals. Reversed and remanded, with instructions to dismiss.

The complainant is the trustee in bankruptcy of the Newport Knitting Company, a corporation under the laws of the state of New York, and lately engaged in the business of manufacturing knit goods at Newport, Herkimer coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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ty, N. Y. The defendant is a national bank, located and doing business at Little Falls in said county, and some 22 miles from Newport. The Titus Sheard Company is a New York corporation, which, like the Newport Company, was engaged in the business of manufacturing knit goods, and was located at said Little Falls. The Sheard Company and the Newport Company, while maintaining distinct and separate corporate organizations, were closely associated in business, and had to some extent the same stockholders and officers. Neither corporation, however, owned any shares in the other, and it does not appear that the same persons owned controlling interests in both corporations. The Sheard Company was a customer of the defendant bank, kept its deposit account with it, and discounted its own paper and that received from persons dealing with it. The Newport Company was never a customer of the defendant bank.

On January 7, 1901, the Newport Company gave the Sheard Company its four months' note for \$5,773.05 in payment for certain machinery and merchandise purchased. The Sheard Company indorsed this note, and discounted it for its own benefit at the defendant bank. The note was reduced by partial payments to \$5,000, and was renewed with the same indorsement from time to time until May 11, 1903, when it was again renewed for four months so as to mature September 11, 1903. On August 22, 1903, however, and before the maturity of said note, it was taken up through the action of the Sheard Company by a new three months' note likewise indorsed by said Sheard Company and secured by collateral deposited by said company. The collateral consisted of accounts receivable amounting to \$6,300 belonging to the Sheard Company, and in which the Newport Company—the maker of the note—had no interest. On September 26, 1903, and before the maturity of the last-mentioned note, the Sheard Company paid \$4,953.33 to the defendant bank, being the amount of said note—\$5,000—less unearned interest, took up the said note, and received back its collateral. The Sheard Company made this payment upon its own initiative and in its own behalf by cheque drawn upon funds belonging wholly to it. At the time when the Sheard Company paid and took up said note and collateral, it was indebted to the Newport Company upon open account in a sum in excess of the amount of said note. Upon taking up said note it credited the amount paid—\$4,953.33—to itself upon its account with the Newport Company. This was done with the knowledge and approval of the Newport Company, but not—so far as appears upon the record—with the knowledge of the defendant. In August, 1903, when the Sheard Company substituted the three months' collateral note in place of the existing four months' note which was merely indorsed, it was otherwise largely indebted to the defendant bank upon its own and indorsed paper, and at that time made an agreement with the defendant whereby it practically pledged all its property as security for such indebtedness. On January 23, 1904, and within four months after the taking up of the last note by the Sheard Company as aforesaid, the Newport Company was adjudged a bankrupt.

The District Court, in accordance with the claims of complainant, held that the last-mentioned transaction amounted to a preference under section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), which, so far as is relevant here, reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of another person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Myron G. Bronner (Albert M. Mills, of counsel), for appellant.
Cookinham & Cookinham, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The one thing absolutely essential to a preference is that the bankrupt transfer

some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case. The defendant bank received no property or money of the Newport Company. The Sheard Company as indorser of the note took up and paid its own funds therefor—funds in which the Newport Company had no interest whatever. It is true that the Sheard Company at the time it paid the note was indebted to the Newport Company, but that in no sense made its funds the property of the latter. An unsecured creditor has no interest in his debtor's property until he has sequestered it. The money which the defendant received belonged to the Sheard Company, and not to the bankrupt. It follows, then, that there was no preference unless that which was actually done can be treated as the equivalent for something else. And that is the theory of the District Court's decision. It is pointed out that, if the Newport Company had collected its claim from the Sheard Company and had itself paid the note, there would have been a transfer from the Newport Company to the bank. And it is said that it was merely a short cut for the Sheard Company to pay the note and charge the amount paid upon its account against the Newport Company—that the effect of the two transactions was the same. There would be much force in this argument if the Sheard Company stood in the transaction merely as a debtor of the Newport Company. It may well be that when a debtor with the approval of his creditor takes up the latter's note at a bank, and offsets the amount paid upon his debt, the payment to the bank will be treated as having been made by the creditor; the debtor being really his agent in the transaction. But that was not the situation here. The Sheard Company was the indorser of the note, and had pledged its own property as security therefor. In taking up the note and collateral it acted in its own behalf, and in no sense as the agent of the Newport Company. The note was not discharged. The Sheard Company as against the Newport Company became the holder instead of the bank. Upon no permissible theory in law or equity can it be said that the note was paid by the Newport Company.

But it is further urged that the effect of the transaction was to appropriate certain assets of the Newport Company, to wit, its demand against the Sheard Company, to the payment of this note to the exclusion of other creditors. As already pointed out, however, this ultimate result would not make the transaction a preference; the Sheard Company alone dealing with the bank and acting in its own interest. But it cannot be conceded that the result claimed would follow. If the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set-off or counterclaim against its debt, it could not legally do so. Bankruptcy Law, § 68b. And, if the Sheard Company could not offset the note against the account of the Newport Company, there was no transfer or appropriation of such account, and much less a preference. The debt could still be collected by the trustee of the Newport Company and used for the benefit of all the creditors.

Finally, it is contended, in substance, that equity requires that the decree be permitted to stand—that the whole transaction was an eva-

sion of the bankruptcy act. We see no basis for this contention. The note which was paid was apparently well secured by the indorser's collateral. There was no reason why it should not have been paid in full. The bank received no more than it was entitled to without looking to the bankrupt's property at all. It cannot be said that equity requires us to affirm a decree compelling a bank to pay back to the trustee of the maker of a note money received from an indorser, and upon the payment of which it surrendered collateral deposited by such indorser.

The decree of the District Court is reversed, with costs, and the cause is remanded, with instructions to dismiss the bill, with costs.

BACON v. CONROY.

(Circuit Court of Appeals, Second Circuit. June 15, 1900.)

No. 272.

1. ADMIRALTY (§ 73*)—DOCUMENTARY EVIDENCE—SHIP'S LOG.

It is the better practice to introduce the log of a vessel in evidence, after being duly authenticated, to prove facts stated therein, rather than to rely on the testimony of the officer who made the entries after reading the same, when much time has elapsed, and the facts are of such a character, that he cannot be supposed to have any independent recollection of them.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 73.*]

2. SHIPPING (§ 153*)—ACTION TO RECOVER FREIGHT—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a finding that the weight of a cargo of chalk carried by a vessel was in excess of that reported by the consignee and on which freight was paid.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 153.*]

Appeal from the District Court of the United States for the Southern District of New York.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellant.

Wheeler, Cortis & Haight (John W. Griffin, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libellant chartered the steamer *Fortuna* to the respondent's testator to carry a cargo of block chalk from Dun-kirk to Philadelphia. The bill of lading though calling for 4,300 tons contained the clause "weight unknown." On arrival the cargo was discharged in tubs and removed by the consignee to some point in the city of Philadelphia where it was weighed. Freight was paid on 3,725 tons. Some six months afterwards this libel was filed, claiming freight on 275 tons in addition.

Several methods are pursued to show that the actual weight of the cargo delivered was not less than 4,000 tons. First, two sizes of tubs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were used, one weighing 1,600 and the other 800 pounds when loaded. The only witness who gives the figures of the tally is the captain, who, reading them from a letter signed by him, the chief officer, and the chief engineer, date not stated nor person addressed, says 5,685 of the large and 572 of the small tubs were discharged. The theory was that the master refreshed his recollection by looking at this letter; but he is not shown to have had any personal knowledge of the tally at all.

The trouble with this calculation is that there is no legal proof of the tally. It was kept from August 26th, the day of arrival, to September 1st, by the second mate at one end of the vessel and the boatswain at the other, and from September 1st to September 9th by a new second mate and the boatswain. The only one of these men produced as a witness, who had personal knowledge, is the original second mate, who tallied at one end of the ship between August 6th and September 1st.

No explanation is offered why the master, having these facts and figures within reach, did not at the time of discharge, when witnesses were at hand and recollection fresh, raise the question whether the amount of freight paid by the consignee was correct. This is the time when such questions should be settled.

The next method is to compare the draft of the vessel at the time of arrival, 22 feet 3 inches, with her loading or displacement scale, deducting other weights than the cargo contained in her. These consisted of boiler water, fresh water, coal, and stores. Allowing for weights other than cargo and for the difference between the specific gravity of the water at Philadelphia and water at sea, the vessel should have had on board according to her loading scale, the accuracy of which was proved by the chief engineer Iverson, cargo weighing over 4,000 tons. The foregoing calculation is corroborated by comparing the weights on board after the discharge of the cargo with the loading scale at the then draft of 11 feet.

The chief engineer testifies that entries in the engineer's log made by him as to the weights of the coal, fresh water, boiler water, and stores on arrival and of the same articles together with the water ballast after discharge of the cargo were to his knowledge correct at the time they were made. The theory was that by looking at the log he refreshed his recollection; but this was evidently not so. He had after looking at the log no revived or independent recollection, but could only say that he knew the entries when made were correct. The log was only marked for identification. We think it would have been better practice to offer the entries in evidence. *Howard v. McDonough*, 77 N. Y. 592; *National Ulster County Bank v. Madden*, 114 N. Y. 281, 21 N. E. 408, 11 Am. St. Rep. 633.

While the proof is not of a very satisfactory character, we think the district judge was justified in finding that a *prima facie* delivery of at least 4,000 tons of chalk was made out, especially in view of the fact that the respondent offered no evidence whatever as to the actual weight of the cargo at Philadelphia if it was weighed, or how

the freight was estimated if the cargo was not weighed, or that it was not within his power to make such proof.

The decree is affirmed, without interest or costs.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This was an action to recover a balance of freight alleged to be due under a charter party of the steamship *Fortuna*, dated July 26, 1905, between the libellant and respondent's firm of John D. McGlincey & Company. Under this charter, the steamer was to transport a cargo of block chalk, not exceeding 4,300 tons from Dunkirk, France, to Philadelphia, at the rate of 7 shillings and 9 pence per ton of 2,240 pounds, captain to sign bills of lading as presented. Pursuant to the contract, a cargo was duly loaded at Dunkirk and delivered to the consignees in Philadelphia. The captain signed bills of lading therefor, as ordered by the charterers. The cargo was delivered in conformity with the bills of lading. It is alleged that freight was duly paid on 3,725 tons, leaving a balance of 275 tons, upon which freight should be paid, but is refused.

The pleaded defense is a denial that the cargo amounted to 4,000 tons and the libellant was left to make such proof as he could of the quantity on board.

The case was not tried in court. The depositions of the master, the chief engineer and the mate were taken, however, and produced. I have read them carefully. Their testimony was objected to because the witnesses, particularly the master, used the ship's logs in giving it, but it appears they were not testifying from the logs, but from their memories as refreshed by them and these objections should therefore be overruled.

The master's testimony showed that he signed bills of lading for 4,200 tons, but the statement of the amount was coupled with an acknowledgment that he signed "weight unknown" and he said he did not in fact know what the weights were. The libellant claims that the bill of lading amount was checked by the ship's tally when loading, but the only evidence of this was the master's statement, that "the mate always takes the number of the cars in loading," which obviously is of no value when the sufficiency of legal evidence is questioned.

It was attempted to establish the weights from the draft of the ship. That involved giving reasonably accurate computations of the weights of coal, water, fresh and boiler, and stores on board before and after discharge. The weight of the coal was established by the testimony of the engineer. Some calculations have been made of the weights of the cargo in connection with what is called the "Builders' scale." That was objected to as not being properly proved and not competent. When it was introduced the first objection was good, but the subsequent testimony of the chief engineer established its correctness and I think it then became competent. The draft of the steamer at sea before discharge was 22 feet, 3 inches, from which should be deducted 3 inches for the fresh water she was in at Philadelphia. By the builders' scale it appears that a load of 4,350 tons is required to give the ship a mean draft of 22 feet. When she was at that draft, she had on board 209 tons of weight other than cargo, which was therefore 4,141 tons, corresponding, substantially, with the bill of lading weight. The testimony shows that the weights of the items of cargo were as follows:

	Before discharge tons.	After discharge tons.
Coal	143	262
Fresh Water.....	12	10
Boiler water.....	38	38
Stores, lumber.....	16	16
Water ballast.....	...	493
	<hr/> 209	<hr/> 819

The exact weight of cargo does not appear, but there is sufficient to show that a greater quantity was on board than paid for and more than the claim here.

No evidence of any kind has been offered by the respondent, nor has any oral argument or brief been submitted by him, or assistance of any kind been given by him to the court, which has been left to ascertain the facts as best it could from the proofs submitted by the libellant, aided by his able brief. I think in the absence of any contradiction of the libellant's proofs, the court is required to deduce from them that the weight of the cargo was at least 4,000 tons. As the respondent has paid for 3,725 tons, a balance remains of 295 tons, which at the charter rate makes, with the exchange at \$4.86, \$517.59, for which amount, with interest, the libellant should have a decree.

SEXTON v. KESSLER & CO., Limited, et al.

(Circuit Court of Appeals, Second Circuit. May 14, 1909.)

No. 263.

BANKRUPTCY (§ 163*)—VOIDABLE PREFERENCES—TRANSFER OF PROPERTY—DELIVERY PURSUANT TO PRIOR LIEN.

A New York banking house, by agreement, and in order to provide security for drafts drawn by it in the course of business on its correspondent in Manchester, England, placed certain stocks and bonds either transferable by delivery or indorsed in blank in an envelope in its safe deposit vaults marked "Escrow, for account of" the Manchester house, which was furnished with a list of the securities giving their market value. The New York house also entered the transfers on its books and with permission of the Manchester house, from time to time, withdrew certain of the securities and substituted others of equal value. The arrangement was made in entire good faith and continued for a number of years, when the New York house, having then outstanding unprotected drafts, and its condition having become uncertain by reason of a panic, delivered the securities to an agent of the Manchester house and within four months thereafter was adjudged a bankrupt. *Held*: That the Manchester house had an equitable lien on the securities while in the possession of its debtor in the nature both of a mortgage and an agreement for a pledge which gave it the right to take possession of the same at any time; that, when it took possession, it did so by virtue of such prior right, and its title was that of mortgagee and pledgee, relating back to the time of the original transaction, and did not constitute a transfer of property within four months of the bankruptcy, which could be avoided as a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 163.*]

Appeal from the District Court of the United States for the Southern District of New York.

See, also, 165 Fed. 508.

McLaughlin, Russell, Coe & Sprague (Abram I. Elkus, Frederick C. McLaughlin, and Rufus W. Sprague, Jr., of counsel), for appellants.

John Larkin and J. Frankenheimer, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. Kessler & Co., of New York, engaged in the business of banking and foreign exchange, had for a long time drawn upon Kessler & Co., Ltd., of Manchester, without giving any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

security for payment of its drafts. Early in 1903 the Manchester house wrote the New York house as follows:

"We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit. Suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

"We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for."

In accordance with this letter the New York house, on June 30th, wrote the Manchester house:

"In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vaults the following securities, package marked 'Escrow for account of Kessler & Co., Limited, Manchester':

1,484 shares Oklahoma Gas & Electric Co., at 25.....	\$ 37,100
2,428 shares United Lighting & Heating Co., at 12.....	29,136
2,352 shares Daimler Manufacturing Co., at 50.....	117,600
\$373,000 United Breweries Co. first 6's, at 65.....	242,245

\$406,081

"This escrow is intended as a protection against our long drawings against your good selves."

July 8th the Manchester house replied as follows:

"We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order. If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

December 23, 1903, the Manchester house wrote to the New York house as follows:

"For the purpose of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December. We do not think the matter will present any difficulty for you. Something in the form of the inclosed is what we require. * * * We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities: * * * Name secs. and market value."

The New York house not only conformed to these directions, but, in addition, entered the securities so set aside and all substitutions of them on their loan book and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or indorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907, when a financial panic occurred in the city of New York. October 25th the stability of the New York house being in doubt, it de-

livered to an agent of the Manchester house then in New York City the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house. November 8th a petition in bankruptcy was filed against the New York house, and November 27th it was adjudicated a bankrupt.

This is an action in equity brought by the trustee in bankruptcy to set aside the transfer of the securities because made within four months prior to the filing of the petition; the New York house being insolvent, and the Manchester house knowing, or having reason to know, that fact, and the intention being to give it a preference. The matter was referred to a master, who found in accordance with the prayer of the bill, and his report was confirmed by the district judge, from whose decree this appeal is taken.

The master and the district judge both held the transaction in question to be a pledge or an agreement to pledge the escrow securities, and that the delivery of them under the circumstances stated in the bill within four months of the filing of the petition in bankruptcy constituted a voidable preference under the bankrupt act. It may be admitted that the conclusion so reached was entirely right if the arrangement is to be regarded as a pledge or a promise to pledge; possession being essential to the existence of a pledge. This relieves us from the necessity of examining authorities relating to pledges. A word, however, may be said as to the cases of *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, *Casey v. National Bank*, 96 U. S. 492, 24 L. Ed. 789, and *Casey v. Schuchardt*, 96 U. S. 494, 24 L. Ed. 790, upon which the appellant especially relies. In the second case a receipt was given by the bank which might have been treated as a declaration of trust; but the defendant relied on its rights as a pledgee. What Mr. Justice Bradley said in the last case was undoubtedly true of all the cases:

"As the only claim made by Schuchardt & Sons in their answer to the securities in question is by way of pledge, and as there was no such delivery and retention of possession by them or their agents or trustees as the law requires to constitute the privilege of a pledge as to third persons, their claim cannot be sustained."

The intention to secure is plain; but this could have been accomplished not only by a pledge, which is the usual course of business in case of choses in action, but by a mortgage or by a trust. It can hardly be doubted that a formally executed declaration of trust as to specific securities by the New York house in favor of the Manchester house would have been good. The New York house, although the maker of the trust, could have properly acted as the trustee (*Locke v. Trust Co.*, 140 N. Y. 135, 35 N. E. 578), to the extent of the trust, viz., the protection of the Manchester house for its acceptances.

As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible. In their correspondence the parties used neither the words "mortgage," nor "pledge," nor "trust," but the inapt word "escrow," which they probably did not understand. What they did, however, clearly evidences their intention. The credit to be given to the New York house was not to depend alone upon its strength, but also upon additional security to be given to the Manchester house. The New York house, being the absolute owner

of certain specified securities, agreed, in accordance with the requirement of the Manchester house, to hold them for its account, and to that end both segregated them from their other securities and entered them upon their books as so appropriated. The Manchester house as the equitable owners authorized the New York house to withdraw the specified securities from time to time for their own purposes not absolutely, but upon condition that they should substitute securities of equal value, which was always done. There were, accordingly, during the whole period of this credit, specified earmarked or traceable securities held by the New York house for account of the Manchester house. The use of the word "collateral" does not necessarily indicate a pledge. It is important only as showing that the Manchester house's ownership of or interest in the securities was only for the purpose of protecting it for accepting the drafts of the New York house.

Considering the family relation and the long business dealing between the two houses, and the fact that they were dealing 3,000 miles apart, and that they had entire confidence in each other, the arrangement made was natural and reasonable. It was sufficiently precise to protect the Manchester house and elastic enough to meet the ordinary requirements of the business of the New York house.

If the transaction had been a mortgage of the securities, the delivery of them October 25, 1907, would have been good as against the trustee in bankruptcy because under the law of the state of New York mortgages of choses in action need not be filed. Lien Law (Laws 1897, p. 536, c. 418) § 90; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee. *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Wood v. U. S. Fidelity Co.* (D. C.) 143 Fed. 424.

So in the case of trust receipts the courts of New York have been astute to carry out the intention of the parties. The course of business is as follows: A banker gives a letter of credit to the purchaser of goods to enable him to pay for them upon condition that bills of lading to the banker's order for the goods shall be delivered to him, accompanied by a draft upon the purchaser. Upon arrival of the goods the banker delivers the bill of lading to the borrower; he executing a trust receipt to hold or sell the goods as the property of the banker for his benefit. Without defining exactly what the relation between the lender and the borrower is as to the goods—that is, whether it is that of mortgagor and mortgagee or of pledgor and pledgee, or a conditional sale—the courts have steadily protected the right of the lender in the goods so delivered. *Farmers' & Mechanics' Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732.

We regard the transaction in question as a declaration of trust in respect to the escrow securities by the New York house in favor of the Manchester house. Being the absolute owner of the securities, it

declared in consideration of its right to draw that it held and would hold the same and all securities subsequently substituted therefor for the benefit of the Manchester house. From that moment the legal title was in the New York house, but the equitable in the Manchester house; the New York house holding the securities in a fiduciary capacity. This was the condition on which the Manchester house gave the drawing credit which continued for several years, and it was because of its ownership that its authority to substitute securities was needed and was given.

We do not apprehend that this conclusion will result in the consequences foretold by the appellee. The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The visible possession of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of chattels where there has been no change of possession will be protected if they are set apart and marked and in this way notice given to the public. *First National Bank v. Pennsylvania Trust Co.*, 124 Fed. 968, 60 C. C. A. 100. There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them. There is no evidence that any exhibition of or statement as to these securities was made to any one by the New York house for the purpose of obtaining credit. Their books, if examined, would have shown what the real dealing between them and the Manchester house was.

If there had been no insolvency, and the New York house had withdrawn securities without substituting others, a court of equity would have compelled it to do so, or at least would have enjoined it from making such withdrawals, at the suit of the Manchester house. If, having failed to cover its drafts, the New York house had refused to deliver the securities to the Manchester house, a court of equity would have compelled it to do so. In delivering the securities to the Manchester house October 25, 1907, the New York house acted without the compulsion of a court of equity in strict accordance with the trust it had declared four years before, when entirely solvent. For the first time in that course of dealing there was an expectation that the New York house would not cover its drafts; that the Manchester house would have to pay them and would need to realize upon the securities which the New York house held for its protection. No new right or privilege was then created voidable under the bankrupt act. The delivery of these earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin v. Camp* (C. C.) 98 Fed. 974, cited with approval in *Thompson v. Fairbanks*, 196 U. S. 516, 524, 25 Sup. Ct. 306, 49 L. Ed. 577. A liberal construction should be given to these transactions in aid of the obvious intention of the parties.

The decree of the court below is reversed with costs.

NOYES, Circuit Judge (concurring). While I concur in the result reached by Judge WARD, I am constrained to base my conclusions

upon essentially different grounds; and the case is of such importance, both on account of the amount in controversy and the principles involved, that a separate opinion seems called for.

In considering the case from any point of view, one thing is apparent from the outset, and that is the good faith of the parties. Another thing is also apparent. The New York house intended that the securities in question should afford protection to the Manchester house for their acceptances, and the latter supposed that they were obtaining protection. Both parties acted upon the assumption that that which they did accomplished something. The New York house furnished security in the form desired by the Manchester house and the latter accepted the former's drawings upon that security. The transaction, if invalid, is only so because it contravenes some statute or positive legal principle; and it cannot be declared invalid without inflicting great hardship upon the Manchester house.

In determining the validity of the transaction, it is necessary, in the first place, to ascertain what its legal nature was. Judge WARD has held that it amounted to a declaration of trust by the New York house in favor of the Manchester house; but I cannot accept this conclusion. It is an essential element in a declaration of trust that title pass from the declarant of the trust as an individual to himself as trustee. It must be shown that he intends to divest himself of the beneficial interest in the property and to hold it thereafter as a trustee for the benefit of another. Now it is clear from the evidence that this is just what the New York house did not intend to do. They intended to set aside the obligations only as security for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to have no interest in the security. The beneficial interest in the property, the equity of redemption, instead of passing to the Manchester house, as would be essential in a declaration of trust, was intended by both parties to remain in the New York house. The initial setting aside of the securities and the course of dealing between the two houses were, in my opinion, wholly inconsistent with the creation or existence of a declaration of trust. The transaction must stand, if at all, as one in which the Manchester house obtained security only.

Now security might have been afforded either by way of mortgage or pledge. The general distinction between a mortgage and a pledge is that in one the title passes, but not necessarily the possession; while in the other the title does not pass, but the possession must. A pledge is a mere lien and something less than a mortgage. As said by the Master of the Rolls in *Jones v. Smith*, 2 Ves. Jr., 372:

"A mortgage is a pledge and more, for it is an absolute pledge to become an absolute interest if not redeemed at a certain time."

In this case, the bonds, certificates of stock, promissory notes, and other securities were duly indorsed and assigned so that when Kessler & Co. of Manchester took possession of them shortly before the bankruptcy proceedings the title to them passed even if it had not done so before. Under these conditions there is the highest authority for saying that, when the Manchester house received the securities so indorsed and assigned, it had a double title to them—that of mortgage and

pledgee. In the very case principally relied upon by the defendants (*Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779), the Supreme Court of the United States, in speaking of a case where bills receivable had been both pledged and assigned to a creditor, said:

"In such case they [the securities] are held by the creditor by way of mortgage as well as pledge, and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is that the title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (*Pothier, Nantissement*, 8); and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual. It may be constructive, as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case there is a union of two distinct forms of security; that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.

"This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their indorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio (N. Y.) 269, and in *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568. Hence the actual possession of the securities by the creditor was a matter of less importance in those cases."

I fully appreciate that this language of the Supreme Court seems in conflict with the generally accepted doctrine that a pledge of choses in action does not necessarily become a mortgage because the title is conveyed. In the case of a chose in action there cannot well be a pledge without an assignment. Thus, if negotiable paper does not require indorsement, title passes to the pledgee upon delivery; if indorsement is necessary, the fact that it is made does not, it is generally held, necessarily make the transaction a mortgage. In such a case it is necessary that the pledgee should have the title in order to obtain effectual security. Consequently, it has usually been said in the case of indorsed shares of stock and negotiable paper that whether a transaction should be regarded as a mortgage or a pledge must be determined from the agreement between the parties.

Accepting this latter view as correct, there is much to support the contention that the parties in this case intended something more than a pledge. They used the word "escrow," which has usually to do with the passing of title. The securities were delivered to the Manchester house as being its property, and they had previously been set aside and marked with its name. But I think it unnecessary to determine whether the transaction was a mortgage or a pledge. It is sufficient to say, in view of the decision of the Supreme Court, as well as in view of the facts shown in addition to the indorsements indicating a mortgage, that the Manchester house, after taking possession, may safely be regarded as holding both by way of mortgage and by way of pledge.

Indeed, the case of *Casey v. Cavaroc*, supra, would seem to afford authority for the conclusion that the transaction might be valid as a mortgage even if Kessler & Co. of Manchester had not taken actual possession of the securities before the bankruptcy. As shown in the extract from the opinion already quoted, the matter of the physical possession of securities is of less importance when they are so indorsed that title will pass than when there is a mere attempted pledge. And in another part of the opinion the court said (96 U. S. 486, 24 L. Ed. 568):

"It must not be overlooked that the *Crédit Mobilier* has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage, for the title of the securities was never transferred to them. The evidence of the cashier is that they were all stamped payable to the order of the bank, when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank had failed."

Moreover, were the fact of taking possession absent in this case, it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference before delivery of indorsed and unindorsed securities, except in the case of special indorsements, would seem to be slight; but the equities of the case, coupled with what the parties did, aside from any technicality, make out a strong case in support of an equitable lien in the nature of a mortgage upon the securities in favor of the Manchester house, valid against the trustee in bankruptcy without a change of possession. It is unnecessary, however, to determine the case, nor to consider it at length, upon the theory that there was no change of possession because, as we have seen, the Manchester house did take possession of the securities, and such act is a factor of importance, and, as already shown, after the Manchester house took possession it held the securities both by way of mortgage and by way of pledge.

Now, there being no fraud in the transaction and no rights of purchasers or attaching creditors having intervened, the taking possession of the securities by the Manchester house before the bankruptcy was, in the absence of a statute making it unlawful, entirely legal and proper. Regarded simply as a pledge, the pledgee had the right to take possession. Thus in *Parshall v. Eggert*, 54 N. Y. 18, the court said:

"In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession, at the time of the pledge or subsequently, is entitled to be preferred. * * * A creditor who acquires a specific right to or lien on the thing pledged may prevent the pledgee's interest in an undelivered chattel from attaching; but such is not the condition of the creditor at large. The only ground on which he can claim to prevent the perfecting of such a right in the pledgee is that it works a fraud upon him."

And in *Jones on Pledges* (2d Ed.) § 38, it is said:

"A pledge or contract for a pledge, ineffectual for want of delivery, may be rendered valid by a subsequent delivery, even as against an intermediate creditor at large of the pledgor. Of course, such subsequent delivery would not

prevail against a creditor who had, between the time of the making of the contract and taking possession under it, acquired a specific lien upon the thing pledged by attachment or levy of execution. The only other obstacle which could prevent such a transaction from being effectual would be the intervention of fraud."

When therefore the Manchester house obtained possession of the securities, it lawfully held them as pledgee and mortgagee, unless its rights were affected by some statute; and the only statute which it claimed to operate against it is the provision of the bankruptcy act (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), making transfers of property made under certain conditions within four months of bankruptcy unlawful preferences. So the primary question whether the act applies in this case is whether, within its meaning, the securities in question were transferred within four months of the bankruptcy. If they were not so transferred, there was no preference, and the determination of the question of time will dispose of all questions concerning the securities constituting the general escrow.

Manifestly at some time there was a transfer of the securities. When did it take place? If it took place at the time the parties intended to charge the securities for the benefit and protection of the Manchester house, when they were put aside and indorsed, when the equities of the Manchester house were created, it took place more than four months prior to the bankruptcy. If, on the other hand, it took place only when the physical possession of the securities was taken, it was within the prescribed period.

Now, as bearing upon this question of time, it is clear that the Manchester house had the right at any time to demand and take possession of the securities set aside for its benefit. While the necessity for immediately taking possession was evidently not contemplated by the parties, I think that the very fact that the securities were set aside "in escrow" shows that the right of the Manchester house to take possession was recognized at the beginning. Delivery upon condition is the very essence of an escrow, and, while that term was improperly used by the parties here to describe their transaction, I think it still carries with it the idea of delivery; and, there being no agreement otherwise, delivery would take place when required by the Manchester house. I have no doubt that after demand the Manchester house could have enforced its rights to the possession of the securities in equity if not in law.

The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created—whether the act of taking possession created a lien, or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the transfer be regarded as having taken place more than four months before the bankruptcy.

The case of *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, seems directly in point here. In that case a mortgagee

took possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage within four months before bankruptcy proceedings against the mortgagor; but the Supreme Court held that this was done pursuant to a pre-existing right and did not constitute a preference, and quoted with approval the following extract from *Sabin v. Camp* (C. C.) 98 Fed. 974, where it was held that a transaction which was consummated within the prescribed period was not a preference, because it had originated before:

"What was done was in pursuance of the pre-existing contract, to which no objection was made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals; and when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The Supreme Court then went on to say:

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and, when enforced by the taking of possession, that possession, under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subjected to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated."

See, also, *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; *Wood v. United States Fidelity, etc., Co.* (D. C.) 143 Fed. 424.

I think these principles applicable here. While the Supreme Court in the cases referred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference, although occurring within the prescribed period. "The bald creation of a lien within four months" is a preference.

The application of the principle involved in this distinction is de-

cisive here in favor of the Manchester house. It had an equitable right to the securities which were held "in escrow" for its benefit. Its rights and equities were created years before the bankruptcy. It could at any time have enforced its right to the possession of the securities. No element of fraud and no intervening rights of purchasers or attaching creditors appear. The securities were not property the possession of which would be visible to third persons and afford a basis of credit. It is my opinion that possession was taken pursuant to a pre-existing right, and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy.

The case of *Zartman v. First National Bank*, 189 N. Y. 273, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, relied upon by the appellee as his principal case upon this point, is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession.

Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing can properly be said to have reasonable cause to believe that the mortgagor in surrendering possession is intending to give him a preference. He takes possession in his own right of that which he looks upon as his own special property. Instead of regarding the transaction as a preference, he would, as suggested in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, rather take it as a recognition of his right under his mortgage or pledge. See, also, *Humphrey v. Tatman*, 198 U. S. 93, 25 Sup. Ct. 567, 49 L. Ed. 956.

Upon principles similar to those already considered, I think that the taking of possession by the Manchester house of the securities embraced in the "special escrow" related back to its creation, and, consequently, that that transaction, although occurring within four months of the bankruptcy, was based upon a contemporaneous consideration and did not constitute a preference.

The decree of the District Court should be reversed, with costs.

LACOMBE, Circuit Judge. I concur in the conclusion that the decree should be reversed, for the reasons set forth in the opinion of Judge NOYES.

KANSAS NATURAL GAS CO. v. HASKELL et al.

(Circuit Court, E. D. Oklahoma. July 3, 1909.)

Nos. 856-859.

1. COURTS (§ 303*)—JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST THE STATE."

A suit to enjoin individual defendants from proceeding as officers of a state to enforce an act of the Legislature of such state which is unconstitutional and void is not a "suit against the state" within the meaning

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 172 F.—35

of the eleventh amendment to the Constitution, and is within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. § 303.*

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.

Federal jurisdiction of suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.]

2. CONSTITUTIONAL LAW (§ 47*)—VALIDITY OF STATE STATUTE—DETERMINATION—SCOPE OF INQUIRY.

In determining whether a state statute is within the powers of the state, a court will look beyond the title of the act, to ascertain its real purpose and effect from an examination of the body thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 47.*]

3. MINES AND MINERALS (§ 48*)—CONSTITUTIONAL LAW (§§ 206, 240, 277*)—EMINENT DOMAIN (§ 87*)—NATURAL GAS—NATURE OF PROPERTY—POWERS OF STATE.

Natural gas found within the territorial limits of a state is not a product which the state may conserve and preserve by law as a thing in which the people of the state have a common interest, as flowing streams, wild animals, etc.; but one who by lawful right reduces it to possession has the absolute right of property therein, with the right to transport and sell and deliver the same as other personal property, of which right he cannot be deprived by the state without just compensation, without violation of the fourteenth amendment to the federal Constitution, and also, in Oklahoma, or article 2, § 24, of the state Constitution.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 48;* Constitutional Law, Dec. Dig. §§ 206, 240, 277;* Eminent Domain, Dec. Dig. § 87.*]

4. COMMERCE (§ 33*)—EMINENT DOMAIN (§ 2*)—INTERSTATE COMMERCE—ATTEMPTED PROHIBITION BY STATE.

Acts Okl. 1907, p. 586, c. 67, which prohibits, except for private use, the construction of pipe lines for the transportation of natural gas within the state, except by corporations organized thereunder by charters providing that such gas shall not be transported out of the state, nor sold or delivered to any one else to be taken out of the state, is void as an attempt to interfere with interstate commerce, in violation of the commerce clause of the federal Constitution, and, as applied to owners of gas wells in the state, as in violation of article 2, § 24, of the state Constitution, providing that private property shall not be taken without just compensation.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33;* Eminent Domain, Dec. Dig. § 2.*]

5. HIGHWAYS (§§ 80, 89*)—TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS—USE OF HIGHWAY BY ABUTTING OWNER FOR OTHER PURPOSES.

The fee to the land comprising rural highways in the portion of Oklahoma which was formerly Indian Territory is not vested in the state, but in the abutting landowners, subject only to an easement in the public to use the same for highway purposes; and the state has no power to prohibit the laying and maintaining of pipe lines over or across such highways, by contract with such owners, for the transportation of natural gas from within to without the state in interstate commerce, where it does not interfere with the easement in the public, and subject to such reasonable rules and regulations as the state may impose in the interest of the public health and safety.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 288-299; Dec. Dig. §§ 80, 89.*]

In Equity. On motions for preliminary injunctions and demurrers to bills. Bills by the Marnet Mining Company, by A. W. Lewis, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by O. A. Bleakley against the same defendants are also governed by the opinion reported herewith.

E. L. Scarritt, Eugene Mackey, John J. Jones, J. P. O'Meara, Zevely, Givens & Smith, and Edward W. Hatch, for complainants.

Charles West, Atty. Gen., and Flynn, Ames & Chambers, for respondents.

POLLOCK and CAMPBELL, District Judges. The scope of each of the foregoing bills being identical, and the object and purpose sought to be accomplished thereby being the same, the cases will be considered together, as they have been argued, briefed, and submitted for decision in that manner. The facts necessary to a decision of the questions involved may be stated, as follows:

At its regular 1907 session the Legislature of this state passed an act, the same being chapter 67, p. 586, of the Laws for the Year 1907, which provides as follows:

"Chapter 67.

"Pipe Lines. Regulating Gas and Oil Pipe Lines.

"Article 1.

"An act regulating the laying, constructing, and maintaining and operating of gas pipe lines for the transportation of natural gas within the state of Oklahoma, defining the modes of procedure for the exercise of the right of eminent domain for such purposes, providing for the inspection and supervision of the laying of such pipe lines and limiting the gas pressure therein, and providing penalties for the violation thereof.

"Be it enacted by the people of the state of Oklahoma:

"Section 1. Any firm, copartnership, association or combination of individuals may become a body corporate under the laws of this state for the purpose of producing, transmitting, or transporting natural gas to points within this state by complying with the general corporation laws of the state of Oklahoma, and with this act.

"Sec. 2. No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this state shall be granted a charter or right of eminent domain, or right to use the highways of this state unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, copartnerships, companies or corporations engaged in transporting or furnishing natural gas to points, places, or persons outside of this state.

"Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state.

"Sec. 4. No association, combination, copartnership or corporation shall have or exercise the right of eminent domain within this state for the purpose of constructing, or maintaining a gas pipe line or lines within this state, or shall be permitted to take private or public property for their use within this state, unless expressly granted such power in accordance with this act.

"Sec. 5. The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across or through the highways, roads, bridges, streets, or alleys in this state, or of any county, city, municipal corporation or any other public or private premises within this state is hereby declared an additional burden upon said highway, bridge, road, street, or alley, and any other private, or public premises may only be done when the right is granted by express charter from the state and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

"Sec. 6. All pipe lines for the transportation or transmission of natural gas in this state shall be laid under the direction and inspection of proper persons skilled in such business to be designated by the chief mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

"Sec. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe lines for the transportation or transmission of natural gas or used on or in any gas well within this state.

"Sec. 8. Any corporation granted the right under the provisions of this act to exercise the right of eminent domain, or use the highways of this state to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this state, which shall transport or transmit any natural gas to a point outside of, or beyond this state, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of, or beyond this state, shall by each or all of said acts, forfeit all right granted it or them by the charter from this state, and said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this Act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the state for the transportation or transmission of natural gas within this state, and all the property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of the state through its proper officer and in said action there shall be a right to the state of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the state, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this state from any pipe line or lines going out of, or beyond the state. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the state, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation, whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked: Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this act.

"Sec. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this act; and before any gas pipe line company shall furnish or sell gas to the public, it shall secure from the inspector a certificate showing that said line is laid and constructed in accordance with this act, and under the inspection of the proper officers, provided, that nothing in this act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this state and further provided, that factories in this state may transport or transmit gas through pipe lines for their own use for factories located wholly within this state, upon securing the right of way from the state over or along the highways and from property owners to their lands.

"Sec. 10. That no person, firm or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this state or in this state construct, operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this act provided, except as in section 9 of this act, and provided further that all persons, firms, corporations, associations and institutions now doing the business of transporting or transmission of natural gas in this state and otherwise complying with this act are hereby permitted to incorporate under the provisions of this act within ten days after the passage and approval of the same.

"Sec. 11. All acts and parts of acts in conflict with this act are hereby repealed.

"Sec. 12. An existing emergency is hereby declared by the Legislature for the preservation of the public peace, health and safety of the state.

"Sec. 13. This act shall take effect from and after its passage and approval as provided by law.

"Approved December 21, 1907."

The several bills presented in the above entitled and numbered cases call in question the constitutional validity of the foregoing enactment. The status and interest of the several complainants in the subject-matter of this litigation, as averred in the bills of complaint, may be briefly stated as follows:

The Kansas Natural Gas Company, complainant in case No. 856, is, and was at the date of the commencement of that suit, a corporate citizen of the state of Delaware. Its business is that of purchasing and distributing natural gas to consumers. It is in the market for, and is willing to buy and receive, large quantities of natural gas for transportation by it to the several cities of Kansas and Missouri along its trunk pipe line, and supplied by it with natural gas there to be distributed, sold, and used. It has a contract for the purchase of all the gas that can be produced from a certain well located in Washington county, this state, and has acquired by purchase a right of way over and across the land upon which said well is situated for the laying of a pipe line for the transportation of said gas. It proposes to, and if permitted to so do will, extend its present trunk pipe line from the present southern terminus thereof in the state of Kansas southward across the state line into the state to receive gas which it has a right to receive under its said contract. It also proposes to build and construct lateral and branch lines from said main trunk line so extended for the purpose of gathering and receiving such gas as it may be able to purchase from the owners of other wells in the state. Said line will be used by it for the transportation of natural gas from wells in the state into the states of Kansas and Missouri, and not in any way for local traffic in the state. The cost of constructing its proposed pipe lines will be more than \$100,000.

The Marnet Mining Company, complainant in case No. 857, is, and was at the date of the commencement of that suit, a corporate citizen of the state of West Virginia. For the purpose of transporting natural gas from the owners and producers thereof in the state to purchasers and consumers thereof in the states of Kansas and Missouri, it has purchased a right of way over certain lands in this state, and proposes to build and construct a system of pipe lines from the states of Kansas and Missouri into this state, to be used exclusively for in-

terstate transportation of natural gas, and not in any way for local traffic in the state. Upon the completion of said pipe line, it will be in the market for, and will be willing to buy and receive, large quantities of natural gas, to be delivered at the wells in this state, and thence transported by it through said pipe lines out of the state, and into the states of Kansas and Missouri, for sale, distribution, and use in those states.

A. W. Lewis, complainant in case No. 858, is, and was at the date of the commencement of said suit, a citizen and resident of the state of Ohio. He is the owner of an oil and gas lease made to him by one Stephen B. Tehee on the 12th day of May, 1905, by the terms of which he has acquired the right to construct wells on a certain tract of land in this state belonging to said Tehee, and to take therefrom all the gas which can be produced from said premises for a period of 15 years from the date of said contract. Agreeable to the terms of said contract, complainant at a cost of many thousand dollars drilled and constructed a well upon said land capable of producing many millions of cubic feet of gas per day. Because of the supply of gas in this state being in excess of the local demand, he is unable to sell, market, or dispose of the same in this state, and, being prevented from transporting said gas from the state, he has suffered great loss and damage in being deprived of his property without compensation.

O. A. Bleakley, complainant in case No. 859, is a citizen and resident of the state of Pennsylvania, and was at the date of the commencement of that suit. For the purpose of constructing a pipe line for transportation of natural gas from certain points in this state into the state of Kansas, he applied to the honorable Secretary of the Interior for a right of way over the lands of certain Indians in Washington county, in this state, through which said proposed pipe line will run, and on the 2d day of June, 1908, the honorable Secretary of the Interior of the United States, by virtue of the power vested in him, did grant unto complainant the right of way across said Indian lands along and over a certain designated route. This right of way was granted to complainant on condition that he should, in accordance with the laws of the United States and the rules and regulations of the Interior Department, pay to the Indian agent the value of such right of way, the damages which the several owners of land over which the same would pass would sustain from laying, building, and maintaining said line. In compliance with said condition and requirement he paid to the Indian agent at Muscogee the sum required to be paid, said sum being the full and fair amount of such right of way and the full and fair amount of such damages. The complainant proposes to build and construct a pipe line on the right of way so obtained, for the exclusive purpose of transporting natural gas from this state into the state of Kansas, not in any way for local traffic in this state.

The several bills further disclose under a large area of this state natural gas exists in abundance; that a large number of wells have been drilled at great expense and capable of producing more than 1,000,000,000 cubic feet of natural gas per day; that this amount is

much more than is required to meet all the demands of the people of the state; that this excess of supply is required to meet the wants of those residing without the state, in the states of Kansas and Missouri; and while such want may be supplied through distributing plants now constructed and those contemplated by complainants, and the excess product may be there disposed of at a fair profit by the owners, under present conditions the owners are required to cease development work, to keep large and valuable wells capped and inoperative, to their great injury and damage. It is further disclosed by the several bills the gas owned by complainants for the most part is produced from lands owned by Indians under leases executed by them with the approval of the Secretary of the Interior before the admission of this state into the Union. It is further averred in the bills the sole object and purpose of complainants is to engage in the marketing and transportation of natural gas beyond the confines of the state only, and not to engage in the performance of any public service in this state; that in constructing lines for such transportation it will not be necessary to carry them along and upon the public highways of the state, but only to cross under or over the same; that such pipe lines so to be constructed are private lines, to be safely and properly constructed and laid by virtue of private contracts with the owners of the land in such manner as to endanger the lives, health, and property of no one, and in just conformity to any and all reasonable rules and regulations of the state for the safety and health of the citizens of said state. The several bills further aver each of the defendants, by virtue of his office and the Constitution and laws of the state of Oklahoma, is clothed with some power and authority and charged with the performance of some duty in the execution and enforcement of the laws of the state and in the protection of public rights, and particularly in respect to the execution and enforcement of the provisions of chapter 67 of the Session Laws of the State for the Year 1907, above set forth, and that as such officers, or otherwise, they have assumed and undertaken to execute and enforce said act by both actions and proceedings in the courts of the state and by force of arms; that it is the avowed object, purpose, and intent of the defendants to the several bills, and each and every of them, to prevent the transportation of natural gas produced in this state beyond the limits of the state, and to that end they are charged with the commission of the following acts:

(1) They caused to be passed by the Legislature of the state the act above set forth. It is further charged said act was passed solely for the purpose of preventing the transportation of natural gas beyond the borders of the state; that said act is wholly illegal and void, because in contravention of certain designated articles of the Constitution of the United States and of this state. (2) That with force and violence, against the rights of the owners thereof, and in violation of the Constitution of the United States and of this state, defendants seized a gas pipe line in course of construction across the line dividing the state of Kansas and this state, and which was to be used wholly and solely for interstate carriage and transportation of gas, tore the same up, and threw the gas pipe and materials of which it was

being constructed back upon the Kansas side of the state line. (3) Defendants caused the line dividing the state of Kansas and this state to be patrolled on the Oklahoma side thereof with armed guards, ordered and instructed by defendants to resist by force and arms the laying and building of any gas pipe line across said line, and to prevent with force and violence the building of any such line, and, if necessary to that end, to tear up and destroy the same. (4) That defendants have, assuming to act in pursuance of the authority granted by the foregoing act, taken possession of all pipe lines engaged in the interstate transportation of natural gas from this state into adjoining states, by force and violence or through receiverships in legal proceedings in the local courts of the state, the sole object and purpose of which was to effectually prohibit and prevent the transportation of natural gas from out this state; that defendants threaten, and it is their purpose, to tear up and destroy by force and violence any gas pipe line transporting natural gas from out this state, and to prevent by force, violence, and by trespass upon the complainants' property and rights, the construction and operation of any pipe line constructed by complainants.

The prayers of the several bills of complaint are as follows: (1) For discovery; (2) that chapter 67, Laws 1907, set forth in the bills, may be declared illegal and void, because in conflict with section 8, art. 1, and the fourteenth amendment to our national Constitution; also illegal and void as offending against the provisions of section 57, art. 5, and sections 24 and 32, art. 2, of the Constitution of the state; (3) that defendants, each and all of them, their agents, servants, and employés, may be perpetually enjoined and restrained from tearing up, destroying, or in any way interfering with the laying, building, or construction of natural gas pipe lines by complainants for the purpose disclosed in the bills of complaint, and from bringing or maintaining in the courts of the state any suits or actions under the provisions of the statute above set forth, or any other law, to restrain complainants from constructing, maintaining, and operating any such pipe line, or to restrain complainants from transporting natural gas from out the state; (4) a temporary or provisional injunction of like effect and purpose pendente lite; (5) other and general equitable relief.

Against these several bills, defendants, each and all, have lodged demurrers, which were presented in oral argument and now stand submitted for decision on elaborate briefs filed by the solicitors for the respective parties, together with application on the part of complainants for provisional injunctions pendente lite. In support of the demurrers interposed, defendants contend, as follows: (1) That these suits, while in name against defendants, occupying official positions under the Constitution and laws of the state, are in truth and in fact against the state of Oklahoma in its sovereign capacity; hence are in contravention of the eleventh amendment to the Constitution. (2) That the act above set forth is a lawful exercise of the legislative power of the state in controlling, safeguarding and protecting the use and enjoyment of the public highways of the state, the organization

of corporate citizens of the state, and the conferring thereon corporate powers, in regulating the laying of natural gas pipe lines, providing for the inspection of such lines, and other matters, all within the legislative power of the state. (3) That the act is valid, because passed by the Legislature in a lawful exercise of the police power of the state, in preserving and protecting from waste the natural resources of the state. (4) It is contended, if the law be unconstitutional, complainants have not by their bills shown such interest in the subject-matter of the litigation as will enable them to challenge the validity of the enactment.

In support of the bills it is the insistence of complainants: (1) Regardless of the form of the act and its declared purpose, as expressed in the title, the manifest, dominant object and purpose sought to be accomplished thereby is to prevent the transportation of natural gas from out the state into other states. That the courts will look beyond the mere declaration of purpose stated in the title of the act to find its true intent and purpose, and, such true intent and purpose being found to be to prohibit or regulate commerce among the states, the act will be declared void because in violation of the commerce clause of the Constitution. (2) That a state has no such public interest in natural gas found within its territorial limits as will authorize it to prevent its transportation in interstate commerce, but that the owner of the soil, or the lessee of natural gas rights in the land from the owner, has a vested private property right in the gas found therein, which, when reduced to possession, is a purely private right of ownership, with full power of sale, disposition, and transportation under proper safeguards, which private property rights of the individual cannot be taken away, destroyed, or unduly restricted by the state without just compensation being made to the owner. And as the act in question attempts to take away, destroy, or render less valuable such private property rights of complainants, without compensation, it is in violation of the fourteenth amendment to the national Constitution, and section 24, art. 2, of the Constitution of the state. (3) That the fee of the public highways of the state is by law vested in the abutting landowners, and not in the state, as contended by defendants. That the public have a right of easement in the highways only. Therefore complainants, while conceding they may not forcibly obtain a right of way for their pipe lines, save by the exercise of the sovereign power of eminent domain, which the state may lawfully refuse to grant them, yet they assert they have the lawful right to procure such right of way by private contract and purchase from the owners, and for such purpose no franchise from the state and no right to exercise the power of eminent domain granted by the state is necessary. (4) The said act is in contravention of the Constitution of the state, because it contains more than one subject, not clearly expressed in its title. (5) Because it attempts to create monopolies, grant exclusive privileges and franchises to corporations of its creation, and in violation of the constitutional provisions of the state.

The questions raised for decision by these several conflicting contentions are important to complainants and all others similarly situat-

ed with them, the state, as represented by its defendant officials, and the public at large, in that the validity of an act of the Legislature of the state declaring the will of the state on a question of great public importance is challenged, and its validity must be determined. However, as said by Chief Justice Marshall delivering the opinion of the court in the great case of *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Therefore, with due regard for the importance of the questions presented and the responsibility attendant upon their decision, we shall proceed to a determination of the cases. And, first, let us inquire whether it be true, as contended by defendants, these suits in legal effect have been brought and are sought to be maintained against the sovereign state of Oklahoma in violation of the eleventh amendment to the Constitution of the United States; for in the orderly administration of justice no court should proceed to decision unless satisfied of its right to so do. We shall therefore first advert to the question of jurisdiction of this court to proceed at the suit of complainants against defendants who occupy official positions in the state and stand charged with the public trust imposed on them by its laws; for, if it be true defendant officials are sought to be restrained or prevented by complainants from carrying out the will of the state, as lawfully expressed through the legislative branch of its government, in the exercise of its sovereign power to legislate, then these suits are in a true and just sense directed against the sovereign state of Oklahoma, because they are brought and sought to be maintained against those who are admitted to be the lawfully constituted representatives of the state, charged by its laws with the performance of certain public duties.

However, the inquiry here necessary to be made does not end with the determination that defendants are lawfully constituted representatives of the state. That much is conceded. The question rather is: Has the Legislature of the state by the act in question sought to impose on defendants, its lawfully constituted representatives for some purposes, the discharge of other duties, over and beyond its constitutional powers to impose, the performance of which by defendants will result in injury to complainants? For, if so, as the Legislature of the state acted outside its constitutional bounds, the act must fall, and in falling carry down the obligations and duties sought to be imposed upon defendants, and they will be left standing naked, as individuals clothed with no power or authority emanating from the state, and thus viewed and considered alone as individuals assuming to act under the

guise of law where no law exists; for an unconstitutional act is not law, confers no power, and creates no office.

Mr. Justice Field, in *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, said:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Mr. Justice Peckham, delivering the opinion of the court in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, after an extended review of many prior decisions of that court, says:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

In *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410, Mr. Justice Brown, delivering the opinion, says:

"The question whether this is a suit against the state, within the eleventh amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another state, is also one which we think belongs to the merits, rather than to the jurisdiction. If it were a suit directly against the state by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the state, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the state that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn v. Bank of the United States*, 9 Wheat. 738, 858, 6 L. Ed. 204, wherein he makes the following observation: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'"

See, also, *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899.

Hence it appears too clear for argument we must first consider and determine the validity of the act challenged by complainants before we are qualified to pass upon the objection urged that the suits are in effect against the state, and as such in contravention of the eleventh amendment to the Constitution. We shall, therefore, proceed to the constitutional validity of the act quoted. And, first, let us consider whether the charge made against the act by complainants, that the true legislative intent and purpose is not expressed in its title, but, on the contrary, the sole, dominant object and purpose of the Legislature in the passage of the act was to prevent the transportation through pipe lines of natural gas from out of the state, and

whether such purpose clearly appears from an examination of the provisions of the act itself; for, if so, it is quite clear this court may and should consider the act in its true light, regardless of the purpose expressed in its title.

There can be no doubt, we think, but that the purpose of the act as expressed in its title is clearly within the constitutional power of the Legislature of the state and impervious to any objection emanating from that source. By a reference to the act itself, it will be seen section 1 provides for the formation of domestic corporations to engage in the business of transporting natural gas within the state, a power clearly within constitutional limits, standing by itself. However, section 2 provides no such corporation shall be granted a charter to transport natural gas through pipe lines unless as a condition precedent to such grant it shall stipulate as follows: First, that it will transport natural gas only in the state; second, that it will not connect with, transport, or deliver natural gas to individuals, associations, companies, or corporations engaged in carrying or furnishing natural gas to points, places, or persons without the state; and, further, that such stipulation or contract with the state shall be embodied in its charter, and unless such company so contracts it cannot exercise the power of eminent domain, and cannot acquire any right to cross over, under, or along the highways of the state. Section 3 declares that foreign corporations engaged in transporting natural gas by means of pipe lines shall never be licensed by or permitted to conduct such business within the state. By section 4 it is provided that no association, combination, partnership, or corporation shall be granted the right to exercise the power of eminent domain for the purpose of acquiring a right of way for its pipe lines in the state, unless incorporated under this act. By section 5 it is provided the construction or maintaining of a natural gas pipe line along, under, over, or across any public highway of the state, or any streets, alleys, or public ground of any city in the state, is an additional burden on the servitude or easement theretofore granted. Section 6 provides for the laying of natural gas pipe lines under the supervision of the mine inspector of the state. Section 7 makes provision for the tensile strength of the materials employed in constructing any natural gas pipe line, and further provides against the pumping of gas from wells into such mains. Section 8 expressly provides against any corporation so organized transporting any natural gas out of the state, also provides against any such corporation connecting, attempting to connect, or threatening to connect with any pipe line transporting natural gas outside or beyond the limits of the state, and makes the act of any such corporation in so doing a ground of forfeiture of all its corporate rights theretofore granted, following by the confiscation of all its property to the state, and other drastic and unusual punishment not only visited on the offending corporation itself, but on its stockholders and others. Section 9 makes provision for the inspection of natural gas pipe lines employed by public service corporations in the state, and provides that factories located wholly within the state may maintain private pipe lines to obtain their supply. Section 10 provides a complete and absolute prohibition

against all persons, firms, associations, and corporations constructing or operating a pipe line in the state for the purpose of transporting natural gas, except they shall become a body corporate under the terms of this act.

From this reference to the body of the act, it is seen, in some respects, the Legislature proceeded in pursuance of its undoubted legislative power, and in such matters the act is plainly valid, even if its remaining features be found void, if such valid matters be found capable of separation from the invalid parts. But can any reasonable man of limited intelligence, from an examination of the act, believe the true intent and purpose of the Legislature was to make provision for such minor details as inspection of pipe lines laid for the transmission of natural gas, the incorporation of pipe line companies to transport natural gas, or the conferring on such companies of the power of eminent domain, or the right to use the public highways of the state, or the streets and alleys of its cities, or other like purposes expressed in the title of the act? On the contrary, can any reasonably intelligent mind read this act and remain blind to and unaware of the real purpose sought to be accomplished thereby? Does not every section and line, save in respect to matters of minor importance mentioned, proclaim in the loudest tones, and in the most positive and convincing manner, a subtle and determined purpose to forever foreclose all persons from the attempt to convey in any manner, through the instrumentality of pipe lines, natural gas out of the state, and to thus cut off and destroy any interstate transportation of such product as effectually as though such business had been in express terms interdicted? We have encountered no doubt whatever in arriving at the conclusion the charge made against the act by complainants, that its true intent and purpose is not stated in its title, but that the dominant object and purpose of the act was to place within the grasp of the state the absolute dominion and control of the business of transportation of natural gas through pipe lines (the only practicable method of conveyance of such product known), to the end that by the exercise of such control it might absolutely and forever prohibit its transportation beyond the territorial boundaries of the state, is true.

That this court may, should, and will look beyond the purpose of the act as declared in its title, to ascertain from an examination of its body the true object sought to be accomplished thereby, is open to neither dispute nor doubt. Mr. Justice Harlan, delivering the opinion of the court in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Case*, 99 U. S. 700, 718, 25 L. Ed. 496), the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 2 L. Ed. 60, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, * * * whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured * * * by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Mr. Justice Matthews, in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, in passing on a city ordinance of the city of San Francisco, fair on its face, said:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinance complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. The principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; and *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145."

Viewed in the light of authority, tested by the very reason and common sense of the situation disclosed by the record in these cases, can the state, through its defendant officers, accomplish the object and purpose sought to be attained by it in the passage of the foregoing act? That is, can it prohibit the exportation of natural gas beyond its borders, and thus conserve it for the use, benefit, and enjoyment of its own people, and the upbuilding and fostering of manufacturing establishments and other commercial industries and enterprises, the result of which will serve to increase the taxable wealth of the citizens of its state, and make it commercially great and prosperous among the sisterhood of states? In other words, the question of supreme importance here presented for decision, in its last analysis, is this: Does a state possess the constitutional power, derivable from any source whatever under our Constitution and laws, to prohibit, through its legislative assembly and lawfully constituted officials assuming to act in pursuance of its expressed will, the transportation of natural gas in interstate commerce, or persons from engaging in such enterprise in a lawful manner? For, unmasked and shorn of all pretexts, evasions, and subterfuges, this is beyond all cavil precisely what the act in controversy contemplates, and its enforcement, if valid, means;

for it is both incomprehensible and inconceivable to our minds that it might even be thought by any one that another view of the act in question should be taken by a court, or that it might in the end be solemnly decreed that which is abortive and ineffectual if attempted by direction shall become virile and impregnable to attack if sheltered behind such subterfuges, glossed by such pretexts, or coated with such evasions as are here employed, which are, as was so well said by Judge Philips in *United States v. Colorado & N. W. R. R. Co.*, 157 Fed. 342, 85 C. C. A. 48, "but the rose in the mailed hand."

In the determination of the question thus presented it is well to ever bear in mind this nation is no longer and in no just sense simply a confederacy of sovereign states, acting by virtue of a joint agreement, with all the jealousies, discords, weaknesses, and perils attendant thereon, but it is a single, effective, united, centralized, organized, powerful, fearless nation, whose Constitution and laws, enacted in pursuance thereof, are the supreme law of this land, binding, controlling, and governing the conduct of the most powerful state and the most humble citizen alike; that its constitutional power extends to every foot of space and every subject-matter within its territorial limits, and is there ever present and acting. State lines do not affect its operation, and state laws cannot trench upon the exercise of its authority. Such a national government, invested with such national powers, the thirteen original states formed for their mutual welfare, protection, and advantage, after a vain and futile attempt to live and subsist under a government formed by a confederacy of states. To the continued existence and perpetuity of such a national government, truly national and supreme, not alone in name, but in the dignity and majesty of power, each succeeding state admitted into the Union, as a condition precedent to its admission, irrevocably consented, and will remain bound by such consent until time shall be no more. Wherever goes this national power, there goes the power of the courts for its enforcement. As said by Chief Justice Marshall in *Cohens v. Virginia*, supra:

"That the United States formed, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people."

True it is, hand in hand with the supreme national power, within its territorial borders, goes the sovereign power of the state, operating upon all matters of purely local or intrastate concern, which have not been committed to the control of the nation. The two powers, each in its proper sphere supreme, invade all our national space, wherever states have been created and their boundaries marked out, existing in absolute harmony one with the other, never, when properly interpreted, understood, and applied, coming in conflict with each other, but moving onward and upward in perfect harmony toward a broader and better civilization and a higher national destiny for all, with that accuracy and precision that governs the movement of the planets in their orbits or the seasons in their course. Considered in this light, let us proceed to a determination of the questions presented, stopping to inquire, on the one hand, whether the constitutional objections

interposed by complainants to the validity of the act in question, viewed in its true light, are sound and tenable, as the limits of those objections have been pointed out and applied by courts of the highest standing from the beginning, and, on the other hand, whether the power attempted to be exercised in this instance by the state is within its proper sphere of influence, or comes in conflict with the exercise of powers expressly delegated to the nation or withheld from the state.

Complainants first contend the act in question, viewed as one intended to prohibit the transportation of natural gas without the territorial limits of the state by means of pipe lines, is void, because repugnant to clause 3 of section 8, art. 1, of the federal Constitution, which confers on Congress the exclusive right "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Mr. Hare, in his work, on American Constitutional Law (page 1257), in speaking of the power thus conferred on Congress, says:

"So vast is the subject of this power, and so much does it comprise, that its limits cannot well be defined without the risk of excluding something which may in some form, or at some time, deserve to be included. It is given in the largest and most liberal terms, and has been interpreted and applied with adequate, if not equal, liberality."

Chief Justice Marshall, delivering the opinion of the court in the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, said:

"Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one."

Again:

"Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

Again:

"Interstate commerce, or commerce among the several states, is commerce that concerns more than one state. The only form of commerce within the limits of the United States which is not subject to the vast and exclusive power of Congress is the purely internal commerce of each state, which is reserved to each by direct implication."

Mr. Justice Field, in *Welton v. State of Missouri*, 91 U. S. 275, 23 L. Ed. 347, said:

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted."

Mr. Justice Peckham, in *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, said:

"Definitions as to what constitutes interstate commerce are not easily given, so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Hooper v. California*, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. Ed. 297; *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325."

Mr. Justice Brewer, delivering the opinion in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, said:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

The reason for conferring this unbounded and exclusive reach of power on Congress, if reason need be given, is not only familiar to all students of the history of our country, but this reason has been stated and emphasized by oft-repeated decisions of the Supreme Court until it is no longer misunderstood by any one. In *Welton v. State of Missouri*, *supra*, it is said:

"The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. 'It was regulated,' says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, 'by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced

the present system than the deep and general conviction that commerce ought to be regulated by Congress."

Mr. Chief Justice Waite, delivering the opinion of the court in *Pensacola Tel. Co. v. Western, etc., Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, said:

"The powers thus granted are not confined to the instrumentalities of commerce or of the postal service known or in use when the Constitution was adopted; but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroads, and from the railroads to the telegraph, as these agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation."

Therefore there can be no doubt whatever but that the transportation of natural gas in interstate commerce through pipe lines is interstate commerce within the meaning of the commerce clause of the federal Constitution, unless the very nature of the article itself, natural gas, is such as to take it out of the domain of commerce, as that term is employed in the Constitution, and consequently to place it within the power of the Legislature of Oklahoma to control, regulate, or prohibit, as is attempted by the act in question.

On this head it is the contention of defendants that natural gas must be considered as animals *feræ naturæ*, running streams, the air we breathe, and our forest reserves, which are the common heritage of the whole people, which the state, as the representative of all the people, by virtue of this common ownership, may regulate and control for the benefit of all, and over which no man may acquire such absolute ownership as the state may not regulate or control; and the cases of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, relating to the transportation of wild game, *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, relating to the contamination of the air of Georgia by fumes from the smelters of the defendant company, and *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, relating to the carriage of the waters of the Passaic river of New Jersey into New York, are cited in support of the contention made.

In this connection we deem it neither wise nor necessary to attempt a determination of what precise rule of property rights shall govern and control the disposition of the vast deposits of petroleum, gas, and oil found in this state; for on this question the decisions of the highest judicial tribunals of those states in which these minerals abound are not in harmony. Whether the rule first announced in the case of *Hail v. Reed*, 15 B. Mon. (Ky.) 479, and followed by the courts of last resort in all the great oil and gas producing states save one, Indiana, shall become the law of this class of property in this state, is deemed immaterial to a decision here; for, whichever rule may be adopted, the conclusion here reached must be the same, as will be seen

from a statement of the rules. The rule of property right in natural gas and oil in all the states save Indiana is stated by Mr. Justice Shiras in *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304, as follows:

"Petroleum gas and oil belong to the owners of the land, and are a part of it, so long as they are on it or in it, or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property."

See, also, *Snyder on Mines*, pp. 954-958, § 1170; *Thornton on Oil and Gas*, pp. 18-20; *White on Mines and Mining Remedies*, p. 223, § 162; *Funk v. Haldeman*, 53 Pa. 248; *Stoughton's Appeal*, 88 Pa. 198; *Blakeley v. Marshall*, 174 Pa. 429, 34 Atl. 564; *Gill v. Weston*, 110 Pa. 317, 1 Atl. 921; *Gas Co. v. DeWitt*, 130 Pa. 249, 18 Atl. 724, 5 L. R. A. 731; *Chartiers Block Coal Co. v. Mellom*, 152 Pa. 297, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645; *Hague v. Wheeler*, 157 Pa. 341, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; *Murray v. Alfred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317; *Ontario Natural Gas Co. v. Gossfield*, 18 Ont. App. 666; *Hughes v. Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Williamson v. Jones*, 39 W. Va. 256, 19 S. E. 436, 25 L. R. A. 222; *South Penn Oil Co. v. McIntire*, 44 W. Va. 305, 28 S. E. 922; *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Wilson v. Youst*, 43 W. Va. 834, 28 S. E. 781, 39 L. R. A. 292; *Preston v. White*, 57 W. Va. 278, 50 S. E. 236; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 328, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Gas Co. v. Ullery*, 68 Ohio St. 271, 67 N. E. 494; *Honemaker v. Amos*, 73 Ohio St. 170, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 11 Am. St. Rep. 708; *Hail v. Reed*, 15 B. Mon. (Ky.) 479; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304.

The rule adopted by the courts of Indiana is this: The owner of the fee of oil or gas bearing lands does not have an absolute ownership in the oil or gas in place in the land, but a qualified ownership only, capable, however, of being made absolute by reduction to possession. *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

However, as has been stated, which of the two is the better rule of decision, and the one which should be adopted as controlling property rights in this class of property in this state, we deem it neither necessary nor proper to here determine; for it is clear, even if the Indiana rule should be adopted, the contention made by defendants that there exists in the people of the state, in the natural gas found within the state, such a common ownership as the state may control and protect for the benefit of the whole people, as it may the wild game of the state, the common air, the flowing streams, etc., must be denied, for this precise point was ruled in clear and forceful language by the Supreme Court, Mr. Justice White delivering the opinion, in *Ohio Oil*

Company v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, where, giving effect to the property rule established by the courts of Indiana, it is said:

"But, whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil, no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership, is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut*, *supra*. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

And the same distinction between things *feræ naturæ* and natural gas was recognized in *Attorney General v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489, where it is said:

"We may concede, also, for present purposes, that subterranean waters, such as may be reached only by driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that, if they be thus converted into a merchantable commodity, the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and natural gas, concerning the latter of which it was held by the Supreme Court in Indiana in *State ex rel. Corwin v. Indiana & Ohio Oil, etc., Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579, that the state could not constitutionally prohibit its transportation beyond the confines of the state."

From all of which it becomes apparent the contention of defendants that the natural gas found within the territorial limits of the state is the common heritage of the people of the state, which may be conserved and preserved by the state as trustee of those things in which the people have a common interest, as flowing streams, wild animal life, etc., is unsound and must be denied. On the contrary, it must be held he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock,

or the merchant of his wares, and such absolute right therein as the state cannot deny him without making just compensation, and any attempt to so do would be in violation of the fourteenth amendment to the federal Constitution, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

And it would be also violative of the correlative guaranty found in section 24, art. 2, of the Constitution of the state, in that it would constitute a taking of private property without just compensation made to the owner. While it is undoubtedly true, as has been many times decided by the Supreme Court, a state may entirely exclude a foreign corporation from doing business within the state, or may admit it on such terms and conditions as it may deem proper to impose (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657); and, again, may rightfully and at its discretion confer upon or withhold from corporations of its creation the exercise of lawful corporate powers and franchises, yet such conceded lawful exercise of power on the part of the state does not meet the exigencies of the present situation, for here complainants, both personal and corporate, are seeking no rights of franchise or privilege from the state. They are insisting on the right to transact no intrastate business of any kind or character. On the contrary, by their bills presented they expressly disclaim any such intention. What they do seek is to enter the state for the purpose of engaging in interstate business in a commodity, the lawful subject of private ownership, or to transport without the state private property of which they are the lawful owners, now within the state, for the purpose of its sale and disposition, or to employ property owned by them in the state in interstate transportation; and in attempting to so do they are confronted by defendants, assuming to act under authority of the act in question, which, if valid, deprives them of that dominion over and right incident to the ownership of private property, which, as contended by complainants, they may not lawfully be denied without just compensation made to them. And this leads us to inquire: What is property? And what constitutes such taking of private property as is inhibited by the constitutional provisions in question? The *Century Dictionary* defines the word "property" as follows:

"The right to the use or enjoyment or the beneficial right of disposal of anything that can be the subject of ownership; ownership; estate; especially, ownership of tangible things."

"The word 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed." *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938.

Mr. Justice Field, in *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394, said:

"It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation."

And, again:

"There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

The same learned justice, in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, said:

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment."

Mr. Justice Miller, in *Pumpelly v. Green Bay Company*, 13 Wall. 166, 20 L. Ed. 557, said:

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not 'taken' for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which has no warrant in the laws or practices of our ancestors."

Mr. Justice White, in *Ohio Oil Company v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, says:

"On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right, which belongs to them, without a taking of private property."

Mr. Justice Field, in *Charlotte, etc., Railroad v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051, said:

"Private corporations are persons within the meaning of the amendment. It has been so held in several cases by this court. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Pennsylvania Mining Co. v. Pennsylvania*, 125 U. S. 181, 189, 8 Sup. Ct. 737, 31 L. Ed. 650; *Minneapolis & St. Louis Railroad Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585."

It is, again, the insistence of the defense, should it be determined natural gas is in its nature such a product as to be susceptible of absolute, individual, private ownership, with all rights incident to such ownership, including that of transportation, sale, and delivery, which rights are beyond the power of the state to take away without just compensation made to the owner, yet it is earnestly insisted the state in the exercise of its sovereign power of eminent domain may either grant or withhold the exercise of that power at will. Therefore it

may, as it has done in this case, confer it on corporations of its own creation and deny it to all others, including the complainants.

The contention made, in so far as stated, we think sound beyond doubt. However, based on this well-established premise, it is further insisted by the defense that the fee to what is called the "public highways" in this state is vested in the state for the common benefit of the whole people. Therefore it is urged the state possesses the same power and control over its public highways, to prevent the laying of natural gas mains along, over, or across them ordinarily possessed by cities over their public streets, alleys, and other public places; and as complainants are rightfully denied the exercise of the power of eminent domain to procure a right of way, and are rightfully denied by the act in question the right, privilege, or franchise of going upon, along, over, across, or under the highways of the state with their pipe lines, therefore the conclusion is drawn that whatever rights complainants may have acquired by virtue of private contract, or may in future acquire in such manner, yet as the state may lawfully withhold from or deny to complainants the use or occupancy of its public highways in any and all manners, it may lawfully and effectually block all endeavor on the part of complainants and all others to construct pipe lines designed or intended for the purpose of transporting natural gas from out the state, whether such gas be owned by complainants or others; and the cases of *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, *Western Union Tel. Co. v. Penn. R. R. et al.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525, *Northwestern Telegraph Exchange Company v. City of St. Charles (C. C.)* 154 Fed. 386, and many other cases, are cited in support of the conclusion stated.

Without either conceding or deciding the correctness of the result obtained by this process of reasoning, should the soundness of the premises on which it is based be conceded, as applied to the act in question, which has been found to have been designed and intended as an absolute prohibition on interstate commerce of a product the subject of exclusive, private ownership, with all the rights incident to such ownership, including the right of sale, transportation, and delivery, yet we conceive the very postulate on which the logic employed is based is radically unsound in this:

The lands involved in these suits, and all lands within the jurisdiction of this court, comprised what was known as Indian Territory. The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein, and the abutting landowner may use the highway for his own benefit and enjoyment in such manner as is not inconsistent with the superior rights of the public to pass over, maintain, and improve the easement granted; whereas, the public streets, squares, alleys, and other public places of cities of this country, as a very general rule, by act of public dedica-

tion by the owner and founder, pass to the city in its corporate capacity for the benefit of the public, absolutely in fee, for use, enjoyment, control, and disposition by the corporation. For this reason, in our judgment, the authorities cited by solicitors for the defendants do not apply.

It was the rule of civil law that the fee to public highways vested in the state. *Dunham v. Williams*, 37 N. Y. 254; *Mitchell v. Bass*, 33 Tex. 259; *Renthrop v. Bourg* (La.) 4 Mart. (O. S.) 97; *Hatch v. Arnault*, 3 La. Ann. 482; *Mendez v. Dugart*, 17 Id. 171; *Bradley v. Pharr*, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647. It has ever been the rule of the common law that the fee of highways vested in the abutting landowners, and not in the state. Mr. Justice Story, delivering the opinion of the court in *United States v. Harris*, 1 Sumn. 21, Fed. Cas. No. 15,315, said:

"The general principal of the common law is that the soil over which a street or highway is laid still remains the property of the original owner, subject to the easement."

Mr. Justice McLean, delivering the opinion of the court in *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477, said:

"By the common law the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only; for, if the road shall be vacated by the public, he resumes exclusive possession of the ground, and while it is used as a highway he is entitled to the timber and grass which may be grown upon the surface and to all minerals that may be found below it. He may bring an action of trespass against any one who obstructs the road."

These lands were, until recently, the tribal property of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole tribes of Indians, not subdivided by survey, and without legally defined public highways. Recently they have been surveyed, and by separate acts of Congress as to each tribe, based upon tribal agreements, have been allotted to the individual Indians in severalty, with a view to statehood, which soon followed. In these various acts of Congress provision was made for public highways. As to the Cherokee Nation, wherein lies the particular land involved in these suits, it was provided by Act Cong. July 1, 1902, c. 1375, § 37, 32 Stat. 722:

"Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers and others shall take the title to such land subject to this provision."

Similar provisions were contained in the acts relating to the other nations, providing for public highways of various widths, but in each case providing that the allottees, purchasers, and others should take title to such lands subject to the highway rights therein provided for. It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abutting landowners, subject only to the easement granted the public for highway purposes, following the rule of the common law.

It is unnecessary for the present consideration to determine the status of highways in that portion of the state which was formerly

Oklahoma Territory; for while the laws in force in that territory at the time of the admission of the state into the Union, not repugnant to the Constitution and not locally inapplicable, were extended over the entire state, in our judgment nothing contained therein can be held to affect the status of the rural public highways under consideration, especially in view of the terms of the enabling act and the Constitution established pursuant thereto, even if it were conceded that a different condition with regard to title of rural public highways existed in Oklahoma Territory.

It being therefore determined the fee of the rural highways over the lands involved vests in the adjoining landowners, as in most of the other states of this Union, what are the rights of the owners of the fee therein? This question has many times received the consideration of the courts. In *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159, Chief Justice Parsons, delivering the opinion of the court, said:

"But the soil and freehold remains in the owner, although incumbered with a way; and every use to which the land may be applied and all the profits which may be derived from it consistently with the continuance of the easement the owner can lawfully claim. He may maintain ejectment for the land thus incumbered; and if the way be discontinued he shall hold the land free from this incumbrance. Upon these principles there can be no doubt but that the owner of the land can sink a drain or any water course below the surface of his land covered with a way, so as not to deprive the public of this easement."

In *Woodring v. Forks Township*, 28 Pa. 361, 70 Am. Dec. 134, Chief Justice Lewis, delivering the opinion of the court, said:

"A man who owns the soil on which the public has a highway, has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. '*Sic utere tuo ut alienum non laedas*' is the maxim which applies in such cases. He might cut a passage across the road for the purpose of draining his land or leading water to his mill, because the land is his own and he may use it for all legitimate purposes."

In *Starr v. Camden, etc., R. R. Co.*, 24 N. J. Law, 597, it was held by the Supreme Court of New Jersey as follows:

"This easement [of a public highway] does not comprehend any interest in the soil, nor give the public the legal possession of it. The right of a freehold is not touched by the establishing of a highway, but continues in the owner of the land, in the same manner that it was before the highway was established, subject to easement. This principle is so universally recognized that it would seem to be a work of supererogation to cite authorities to sustain it; hence the owner of the soil may lay water pipes, gas, or other pipes below the surface, may excavate for a vault or dig for mining purposes, and use it in any other manner that does not interrupt the free passage over it. He retains the full possession of it, subject only to the easement. He may fell the trees upon it, cut the grass, or depasture it."

In *Papworth v. City of Milwaukee*, 64 Wis. 389, 25 N. W. 431, it was held:

"A lot owner, being the owner of the fee to the middle of the street, may construct vaults or other areas under the sidewalk, with opening in the walk, if this be done in such a manner as not to interfere with or endanger public travel."

In *Commissioners of Shawnee County v. Beckwith*, 10 Kan. 607, it was held:

"In this state the statutes provide for the establishment of public roads and highways; but both the Constitution and statutes are silent as to how much of the land, or what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor. Therefore we would infer that nothing connected with the land passes to the public, except what is actually necessary to make the road a good and sufficient thoroughfare for the public. The public obtains a mere easement to the land. It obtains only so much of the land, soil, trees, etc., as is necessary to make a good road. It obtains the right for persons to pass and repass, and to use the road as a public highway only, and nothing more. *Caulkins v. Mathews*, 5 Kan. 199, 200, and cases there cited. The fee in the land never passes to the public, but always continues to belong to the original owner. He continues to own the trees, the grass, the hedges, the fences, the buildings, the mines, quarries, springs, water courses, in fact everything connected with the land over which the road is laid out, which is not necessary for the public to use as a highway. *Angell on Highways*, pp. 301 to 312, ch. 7, and cases there cited. He may remove all of these things from the road, or enjoy them in any other manner he may choose, so long as he does not interfere with the use of the road as a public highway. No other person has any such rights. In fact, the original owner has a complete and absolute domain over his land, and over everything connected therewith after the road is laid out upon it, as he had before, except only the easement of the public therein."

In *Overman v. May*, 35 Iowa, 89, it was said:

"The fee therein being deemed to be in plaintiff, the public has no right other than to use the premises as a highway, than in the right to pass and repass thereon, and the incidental right to repair the same and keep it in proper condition for that purpose. There is no evidence, nor is it claimed in argument, that this use upon which the easement is claimed ever extended beyond this. The title to the land and all the profits to be derived from it, not inconsistent with and subject to the easement, remain in the owner of the soil. He owns all the trees upon it, all the mines and quarries under it. He has all above and under the ground, except the right of way in the public, which is a right of passage."

In *Woodruff v. Neal*, 28 Conn. 167, Chief Justice Storrs, delivering the opinion of the court, said:

"It is well established in this state, in conformity with the process of the common law, that a highway is simply an easement or servitude conferred upon the public in regard to the right to pass over the land on which it is laid out, and an incident of such right that all use of soil and materials upon it in a reasonable manner for the purpose of making and repairing it. The title of the owner of the land is not extinguished, but is simply so qualified that it can only be enjoyed subject to the easement. He retains all the rights of property in the soil not incompatible with the public enjoyment of the highway, and, whenever the highway is abandoned or lost, the entire and exclusive and unincumbered enjoyment reverts to him. Subject to this right of the public, he may take trees growing upon the land, sink water courses under it, and has a right to every use and profit that can be derived from it, not inconsistent with the easement, and, if disseised (as he may be), can maintain ejectment, and recover possession subject to the easement. He can also maintain trespass for any act done on the land not necessary for the enjoyment of the easement, which would be actionable injury if the land was not covered by a highway."

See, also, on this subject, *Cooley on Torts* (2d Ed.) 372; *Jones on Easements*, §§ 478, 479; *Washburn on Easements*, 252; *Kent's Commentaries*, 432; *Elliott on Roads and Streets*, 519.

From this examination of the subject it must be clear, as complainants do not seek to perform any public service for the state, or for any city or town within the state, calling for the use of the streets, alleys, and other public places, or for a contract right in the nature of a franchise to conduct such business, but seek only a right of way for the purpose of laying down and maintaining pipe lines for the transportation of natural gas from within to without the state in interstate commerce, for which no franchise is either necessary or desired, they are at liberty to procure such right of way by private contract, and conduct such operations in a lawful manner, under such reasonable rules and regulations as to inspection and manner of operation, as the state may justly impose.

It is not intended, by anything said in the course of this opinion, to either hold or intimate the state does not possess the power to supervise, control, and regulate in a reasonable manner the method of construction and manner of laying and maintaining pipe lines to be employed in the transportation of natural gas in interstate as well as intrastate commerce, for the purpose of preserving the health and promoting the safety of its citizens and safeguarding the public against accident which may result from the conduct of a business in which a highly inflammable, dangerous, and volatile product is transported. This right of reasonable inspection, supervision, and control, commensurate with the attendant danger, the state has and should exercise in its reserve police power. What we do say, and intend to be understood as saying and meaning, is this: All such regulations must be reasonably adapted and necessary to accomplish the end sought, and the result or end sought to be attained must be such as falls within the scope of the power residing in the state. It must not be employed under disguise for the purpose of prohibiting, regulating, or controlling a proper subject of interstate commerce, for the exclusive power of regulating interstate commerce resides in the Congress under the commerce clause of our national Constitution.

Again, it must not be exerted in disguise for the purpose of denying any person within its jurisdiction the equal protection of the laws, or deny any such person his just property rights without due process of law. Any such state enactment violates the fundamental law of our country, and of this state as well, and must be and will be declared inoperative and void at the suit of the parties injured thereby. As said by Mr. Justice Harlan, in *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679:

"The question of constitutional law, to which we have referred, cannot be disposed of by saying that the statute in question may be referred to what are called the 'police powers' of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to the law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the su-

preme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23; *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *M., K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878."

Or as said in *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315:

"But it is claimed on behalf of the defendant in error that this section can be sustained as an exercise of the police power of the state. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Lake View v. Rosehill Cem. Co.*, 70 Ill. 191, 22 Am. Rep. 71; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillison*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465."

It follows, from what has been said, in our judgment, the act in question, viewed in its true light, as one enacted for the express purpose of forever prohibiting the interstate transportation of natural gas through means of pipe lines from out this state, impinges on the rights of complainants as disclosed by their several bills of complaint, as those rights are guaranteed and protected by our national Constitution, and that of the state as well, in that the act in question attempts to prohibit commerce among the states in property capable of absolute private ownership, with all its incidents, and susceptible of being so transported, and such prohibition violates the commerce clause of our national Constitution, and in that the sole, dominant purpose of the act, as construed above, if enforced against complainants, invades their rights as guaranteed by the fourteenth amendment to the national Constitution, and section 24 of article 2 of the Constitution of this state. In this view of the case, the remaining objections made by complainants to the validity of the act need not be here considered.

It must therefore be held, and is held, in so far as the act in question attempts to prohibit the transportation of natural gas by the complainants in interstate commerce through means of pipe lines constructed for that purpose, or attempts to prohibit complainants from employing their property in interstate commerce, or from engaging in the business of interstate commerce in natural gas, under such reasonable rules and regulations as the state may impose, and the nature of the business transacted may demand for the health and safety of the citizens of the state, it is unconstitutional, void, and beyond the power of the state to enact; that these suits are not in truth and fact against the state in its sovereign capacity, in violation of the eleventh

amendment to the national Constitution, but were brought and are maintained as against defendants, officials of the state, assuming to act in pursuance of authority conferred by the act in question, which is beyond the constitutional power of the Legislature of the state, to the threatened injury and damage of complainants in their property rights; and therefore they may maintain these suits.

It is deemed proper to here state the Supreme Court of the state of Indiana arrived at the same conclusion here reached by us on consideration of an act of the Legislature of that state which in express terms prohibited that which is here attempted to be prohibited by indirection. See *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579.

And we may be permitted to further remark: Would it not be most singular, indeed, to record in our national history and transmit to generations of readers yet unborn the fact that Oklahoma, rich, not alone in material wealth and natural resources, but in her splendid citizenship, on the very year in which she was admitted into this Union on terms of perfect equality and unity, there to rest forever in peace and safety, free from internal strife and external violence, permitted to participate in the counsels of this great nation and to partake of its benefactions, permitted to share on equal terms with her sister states in that pride of memory of the noble souls who redeemed this land from the wilderness and kept it free from the hand of the oppressor, of those matchless intellects who conceived and fashioned our form of government, and guided it safely through the trials and perils incident to the establishment of the first enduring representative republic the world has ever known, of those heroic spirits who died that this nation might live, one and inseparable, and that the principles of free government might not perish from the earth, permitted, on her own invitation, to share in the grandeur of its national accomplishments and the magnificence of its international power—that this great state would, even though she could, not out of her poverty or necessity, but out of her abundance of mineral wealth, lock herself up as within a self-imposed Chinese Wall, and thus refuse to share in her plenty and exchange nature's benefactions with her sister states, in return for the many favors conferred on her by the nation? May it not be justly and timely inquired: What has become of our vaunted Western hospitality and our boasted Southern chivalry? For in Oklahoma, more than in any other state of this Union, West and South unite. We conceive the fulfillment of the design here attempted to be neither within the limits of possibility of accomplishment under the Constitution and laws of our common country nor the end sought desirable to the state, even if accomplished.

Therefore let the demurrers interposed by the defendants be overruled, with such leave to plead over, if so advised by their solicitors, as may be granted by the presiding judge of this court in his order; and, further, let the provisional injunctions applied for by complainants be granted on such conditions as to bonds as may be determined by the judge of this court.

VAN DEVENTER v. LOTT et al.

(Circuit Court, E. D. New York. July 24, 1909.)

1. NAVIGABLE WATERS (§ 44*)—LITTORAL RIGHTS—LANDS FORMED IN SEA.

Land within the original boundaries of a shore owner, reformed by the sea after having been washed away, is to be considered as restored rather than as a growth or addition to other property to which the actual accretion may have attached; but new land formed in the sea in front of the property of such an owner beyond the original high-water mark which constituted his boundary, and with a navigable channel between through which the sea may be reached, if not an accretion to different property, belongs to the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 266; Dec. Dig. § 44.*]

2. NAVIGABLE WATERS (§ 44*)—RIGHTS OF OWNERS OF SHORE LANDS—LAND FORMED IN SEA.

At the time the earliest maps were made of the locality, in 1797, and subsequently, the inlet to Jamaica Bay on the southern coast of Long Island extended nearly north and south between what is now Barren Island on the west, and Rockaway Point or Beach on the east. Since then it has changed to a southwesterly direction from the bay, washing away a portion of the island, while Rockaway Point has been extended westward for several miles to the southward of the island. *Held*, on the evidence, that the land forming such extension was formed by the shifting and growth of shoals and bars which were not within the original boundaries of the island, nor attached to it above high-water mark, and does not belong to the shore owners thereon; also, that it did not form originally wholly as an accretion to Rockaway Beach, but rather by accretions to such bars as well as to the beach and the gradual filling of the shoals, the whole becoming subsequently attached to, and an extension of, the beach, and that the title to such parts as first formed separately vested in the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 267; Dec. Dig. § 44.*]

3. QUIETING TITLE (§ 12*)—RIGHT OF ACTION—POSSESSION OF LAND.

A suit to quiet title by one claimant of land against adverse claimants which has been fully tried will not be dismissed on the ground that complainant's remedy was by action of ejectment, where the evidence shows that complainant has the legal title, and both parties have been for some years claiming and exercising some sort of possession, tenants originally leasing from defendants having later leased from complainant and been allowed to remain by both parties.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12; Dec. Dig. § 12.*]

Necessity of possession in suits to quiet title, see note to *Jackson v. Simmons*, 39 C. C. A. 522.]

4. ADVERSE POSSESSION (§ 40*)—WHAT LAW GOVERNS—LAND ACQUIRED FROM STATE.

Code Civ. Proc. N. Y. § 362, providing that adverse possession will not give title against the state unless continued for 40 years, does not operate in favor of a grantee of the state whose rights are governed by the general statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 172; Dec. Dig. § 40.*]

5. ADVERSE POSSESSION (§ 96*)—NATURE AND REQUISITES—EXTENT OF POSSESSION.

The building and occupancy of a shanty or a fishing cabin on the beach on a large tract of sand extending for some miles between a bay and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sea, formed by accretion, or the setting of stakes or planting of small gardens without any inclosures, does not constitute an adverse possession of any more of the tract than is actually occupied under Code Civ. Proc. N. Y. §§ 370-372, providing that occupancy such as to constitute adverse possession shall be where the land has been substantially inclosed or is usually cultivated or improved.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 533; Dec. Dig. § 96.*]

6. ADVERSE POSSESSION (§ 25*)—NATURE AND REQUISITES—HOSTILE CHARACTER OF POSSESSION.

Where tenants leasing from defendants took new leases from complainant, an adverse claimant, before their occupancy had been long enough to give defendants title by adverse possession, their further occupancy cannot be counted as possession by defendants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116-120; Dec. § 25.*]

7. ADVERSE POSSESSION (§ 53*)—NATURE AND REQUISITES—CONTINUITY OF POSSESSION.

An occupant of land who after being ejected, although the judgment in ejectment was afterward reversed for want of jurisdiction in the court, abandoned the land, and did not return, cannot set up title by adverse possession in a suit commenced several years later.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 268; Dec. Dig. § 53.*]

8. QUIETING TITLE (§ 10*)—RIGHT OF ACTION—TITLE OF PLAINTIFF.

Where the complainant in a suit to quiet title holds the legal title his right to maintain the suit cannot be attacked by defendants, who are without title, on the ground that he holds his title as trustee, or that the conveyance to him was champertous.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 37; Dec. Dig. § 10.*]

In Equity.

Everett J. Esselstyn (Frederic R. Kellogg, of counsel), for complainant.

Hubbard & Rushmore (George C. Case, of counsel), for defendants John R. Lott and Sarah Lott.

Henry M. Gescheidt, for defendants Byron Whitcomb and others.

CHATFIELD, District Judge. The present action involves a determination of the title to certain plots of land running across the strip of sand on the southern portion of Long Island, generally called "Rockaway Point." These plots of land are bounded laterally by the extension of the side lines of certain parcels upon the north side of what is known as Rockaway Inlet. The land to the north of this inlet is a large island, called for 200 years "Barn Island," and since that time "Barren Island," in the southeastern portion of the old town of Flatlands, in the county of Kings, and state of New York. The county line between Kings county and Queens county was first located by the state along the middle line of the channel between Barren Island and Rockaway Beach or Point as it existed in 1802-04. It is undisputed that this channel, which is the only outlet of Jamaica Bay to the ocean, has not remained in the position in which it was at the time the county lines were created by the state, and that the mid-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

dle line of the inlet at the present time, instead of leading straight out to the ocean, substantially in a north and south direction, runs approximately west-southwest some three miles, before it turns to the south, and passes the point of sandy beach or dunes which stretches to the east, and joins what was Rockaway Point when the county lines were laid out. Various state maps, as well as officers of the state and of the respective counties, have assumed that the county line has shifted and followed the movements of this channel; and the parties to this action now seem to take as settled the present location of the county boundary, treating all of this sand breach east of the present inlet as in the county of Queens, in which, for the purposes of assessment and for the recording of deeds, the state authorities locate the land under discussion. This fortunately makes it unnecessary to bring in the state of New York or any state officer as a party to this action, and the questions of adverse possession, of taxation, and the recording of titles in general are matters of such recent date with regard to the plots in question that the county lines determine nothing with respect to the present ownership of the land which might have been retained in the county of Kings, if the county boundary had been a line fixed by monuments, instead of by the middle of a navigable channel. Indeed, under the defendants' theory of the case, the properties claimed by them would seem to have been bodily shifted from one county to the other, not by the movement of the land itself, but by the displacement and shifting of the county boundary from time to time.

It is unnecessary to follow out the chains of title other than to say that the complainant is grantee under a full covenant and warranty deed made by the devisees of Collis P. Huntington on the 11th day of February, 1901, recorded in the county of Queens on the 27th day of September, 1902, in Liber 1287 of Deeds, p. 14, and that the complainant's title is traced through a deed from the city of New York, various partition and foreclosure suits, grants from the state of New York, and conveyances from private individuals to one of the patents granted by authority of the King of England by Governor Dongan of the Colony of New York in the year 1685, and back of that even by a title from the Indians. It appears in the course of the complainant's chain that in the year 1812 the United States was given, under the authority of the state of New York, the right to locate a fort upon what came to be known as Block House Point, and that during the War of 1812 certain militia erected a blockhouse, which has long since disappeared. The United States never took possession of the land in question, nor attempted to exert any dominion over it, except to grant one lease in 1872 (page 1418 of record), and, so far as the testimony presented in this case shows, obtained no title to any of the tract until about the year 1854, when a life saving station or boathouse previously on Barren Island was moved across the inlet and located upon the beach of Rockaway Point, within some 100 yards of the high-water mark, at the southeast corner of the point as it then existed. An examination of the charts, which will be referred to later, and an inspection of the land, show that dunes, with bushes and shrubs, reaching a height of 20 to 30 feet, cover the precise part of the beach upon which

the blockhouse stood, and the tract running therefrom to the southeast, including the original site of the life saving station. A considerable depression through the greater part of the beach as it exists at present, and having a generally southeast and northwest course, marks the strand at the period indicated when the life saving station was located near the point, and according to the testimony, as well as from indications at the present time, fixes the first locality as to which the peculiar questions of this case arise. In general, the title of the complainant, so far as it covers land existent through the entire period, is limited at the western end by these dunes, upon which it has been said the blockhouse and life saving station were placed. From the point of the old shore southwest of the life saving station to the present extreme western point of the beach, a distance of some three or four miles, the beach from ocean to inlet is claimed under the doctrine of accretion, as having been added to the land, both upland and beach immediately adjoining upon the east, and being in all other directions surrounded by water.

The defendants' title, likewise starting with grants from the Indians, had to do with properties stated to be on Barren Island, or Barn Island, and specifically located in said town of Flatlands. The chain of title comes down through various deeds and wills to the present owners or claimants, and their title to the upland, or to the portions of Barren Island claimed by them, is satisfactorily established, and their possession of all portions of the tracts claimed by them north of the present location of the inlet would seem to be beyond dispute. But the extension of the defendants' lines across the inlet (these side lines running some $8\frac{1}{2}$ degrees east of south, according to the maps filed, from the survey made July, 1900, by Samuel K. McElroy, civil engineer, and put in evidence as Defendants' Exhibits 1 and 2) cross as well the present stretch of Rockaway Beach, or the lands added thereto by the westward movement of the inlet. The portions of the beach thus included within these lines so extended are a part of the particular portion of the so-called lands of Rockaway Beach, set apart and assigned to the grantors or predecessors of the complainant in a partition suit involving substantially all of the added or connected beach land, as well as some of the upland east of the old line near the life saving station.

The case involves the decision of a difficult question of fact, in that it must be determined whether the movement of the inlet was such that all of the land added to Rockaway Point or connected with it from time to time toward the west has been raised up out of the ocean and established above high-water mark by what is known as the gradual process of accretion; or whether by a sudden and plainly discernible shifting of the inlet, or by a number of such shiftings, the entire channel, including and carrying with it the county boundary, has broken through what previously was a part of the county of Kings. If the latter method be proved, the old bed of the inlet has filled up by accretion, both to the southwest, from the upland or beach of the complainant, and to the east or northeast from the bars or land to the south of what is now Barren Island.

The defendants' claim is dependent upon their being able to prove, not only that there have been sudden and violent shiftings of position by the inlet, so called, but also that certain bars and land included within the grants in their chain of title to Barren Island have occupied, with more or less accretion in all directions, some parts of the beach now joined to the old Rockaway Point, and that throughout the successive changes in the position of the inlet there has always existed some portion of these lands within the boundaries of their original grants, to which lands could attach by accretion in the same way, and by the same natural processes, through which the intervening spaces were filled and the properties in question joined to the upland near the life saving station and the blockhouse point.

A third possibility suggests itself, which must be considered in the light of the various attempts at possession on the part of the defendants and their grantors and tenants. This third possibility would of itself be sufficient to defeat the title of the complainant, and would leave him limited by lines of the original grants, and by what could properly be held as accretion thereto, for the burden of proof is upon the complainant in the present action, and he must establish, not only that the defendants have not title, but that his title is proven affirmatively. This third position would result from a finding that the lands in question were formed outside of high-water mark, and therefore the property of the state of New York (*Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331), but were never a part of, or joined to, land above high-water mark included within any of the grants in the defendants' chain of title; that is, that the accretion, if any, has been the property of the state, rather than that of individuals. The question of possession or of adverse holding between the state and the lessees or tenants of the defendants could not, of course, be determined in this action, except as we may consider the effect of the deed from the state to the complainant's grantors hereinafter set forth.

The evidence on the question of fact has been of two kinds, charts or maps, including government surveys, and testimony of witnesses familiar with the localities in question. The earliest map shown seems to have been made by one Jeremiah Lott from surveys prior to the 20th day of November, 1797, when the map is said to have been protracted. This map was filed in the office of the state engineer and surveyor, and a copy has been certified in evidence. Objection was made to the entry of this map in evidence, but there seems to be no good reason for doubting its authenticity, and it is apparent from the map itself that the portions relating to Barren Island and Rockaway were not plotted from surveys, but Barren Island is said to be taken from computation, and shows merely an approximate or relative plan of that locality. The next map offered in evidence was published under an act of the Legislature of the state of New York in the year 1827, and purports to show a compilation of surveys of the counties of New York, Kings, Queens, and Richmond. Objection was made to the acceptance of this map in evidence. But there seems to be no reason for not taking it for what it is worth; and, while some of the localities

seem to show more or less distortion, it throws some light upon the general formation of the coast upon the southern side of Long Island at the period within which the map was made. The earliest chart put in evidence by the complainant (Exhibit 61) was published by the United States government as the result of surveys from the 26th day of September to the 3d day of October, 1835, and gives the outlines, together with the character of the soil and vegetation over the locality of Jamaica Bay, but does not purport to give any soundings or depths of water. It will be noticed that between the map of 1827 and the survey of 1835 the first substantial change in what will be referred to as "Rockaway Point" seems to have occurred. The map of 1797 gives no latitude, while the map of 1827 places the southernmost point of Barren Island somewhat further south than either Rockaway Beach or Coney Island, and gives the latitude of this southernmost point as $40^{\circ} 33'$ north latitude. The United States government chart of 1835 shows the southernmost point of Barren Island and the southernmost point of Rockaway Beach substantially on an even parallel, at about $40^{\circ} 34' 15''$ north latitude. But allowing for the inaccuracies in latitude, and in general relative positions of the locations shown by the map of 1827, a substantial change in the form of both Barren Island and Rockaway Beach is noticeable, in that the southeasterly corner of Barren Island has somewhat disappeared, making that corner oblique rather than right angled; and the western end of Rockaway Beach has changed from either the "sore thumb" or bifurcated formation of 1827 to that of a point having its westernmost extremity upon the south or ocean side, and with the portion characteristically denominated the "thumb" already cut off by the ebb tide, coming out of Jamaica Bay.

The United States in 1841 issued a chart showing the soundings of Rockaway Inlet and a part of Jamaica Bay, and on this chart, while the southeast corner and southern portion of Barren Island shows the same formations as on the chart of 1835, the western point of Rockaway Beach has still further protruded, and has begun to force the general direction of the inlet from a north and south to a northeast and southwest course. The deep water channel shown in the chart of 1841 lies close to Barren Island upon its southeast corner, and then turns and runs out, in a southerly direction, to the open ocean. This channel in 1841 passed west of a bar called Duck Bar, and referred to by almost every witness who has testified in this case. Another large sand bar was charted immediately to the westward of this channel (approximately of even latitude with Duck Bar), while a broad space of water, containing a minimum depth at low tide of some nine feet, stretched between Duck Bar and the southwest Point of Rockaway Beach. This is plainly what has been referred to by most of the witnesses as the "East Way" or "East Channel," and means no more than a strip of ordinarily deep water around the point of Rockaway Beach. Thus, Duck Bar at this period lay between this stretch called the "East Way" and the deeper channel scoured out by the tide, setting down from alongside of Barren Island. This chart also shows between Bar-

ren Island and West Bar a shallow stretch of water in some places not more than two feet deep at low tide, and this, at various times, was known as the "West Way," which long subsequently became deep enough for navigation. To a certain extent this West Way indicates the location of the ultimate deep water channel in and out of Jamaica Bay. This West Bar seems to have at some time been called Pelican Bar from a beach known for many years as Pelican Beach, and really constituting the western half of the southern shore of Barren Island. Pelican Beach terminated at what is known as Plumb Gut. Upon the western side of Plumb Gut the beach evidently formed a part of what is known as Coney Island. It will be noticed from an examination of the charts that between 1841 and 1866 Barren Island was separated from Pelican Beach by what came to be called "Dead Horse Inlet," and again at the time of the extreme changes in the neighborhood of the year 1878 a great part of the land formerly called Pelican Beach was washed away, leaving Plumb Island exposed upon the water front, while Barren Island was very materially reduced in size, the southwest corner or portion being so removed, that what is now known as Dead Horse Bay was caused to substantially open out into the ocean, instead of having to be approached through the considerable channel that previously had been called Dead Horse Inlet. These changes, however, were much less in extent than the changes and additions to Rockaway Point during the same period. If the map of 1827 corresponded in its general locations and in its degrees of latitude to the Government charts of 1835 and 1841, we should have less difficulty in fixing the extreme southern boundary of Barren Island, and, if the government charts of 1835 and 1841 placed the southern boundary of Barren Island in the latitude shown by the map of 1827, then the testimony of the defendants' witnesses, Mr. Gescheidt and others, to the effect that the portions of Barren Island, submerged within their recollection, had extended to points within the present boundaries of the beach at Rockaway Point, would be clearly substantiated. But the situation, so far as latitude is concerned, with which the defendants' witnesses start their recollection of the locality, is substantially that shown by the government charts of 1835 and 1841, and under the circumstances such charts, unless shown to be at fault, are better evidence than human recollection about such small questions as the depths of water at precise points and the relative locations upon a north and south line of the shoals of a channel where navigable water was the test of how the channel should be used, and would necessarily be the central feature of the witnesses' recollection. Human memory as to definite monuments is excellent testimony of the existence and general location of these monuments, but a reliable chart or map must be depended on as to small distances and details, even as against human recollection, when that recollection or memory has not been fixed by something connected with those same details.

The witnesses called by the complainant and by the defendants agree in fixing the next great change in these localities after the condition shown by the chart of 1835 at the occasion of a storm which occurred probably in the year 1855.

Two of the witnesses, Dodge and Hicks, started in the year 1855 from near Hook Creek, which is well up in Jamaica Bay, to go out to sea through the inlet with a load of coal for a town further to the eastward on the Long Island coast. They were detained by a severe storm, and could not return for a couple of days. Both witnesses agree that upon their return they worked in from the ocean through substantially the same water in which they passed out until they came to the inlet proper between Barren Island and Rockaway Beach, and there they sailed right through, as Dodge puts it, "where Chaney's garden had been." It appears that ridges (upon which trees were growing) and a considerable tract of garden and upland were washed away from the southeast corner of Barren Island, and a strip some 500 or 600 feet wide cut off by the sea. The bars and shoals to the southeast of the inlet and along the entire southern front of the island in the neighborhood of the so-called Duck Bar shifted their position, and the so-called East Way or passage around the point of Rockaway Beach was filled up, either at the time of the storm or gradually within a short time thereafter, while the western extremity of the point began its rapid progress, assuming the position which continued until 1877 and 1878. The southwestern portion of Barren Island was likewise materially affected by this storm. The so-called West Way, or shallow strip of water passing between the West or Pelican Bars, and the so-called Pelican Beach upon Barren Island, as well changed its shape and position, but did not become more than a shallow body of water navigable by very small boats at high tide, and at low tide substantially dry in various places between Barren Island and the larger bars to the south. But on the Rockaway side the "East Way" substantially united with what had been called the "South Way," or the direct north and south channel between the so-called Duck and West Bars, and the process of accretion either took place on the bars and from Rockaway Point so as to close up the inlet, or else there occurred what is called avulsion; that is, a bodily movement of the inlet from one position to the other, with the corresponding resultant accretion within the limits of the old inlet.

The severe storms of the period around 1878 have already been referred to. To the west of Barren Island Pelican Bar and Beach were destroyed to a large extent, the shallow West Way was deepened and enlarged, Pelican Beach or Island, together with much of the land in front of Plumb Island, disappeared, and Plumb Island became bounded on the south practically by the ocean. The so-called Duck Bar shifted so as to become indistinguishable from the West Bar, and Rockaway Point was extended to the old position of Duck Bar, leaving but one channel which immediately south of Barren Island ran practically northeast as an entrance to Jamaica Bay. Since 1878 and 1879 the growth of Rockaway Beach to the westward seems to have been gradual. The present western extremity of the beach is almost due south of Plumb Island, and reaching nearly to the longitude of the eastern extremity of Coney Island as it now exists. The character of the beach itself and the various United States charts show that during this later period the growth has been what can properly be

called accretion; and we must therefore consider the boundaries of the land and bars, the position of high-water mark upon the Atlantic Ocean, and the positions of the inlet during the periods from 1845 to 1879, in order to ascertain what is the southern boundary of the lands upon Barren Island, and whether the beach now attached to Rockaway Point has emerged from the sea within the boundaries of the territory belonging to the defendants, or whether it has been formed by accretion either to Rockaway Point or to lands which thereby became the property of the state. As has been said, the condition in 1845 must be taken as a starting point, for the testimony of the witnesses is to the effect that Barren Island at that time extended for at least half a mile south of the nearest portion of Rockaway Beach, and all of the bars and points testified to by the witnesses for the defendants must be treated from the position given them by those witnesses, as there is no authentic prior record which would give any better boundaries for the purpose of the defendants' case.

The case of *Mulry v. Norton*, *supra*, was a contest of title over certain lands submerged by the sea within the boundaries of the plaintiff's grant, and a subsequent emerging of the beach and westward growth along the sunken front until the submerged portions had been restored, but with a shallow lagoon between the new portion and the former high-water mark. The court held that the rebuilding or reformation of the land within the boundaries of the former territory when under such circumstances as not to constitute accretion to some other strip would vest the original owners with title as against the state; that accretion could not take place without contiguity, but even when contiguity existed could not cross the lateral boundary lines; and that the owner of the upland would regain the beach, although there had been a previous encroachment of the high-water line to a point inside of where the new formation occurred. In *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, the Supreme Court of the United States recites many decisions relating to riparian rights, and questions of accretion or title to lands in navigable waters. It cites the case of *Mulry v. Norton*, *supra* (declaring the law of New York to be as above stated), and also cases along the Mississippi river, such as *Jones v. Soulard*, 24 How. 41, 16 L. Ed. 604, *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74, *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, and many other decisions showing the holdings of the United States Supreme Court and of state courts with respect to the rights of riparian owners in protecting their access to a navigable stream, and to the acquisition of land forming within the navigable water in front of their property. The court says (page 35 of 152 U. S., page 561 of 14 Sup. Ct. [38 L. Ed. 331]):

"The rule, everywhere admitted, that, where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the king or the state as to private persons; and is independent of the law governing the title in the soil covered by the water"—citing cases from both England and the United States.

No distinction is drawn between lands arising out of navigable water in streams or rivers where the riparian rights extend into the

stream, or where the bed of the river is owned to the middle one by the riparian proprietors, and land arising out of the sea, or arms of the sea, below high-water mark, when the addition is in front of and contiguous to the riparian or littoral property. Blackstone in his Commentaries (page 262) says that lands emerging out of the sea within the bounds of any person belonged to him as between him and the crown; and it is from this situation that the doctrine of *Mulry v. Norton* is worked out. Hence property reformed by the sea, after having once been taken away, is to be considered as restored, rather than as a growth or addition to different property, to which the actual accretion may have attached.

But with respect to Barren Island an entirely different situation arises. It is impossible on the record to hold that the upland or beach of Barren Island above high-water mark has ever occupied the position of the land in question. The charts, however, of 1835 and 1875, hereinbefore referred to, show Duck Bar as an island—that is, having some portions above high-water mark at all times—and in 1875 this Duck Bar Island with deep water on each side, extended approximately north and south over a mile in length, and almost in contact with Barren Island at its nearest point. Between this Duck Bar Island and Barren Island was shoal water, but by the next great movement of Rockaway Inlet Rockaway Beach extended to and included a part of this Duck Bar, which has ever since remained dry land, and the shoal water became the inlet. This movement, as has been said, occurred in the 70's, and, the greater part of the land actually in question in this suit having been formed by that movement of the inlet, we must consider whether the owners of the upland on Barren Island acquired from the formation of this Duck Bar prior to 1875 any title therein; and if they did, inasmuch as Duck Bar was so narrow in its east and west dimensions, the next question, which is even more difficult, is as follows: Would the owners of the upland of Barren Island obtain title to the entire east and west strip formed by this movement of the inlet, that is, by the growth of a long extension of Rockaway Beach out of deep water, because some one of those Barren Island owners might have claimed the narrow strip of Duck Bar immediately in front of his property? This question is yet more complicated, in that when the inlet made this final shift, and the beach which we have been considering was joined to Duck Bar, a deep-water channel was washed between Barren Island and all of the lands in question, which channel has continued and deepened to the present time. But, with respect to Barren Island, the state or county authorities seem to have assumed that the boundary line between Kings and Queens counties has followed the main thread of the inlet in its various positions. There has always been a southern boundary of Barren Island bounded by high-water mark, whether that high-water mark be composed of the so-called West Way and the Inlet or the so-called West Way and South Way united together and continuing into the Inlet. The West Way, according to the testimony of Jurien S. Lott and several others, whose statements are clear enough to be almost beyond question, has not been navigable for boats of any size until within the memory of

the last generation. But prior to that the high-water mark seems to have always existed. The land occupied by Chaney's garden or by the shore of Barren Island at any time, even back to the chart of 1835, was of a latitude north of the present limits of Rockaway Beach or the extensions at any time. The nearest point of Rockaway Beach to Barren Island, until the western direction of the beach had progressed to a great extent, was on the inner or bay side represented originally by the so-called "sore thumb"; and it is evident from all of the charts that Barren Island at every period under discussion extended much to the south of a straight line across the inlet at that point, but as this point was eroded by the ebb tide, and the southern or outside beach of Rockaway Point moved toward the west, the inlet has widened at its northern outlet into Jamaica Bay, and, in addition, the charts show a considerable destruction of Barren Island itself upon its northeast corner. The effect of all this has been to shift the narrowest part of the inlet from its northern extremity to one much further south, but does not alter the proposition that Barren Island itself has never in the form of land above high-water mark extended to positions within the confines of the beach upon the southern side of the inlet, wherever that inlet may be. Shifting sandbars, upon which the Black Warrior went ashore in the year 1859, at that time extended out in front of Barren Island, while the deep-water channel up the inlet ran to the east of these bars. The testimony of the witnesses places this wreck as far as $2\frac{1}{2}$ miles south of Barren Island, and yet other of the witnesses testify that at low water they have walked over the shoals and through the shallows around the Black Warrior. This wreck is said to still exist, and to be upon the southern line of the shoal water at the south of Rockaway Beach, some half or three-quarters of a mile out in the ocean from low-water mark. The government buoy maintained because of this wreck and shoal is directly south of Barren Island, and is nearly a mile outside of the present line of Rockaway Beach. If the southern latitude of Barren Island and of Rockaway Beach were to be taken as shown upon the state map, made by Burr, and published in 1827, the present location of the Black Warrior would be within the former boundaries of Barren Island above high-water mark. But the testimony of the defendants contradicts this possibility, and the location by them of the wreck corroborates the contention of the complainant, that Rockaway Point has been made up from the shifting and growth of shoals and bars attaching themselves to Rockaway Beach, but entirely outside of the furthest boundaries of Barren Island, and that these bars and shoals have never formed a part of Barren Island, so as to be connected with its main land by anything above high-water mark.

Comment has been previously made in this opinion upon the peculiar coincidence with which apparently honest recollection on the part of witnesses as to later conditions agrees with physical facts shown by some of the earlier charts. But equally persuasive testimony and equally definite charts of different dates between the two negative completely the force of any conclusion which might be drawn from the later testimony. As an instance of this, the testimony of Mr. Ge-

scheidt and some of the other witnesses as to the distance to which Barren Island extended to the south, and the facility with which a person could walk over dry sandbars out to the neighborhood of the Black Warrior wreck, and in the same way the Lott map of 1797, and the Burr map of 1828, fit in much more nearly with the charts since 1868, as explained by the testimony of the defendants' witnesses, than with the condition shown under the charts of 1834, 1844, and so on. Perhaps the most striking example of this sort is a chart said to have been produced by the complainant's witness Dodge, although he failed to identify it upon the trial, which was issued by the United States government under the date of 1875, and thus shows conditions subsequent to the great storm of 1855, but prior to the extensive changes of the 70's. According to this map, the deep-water way curved around close to the eastern shore of Barren Island, and close to the eastern edge of what was then called Duck Bar; the earlier deep-water channel to the westward of Duck Bar having entirely disappeared. The depth of water in most places of about one or two feet at low tide, and in no place more than four feet, between Barren Island and the Black Warrior wreck, in a line following the crest of the sandbar, makes it entirely plain that Mr. Gescheidt's recollection of walking out to the Black Warrior wreck under extremely low tides may have been correct, and likely to happen to any one familiar with those waters. But the chart immediately preceding this one, and showing conditions prior to the effects of the storm of 1855, carry the deep-water way between Duck Bar and Barren Island, and do not leave it possible to conclude that the bars upon which Mr. Gescheidt may have proceeded to the scene of the wreck were at any time a part of Barren Island, or connected with it by dry land at high water. On page 1668 of the record, the Indian deed to the predecessors in title of the defendants uses the following language:

"And also all the privileges and appurtenances both of the upland or marshes always belonging thereunto, as the Strann Beach of Beaches as namely that, running out more Westerly with the upland adjoining and is at some times by the Ocean Sea wholly enclosed, called Hoopannah and Shanstomororto & Mactteris."

To this attention is called by the defendants as proving there were three bars in front of Barren Island conveyed by this deed. But it is just as likely, and even more persuasive, that they were a part of the broken lands to the west in the neighborhood of Garrison's Creek and Pelican Beach, and the only conclusion which can be drawn from this deed and the following deed is that the defendants' southern boundary was the Atlantic Ocean. The defendants' strongest argument for this phase of the case is that their boundary was the ocean, and that they are entitled to littoral rights upon the ocean, as against the state of New York, or any one else. In *Mulry v. Norton*, supra, not only did the court determine that the lands formed in front of the complainant's property had been restored within the original boundaries, but applied to such a situation the well-recognized doctrine of riparian rights and accretion or reliction as above stated. Hence, recognizing the doctrine that accretion cannot add to land in a lateral direction over the boundaries of an adjoining owner, the court held

that the plaintiff had title to the lands in front of his beach formed by accretion to the adjoining property, but within his original lines.

Based upon this proposition, and upon the conclusion in the case of *Mulry v. Norton*, the defendants claim that they were given property bounded on the south by the Atlantic Ocean, that any land formed in front of their property as between them and the state of New York belongs to them, and that the complainant, representing lateral owners, cannot claim, even under the doctrine of accretion, a strip of land extending in the form of a point across the front of the defendants' properties, and thus making their southerly boundary the inlet instead of the ocean. It does not seem that this doctrine can be carried thus far. The defendants' land was bounded by the ocean; that is, by tide water. Unless property be washed away and restored within the original limits, the precise doctrine of *Mulry v. Norton* would not apply, and such facts have not been shown in the present case. It is impossible to hold that in the sea, with a wide stretch of navigable water between the two properties, a strip or point of land entirely outside of any boundary lines previously limiting the property in question should be considered as a part of that land. The thread of the stream does not apply to the ocean. The question of navigable water and of access is also inapplicable, for both of these exist under all circumstances, and, so long as navigable water exists between, it would not seem that the doctrine of the "river" cases such as recited in *Shively v. Bowlby*, *supra*, could apply.

It would seem, therefore, that the claims of the defendants to any of the territory of Rockaway Beach cannot be established upon the theory that these lands constitute a part of their original holdings or the holdings of their predecessors in title. But the complainant does not satisfactorily show that the land west of the inlet as it existed in 1845 and 1850 near the life saving station has been added to their property entirely by the process of accretion. There seems to be considerable basis for holding that the accretion has been upon the bars as well as upon the point of the beach, and that from time to time the sandy shoals projecting above low-water mark, and apparently belonging to the state of New York, have themselves been enlarged by accretion, and then have been bodily annexed and attached to Rockaway Beach, and new bars have been formed further to the westward; the same process being then repeated until the present stage in which for the last 30 years, more or less, true accretion has resulted, and the progression of the beach has been more gradual and steady in its motion toward the west.

Assuming, therefore, that the complainant has not satisfactorily proven that the entire beach belongs to him or his predecessors in title by the doctrine of accretion, it is necessary to consider the effect of the deed from the state of New York in accordance with an act of the Legislature in the year 1887, and also to consider the defenses of adverse possession, and the allegations of the defendant that the present action cannot be maintained, inasmuch as the complainant would be left to an action of ejectment, if he is unable to show such possession of the territory as would be sufficient for an action to quiet title, or

to settle conflicting claims to land of which he has record title and statutory possession. It is apparent that the defendants' contention that they are entitled to a jury trial is but secondary to a determination of the issue as to whether the present action is in reality one of ejectment, and whether the defendants have had possession of the property in question. The complainant must show possession for one year before he can maintain an action of this nature. Section 1638, N. Y. Code Civ. Proc. The lands involved are entirely beach lands, composed of white sand, with some swampy deposits, and the only vegetation consists of grass and clumps of small bushes. Any attempt at cultivation, aside from the cutting of hay upon the grassy stretches in the hollows or flat portions of the beach, have been confined to small garden plots near some of the cottages or boathouses of a few individuals, who will be referred to later. In general, there was no occupation of any portion of this beach until some time around the year 1889, when one Smith Foster (who had been there fishing since 1876) established a hunter's and fisherman's cabin, and spent his summers upon the land. He subsequently built several cabins, and gradually enlarged the house in which he lived the entire year, and in which he raised a family. This house was destroyed by fire by agents of the complainant in 1903 after an order in dispossess proceedings, later reversed on appeal, in which it was held that the Municipal Court had no jurisdiction, inasmuch as title to the land was involved. Some seven other tenants of the defendants who had from time to time between the years 1897 and 1902 leased cottage sites at points along the beach subsequently yielded to the demands upon them by a representative of the complainant, made terms, and took out leases from his agent. Their actions therefore are of no value in determining who is now in actual possession of the land. For some 30 years each tenant or occupant protected himself by making arrangements with the defendants, and since that time the tenants or occupants have acquiesced in the demands of the complainant as well, and have not been disturbed by either party. The defendants have from time to time surveyed or run lines, set out posts, and put up certain trespass signs, substantially all of which were soon thereafter taken down by agents of the complainant; and it would seem that since the question has arisen from the dispossess proceedings in 1903 both parties, so far as able without an actual clash, have exercised certain dominion or possession over such parts of the beach as they considered would establish their claims, and would serve the purpose of giving evidence of use of the lands in question. These lands, while not wild lands in the sense of being forest or prairie, are almost entirely wild in so far as any permanent change has been made by human beings in their appearance or condition, except in the immediate vicinity of the six or seven cottages above referred to, and no fencing, or anything of that nature, has been attempted. The complainant, of course, claiming all of the beach, could not fence it in other than by high-water mark on each side, while the defendants, marking out their lines by posts, attempted to keep tenants upon the land, and to set out signs showing their title, have apparently succeeded in maintaining a more or less joint and conflicting sort of possession,

but neither party has had exclusive possession since 1902 of such a nature as to import acquiescence on the part of the other. Under such circumstances it would seem to be impossible to hold that this action, completely tried, where the parties have had all their claims and issues thoroughly presented, should be dismissed upon the technical ground that the defendants were so clearly in possession of the land that nothing but an action of ejectment would lie. We must, therefore, pass to the question of adverse possession, or possession against all claimants and the public, bearing in mind the possibility that parts of the land were at some of these periods property which could have been claimed by the state.

In considering either the question of title or of possession to the lands west of the life saving station, it must be noted that from 1809 to 1887 the entire point upon which the life saving station was located belonged to Ryder and to his grantee the state of New York. If the complainant's theory of gradual accretion were fully substantiated, that accretion, so far as recorded titles are concerned, was to lands belonging to the state, in whom was also vested the title between high and low water mark. The southern boundary of the state was at low-water mark of the most southern tide marks of the islands, bars, and beaches in question. The case of *Attrill v. Degrauw* (C. C.) 90 Fed. 556, determined, among other things, that the title of the state of New York to the point of Rockaway Beach was valid, and was conveyed to the predecessors in title of the complainant by the transfer under the authority of the act of the Legislature, the validity of which transfer was one of the grounds of the decision of the Circuit Court in that action. It must also be remembered that at the time Smith Foster first occupied in any way any of the land in question the point had already reached a position well to the west of the life saving station site, and substantially south of Barren Island, according to the charts, actually including some of the strips now claimed by the defendants. In 1877 and 1878, when the next great addition to the point or jump of the channel is said to have occurred, the land added extended across the south front of Barren Island, being immediately west of that upon which Smith Foster had been staying, more or less, for some three or four years. It would seem, therefore, that Smith Foster and the other occupants of any portions of these lands were either there as tenants or agents of the defendants or as trespassers upon the property of the state of New York. Smith Foster's occupancy (such as it was) and the use of certain land for the purpose of cutting grass and fishing and hunting by some of the defendants, as well as by others of the public, had continued at the time of the deed from the state of New York for some 11 years; and, inasmuch as title against the state cannot be secured, under the provisions of section 362 of the Code of Civil Procedure of New York, in the method known as that of adverse possession, until the 40-year period of limitation had expired, no rights had apparently been acquired against the state, nor even up to the present time would the interval have been sufficient to have allowed such rights to be perfected. But the deed of the state to private individuals was given in 1887, and it must be held that a successor to the title of the state can se-

cure no advantage from the fact that the statute of limitations is greater against the state than against himself, but he is bound by the ordinary statute against himself and his grantors, and adverse possession for 20 years would in such case be sufficient. Section 363 of the New York Code fixes the rights of grantors of the state, but does not affect the rights of other parties against them. As has been said, no actual possession in the sense of cultivation or fencing, or continuous evidence of control and ownership, has been exerted by the defendants or even the complainant as to the whole of the tract, or the whole of the strips to which the defendants claim title. No monuments have been erected, and monuments alone in such land might prove insufficient. The mere planting of stakes would not indicate the purpose for which they were planted, and certainly the planting of stakes by servants of the defendants would not be equivalent to any occupation by Smith Foster or any of the other tenants, nor has their occupation been extensive enough to give notice of what they were occupying. The vast stretch of sand with no human signs or traces of occupation beyond the planting of a stake, or the existence of a wheel track or road, could hardly be said to be "occupied" because a shanty or fishing cabin was erected upon a convenient point overlooking the water. A glance at the premises of Smith Foster and these other tenants indicates that they are no more occupants of the entire strip than are the campers who put up a tent in a similar position along the seashore, and who are merely squatters upon the beach, for the purpose of camping.

Under section 370 of the Code of Civil Procedure, a person claiming title founded upon a written instrument is deemed to have been possessed and occupied of land sufficiently to constitute adverse possession (1) where it has been usually cultivated or improved; (2) where it has been protected by a substantial inclosure; (3) where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant, if this use has continued for the statutory period. By section 371 it is provided that no adverse possession not founded upon a written instrument or a judgment or decree shall apply to more than the premises actually occupied. And by section 372 such occupation is said to be (1) where it has been protected by a substantial inclosure, (2) where it has been usually cultivated or improved. The occupation of no part of Rockaway Beach meets these requirements, with the exception of the immaterial portions around the houses of the tenants in question. As to all of these, with the exception of Smith Foster, whatever possession they may have had adverse to the complainant has been relinquished by their intentional failure to pay rent to the defendants, and by their taking of new leases under which they have paid rent to the complainant, this having happened in each case before the 20-year period, which would complete their possession, had expired. Their acts and their possession of the land cannot be taken advantage of by the defendants after the making of the new leases and the paying of rent to the complainant, for, if the defendants claim adverse possession by reason of the acts of these tenants, such possession must be adverse—that is, under a claim of title hostile to that of the complain-

ant—and the tenants, so far as they are concerned, apparently ceased their share in maintaining a title hostile to the complainant when they took out the new leases and began to pay rent. From that time they apparently held adversely to the defendants or as tenants at will at the most, and in view of the knowledge of all the parties at that time, and of the failure of the defendants to either attempt to dispossess or eject these tenants who had ceased to pay rent, it does not seem that since the making of the new leases by the complainant to these tenants any act of theirs could perfect a title by adverse possession in the defendants. As to Smith Foster himself the situation is somewhat different. The amended complaint alleges that Smith Foster claims to have occupied and to be entitled to possession of a part of the property as the lessee and representative of, for, and on behalf of the remaining defendants, or some of them, and that the said defendant Foster is endeavoring to interfere with the complainant's possession of the property by the assertion of alleged rights in himself to said property or to a part thereof, and to certain buildings erected by him as such alleged representative, lessee, or otherwise; that he has endeavored to cast a cloud upon the title, and has trespassed upon the property of the complainant, and is being used by the remaining defendants to establish their claim to title or possession. The answer of the defendants, including Smith Foster, admits the allegations that Foster claims to have occupied and to be entitled to the possession of some of the property as the lessee and representative of the remaining defendants, but denies the allegation that he has attempted to trespass or to occupy any part of the premises after the assertion of alleged rights in himself, etc. Nowhere in this action has Smith Foster set up a claim that there is any title in himself by adverse possession, and it is unnecessary therefore to consider his acts, except as the remaining defendants seek to take advantage of what he has done as their representative. The testimony shows that Foster, more or less continuously from 1876 to 1903, occupied the parcel of land upon which he built the house and the buildings adjoining thereto, which were destroyed in the year 1903, and that he cultivated certain land immediately around these buildings. Subsequently he located a houseboat upon a different spot, and has remained in possession of the site of this houseboat, but the tract occupied thereby is merely a section of beach and extremely limited in extent. No title by adverse possession has been acquired by his acts since 1903. As to whatever rights might have been acquired by his occupation from 1876 to 1903, a different situation exists. There is a dispute in the testimony as to whether Foster admitted to Mr. Maxwell Evarts, attorney for the complainant's grantor, that he yielded possession, and merely wanted time to get off from the premises. But, whether or not he made such an admission, it would seem that after his forcible ejection in that year neither he nor any of the defendants nor any one on their behalf ever returned and took possession of the property from which he had been ejected, and since that date he has exerted no rights of possession, except to moor his houseboat in the place which it now occupies. Under these circumstances, it must be held that his possession of the property which he had previously occupied did not continue down to the time of the bringing of this

action, and hence could not constitute an adverse title under the Code against the complainant, who enforced his rights in the year 1903.

It is also claimed by the defendants that the complainant is not the real party in interest, and under section 449 of the Code of Civil Procedure cannot maintain the present action. It is unnecessary to consider the rights of beneficiaries, or whether the trust charged upon the property and admitted by the complainant is valid. The entire legal title is in him. So far as the record is concerned, he is the absolute owner of the property, and the purposes for which he held it would not defeat an action like the present. Nor can the claim that the deed of the Huntingtons to the complainant was void for champerty avail the defendants. No such possession in the defendants has been shown as would invalidate the complainant's deed (*Crary v. Goodman*, 22 N. Y. 170; *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482), and the determination of the questions of fact as to adverse possession makes it plain that the deed of the record title from the Huntingtons to Van Deventer in 1901 should be upheld. An extremely interesting and troublesome situation would arise if in the future the growth of Rockaway Beach should be such that the channel or inlet between the present limits of the beach and Coney Island should be closed in a similar way to that in which the beach (considered in the case of *Mulry v. Norton*) was rejoined to the lands upon the west, and if a series of storms or convulsions of land in that neighborhood should open an inlet to Jamaica Bay at some point in front of the bay itself. Such a change would bring up directly the determination of the question whether owners of land fronting upon the ocean were entitled to a straight outlet to the high seas, or to any land that might be formed or arise from the sea within the extension of their lateral boundaries to that point, and, if the doctrine of the Mississippi River Cases could be held to apply, such land would necessarily become the property of the owners of the upland in front of which the new territory was formed. The effect of the determination which the court has reached previously in this opinion makes it necessary to consider this question. But, as has been said, inasmuch as the ownership of land upon the sea terminates at high-water mark, and inasmuch as the right to reach navigable water does not require an outlet straight out to the high seas, it would seem to follow that the creation of such a channel in front of littoral property as is now represented by Rockaway Inlet would terminate any claim to lands formed entirely outside of the original boundary lines, and entirely outside of any coast line upon the north side of their inlet. It would be impossible to consider that property holders upon the shores of lower New York Bay could claim ownership of any part of Sandy Hook simply because it had been formed between them and the open ocean if their original deeds had been bounded by that ocean, nor could the owners of land in Rhode Island claim title to the extension of Long Island if the action of the sea should be such as to carry it to the eastward in such a way as to shut off the sea coast of Rhode Island, as it does that of Connecticut; and yet these questions would differ from the present only in degree, and not in kind, if the finding of the court as to the formation of the beach in question be correct.

Upon the whole case, therefore, it must be held that the complainant has shown title to the property involved, and should have a decree against all the defendants.

FOUCHE v. SHEARER et al.

(District Court, N. D. Georgia, N. W. D. August 4, 1909.)

1. BANKRUPTCY (§ 175*)—FRAUDULENT TRANSFERS—CONVEYANCE BY WIFE TO HUSBAND.

A conveyance by a wife to her husband, made on the eve of bankruptcy, leaving her nothing to pay creditors, is *prima facie* fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 175.*]

2. BANKRUPTCY (§ 227*)—REPORT OF MASTER—REVIEW.

A master's report, finding that a conveyance by a member of a bankrupt firm to her husband was fraudulent, could not be set aside on certificate, unless clearly and manifestly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 227.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

3. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—CONVEYANCE BY WIFE TO HUSBAND—FINDINGS—EVIDENCE.

Evidence *held* to sustain a finding that a conveyance by a member of a bankrupt firm to her husband was made with intent to defraud her creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

In Equity.

J. M. Bellah, for trustee.

G. E. Maddox and F. W. Copeland, for defendants.

NEWMAN, District Judge. Shearer & Shearer is a bankrupt firm composed of J. H. Shearer and Mrs. M. E. Shearer; the latter being the wife of G. S. Shearer. Sproull Fouche, as trustee for Shearer & Shearer, brings this bill in equity in the District Court against G. S. Shearer, T. J. Wadkins, and G. R. Anderson, seeking to have set aside, or have canceled as a cloud on the title, a certain deed to a piece of land in Lyerly, Chatooga county, Ga. The land in question was bought originally from G. R. Anderson, who made a bond for title to Mrs. M. E. Shearer, having received \$500 in cash at the time of the sale; the total purchase price being \$800. Bond for title at the time of the sale was given to Mrs. M. E. Shearer by G. R. Anderson. A short time before the bankruptcy proceedings, the remaining \$300 was paid, and a deed was executed by Anderson to G. S. Shearer, the husband. After the adjudication in bankruptcy, a deed was made and executed to the property by G. S. Shearer to T. J. Wadkins, who had theretofore been an employé in the store of Shearer & Shearer, and lived in the home of G. S. Shearer and his wife, Mrs. M. E. Shearer.

It is charged in the bill that the making of the deed by G. R. Anderson to G. S. Shearer was in contemplation of the bankruptcy of the firm of Shearer & Shearer, and that the deed from G. S. Shearer to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

T. J. Wadkins was in furtherance of a scheme to prevent the property from being subjected to the debts of the bankrupt firm of Shearer & Shearer. It seems from the evidence that G. S. Shearer was the active person in managing his wife's interests in the bankrupt firm. The contention is, in the bill and in argument, that it was apparent that the firm of which Mrs. M. E. Shearer was a member was about to go into bankruptcy, that they caused a deed to be made to the husband, and he, as stated, subsequently, and after the bankruptcy proceedings, made a deed to T. J. Wadkins to get the property still further out of the hands of the creditors of the firm.

The case was referred to W. S. Rowell, as special master, and his report is as follows:

"This is a bill filed by the trustee for the purpose of subjecting assets claimed to be held in fraud by the defendant T. J. Wadkins against the rights of the creditors of the bankrupt. It was filed on December 5, 1908. The only defensive pleading filed was the joint answer of the respondents G. S. Shearer and T. J. Wadkins. On January 16, 1909, and on March 12, 1909, the special master proceeded to take evidence offered by the complainant and respondent on issues made by the bill and joint answer, and the record of the evidence is made up. In the outset of his examination of the pleadings and evidence, for the purpose of deciding the issues, the special master is confronted with the proposition that, notwithstanding the many indicia of fraud disclosed by the record, there is a possibility that the respondent T. J. Wadkins might be entitled to protection upon the grounds that his actions have been bona fide. The special master has therefore scrutinized the record with great care to see if, under any possibility, this respondent has acted in good faith, and if he has bona fide parted with the \$850 he claims to have paid.

"The examination of the pleadings filed fails to suggest to the reasonable mind, seeking for the truth, a just claim of right in this respondent. The bill charges: That certain lots in Lyerly, with a residence thereon, are, in reality, the property of the bankrupt, Mrs. M. E. Shearer; that she made the contract for the purchase of the lots early in the year 1907; that her money paid for the lots; that no one has ever repaid this money to her; that the bond for title was made to her; that the papers executed by Anderson to G. S. Shearer and from G. S. Shearer to T. J. Wadkins were fraudulent as against creditors; and that the bankrupt never received the purchase money.

"A feature of the joint answer of defendants is that the pleader seems to intend to leave the defense in rather clouded shape. He repeats over and over allegations of good faith. He subjects himself to the suggestion that he protests too much; but he denies facts which, in the light of the respondent's own evidence, should have been admitted; depends on writings executed after the bankruptcy proceedings by the co-respondents in fraud. He seems to plant himself on the proposition that, when the co-respondents produced writings entered into between themselves, the burden is cast upon the trustee to prove by positive and direct evidence that the same were not bona fide.

"The special master does not agree with this view of the law suggested by the plea, and he is of the opinion that the rule laid down in *Booher v. Worrill*, 57 Ga. 235, that a conveyance by a wife to the husband, made on the eve of bankruptcy, leaving her nothing out of which to pay creditors, is prima facie fraudulent, is the proper rule to enforce in this case. This plea, with apparent indifference to the two rules of law—that the wife cannot contract with her husband, and that a contract for the sale of land is shown by the writings—carelessly alleges that, while the bond for title was made directly to the wife, and the wife signed a check for \$500 of the purchase money, and the wife signed her notes for the balance of the purchase money, it was really the husband's purchase of land, and he simply borrowed the \$500 from his wife. The pleadings at the outset impress the ordinary intelligence unfortunately for the contentions of the respondent T. J. Wadkins. For this very reason, the special master recognizes the fact that the evidence must be

carefully examined to see that a judgment subjecting this property is not entered unless the evidence clearly discloses that the respondent T. J. Wadkins has acted in bad faith and fraudulently.

"The evidence introduced by complainant clothes this transaction, both as to Shearer and Wadkins, with many indicia of fraud. Under this evidence the conclusion is irresistible that both Shearer and Wadkins were insolvent before filing a proceeding in bankruptcy. Shearer could not do business in his own name. A levy on the very property claimed by the trustee of a *fi. fa.* against Shearer was introduced in evidence. The defendant Wadkins was accustomed to being sued for small amounts in justice court. He was shown to have obtained money on personal security, and the securities were compelled to pay the debts. He had claimed two months' salary from the trustee, when the bankruptcy proceedings were first filed, upon the ground that he was a poor orphan boy and needed money. This evidence of insolvency was also proven in regard to other parties called into the transaction by the respondent as lenders of money.

"The evidence clearly suggested: That G. S. Shearer had absolute and entire control of the business of Shearer & Shearer, both as regarded his wife's and his brother's interest; that he only remained out of the business because of his insolvency; that he had better knowledge than any other person of the affairs of Shearer & Shearer. In this connection, the same general knowledge of the condition of the affairs of Shearer & Shearer and of the relation of the husband and wife to the trade for the land was forced home on the respondent T. J. Wadkins. He was and is living in the house with Mr. and Mrs. Shearer, and employed by them.

"The petition in bankruptcy was voluntary in nature. It was filed only a few days after the shifting of the property from the partner, Mrs. M. E. Shearer, to her husband. Under the evidence, G. S. Shearer can properly be recognized as the moving spirit in the filing of this voluntary petition.

"There is evidence that the respondent G. S. Shearer, before the execution of the deed by him to the respondent T. J. Wadkins, sought to have a fraudulent deed executed, dating it back, because he was about to fail in his effort to save the property to himself by reason of the fact that a judgment against him was about to be levied on it; but the special master goes a step further to see if there was a bona fide transaction by which G. S. Shearer received \$850 from T. J. Wadkins. What reasonable man would pay \$850 or receive \$850 after a proceeding in bankruptcy had been filed, with all this indicia of fraud surrounding the transaction, without having disinterested witnesses to prove the bona fides of the transaction? It is absurd to imagine that intelligent men, under the circumstances, would enter into this transaction, keeping the secret to themselves. With the respondent G. S. Shearer very sick at the time, these two parties took an unnecessary trip away from Lyerly, and into the country, to have this paper drawn and executed. These two swear to the payment of the \$850. The witness Curry says that he saw the respondent Wadkins draw some money from his inside pocket. How much money, he does not suggest. It might be referred to, under his testimony, as "a" money, for he does not tell whether it was \$5 or \$500. He was then, unfortunately, called away, and he did not see any money paid to Shearer. He stated that his daughter, Lydia, remained. It is the opinion of the special master that on this material fact (although a form of payment might have existed and the proceedings still be utterly fraudulent) the testimony of Miss Lydia would have been worth a great deal more than that of the two respondents. They did not introduce her on this subject.

"But the proper, and really the only, evidence of bona fides in this case, would consist in showing that the bankrupt, Mrs. M. E. Shearer, received back the money, and its disposition. After the 11th day of June, 1907, the respondent, G. S. Shearer, claims to have paid to his wife the money she had advanced. If this is true, in the few days intervening—and it was not all paid at one time, but in different payments—more than \$500 was received by the bankrupt, and it would have been easy to show what creditors of the bankrupt received this money, or where the bankrupt had this money deposited. This was not attempted.

"Again, if the transaction was in good faith, and if G. S. Shearer received \$850 from T. J. Wadkins, the best evidence possible of bona fides would have been the production of this \$850 in court, showing that Shearer had it, or else accounting for it by showing transactions in which he had used this much money. This was not attempted by Shearer; but, on the other hand, when cross-examined on this subject by counsel for the trustee, he utterly failed to show the disposition of this amount of money.

"The special master has been confronted with a case where the respondents, seeking to hold this property, insist solely, by pleadings and evidence, on denying facts. They have not produced before the court evidence from any of the sources which would be suggested as a proper repository of evidence of good faith.

"The special master therefore finds: That the deed executed by Anderson to G. S. Shearer was in furtherance of a fraudulent scheme, entered into by said Shearer, whether known to Anderson or not, to hinder, delay, and defraud the creditors of Shearer & Shearer; that the execution of the deed from G. S. Shearer to T. J. Wadkins was fraudulent upon the grounds that there is no evidence from any proper source, and that such proper source exists; and that the transaction between Shearer and Wadkins was bona fide. He therefore finds further that the prayer of the petition be sustained, title to the lots described in the petition be declared to be in the trustee, and the respondent be required to execute such deeds as are necessary to comply with this finding."

I think this is peculiarly a case where the rule should be invoked that the master's report will not be set aside unless clearly and manifestly erroneous. The question is whether these people acted in good faith or fraudulently, and whether or not there was real consideration between Wadkins and G. S. Shearer, and between G. S. Shearer and his wife.

There was considerable testimony, and witnesses were examined and cross-examined in person, in the presence of the special master, who saw them all and could well judge of their credibility and of the value of their testimony. More than this, I think the evidence fully justifies the report. The very clear statement made by the special master renders unnecessary any elaboration of the matter by the court.

As I do not see any reason for differing from the master as to his statement of the law, and his conclusion on the facts is justified by the evidence, accordingly, the report must be confirmed, and a decree may be taken in favor of the complainant as prayed.

DELAWARE, L. & W. R. CO. v. STEVENS et al., Public Service Com'rs.

(Circuit Court, N. D. New York. September 17, 1909.)

1. RAILROADS (§ 9*)—REGULATION—PUBLIC SERVICE COMMISSION—ORDERS—INJUNCTION—CONDITIONS PRECEDENT—APPLICATION FOR REHEARING.

Where a carrier, within the time fixed by an order requiring interstate trains to stop at D., asked for a reconsideration, and, being requested to put the application in writing, did so by a formal letter to the commission, asking modification of the order in certain particulars, and the commission considered the request and denied the modification, the objection to the carrier's bill to restrain the enforcement of the order that it should first have applied for rehearing was untenable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

2. CONSTITUTIONAL LAW (§ 43*)—OBJECTION—WAIVER.

Where a complaint before the Public Service Commission against an interstate carrier prayed an order requiring defendant to operate passenger trains which would afford service for the residents of D. north and south bound at or about the same time of day that was formerly afforded by two trains known as Nos. 9 and 12, which no longer stopped there, and for further relief, but nowhere prayed that the commission order trains 9 and 12 to again stop at D., the railroad's failure to plead and prove that to stop such trains, as required by the commission's subsequent order, would interfere with interstate commerce, the carrying of United States mails, and would confiscate the railroad company's property, in violation of state and federal Constitutions, did not constitute a waiver of such objections.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

3. CONSTITUTIONAL LAW (§ 70*)—PUBLIC SERVICE COMMISSION—REVIEW BY COURTS.

State courts in reviewing orders of the Public Service Commission act judicially, and not legislatively.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

4. COMMERCE (§ 8*)—INTERSTATE COMMERCE—REGULATION.

Congress, having been given sole jurisdiction over, and the right to regulate, interstate commerce, and having created the Interstate Commerce Commission as a tribunal for that purpose, the states have no power or jurisdiction to directly interfere with or directly regulate the same by Public Service Commissions or otherwise.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

5. COMMERCE (§ 8*)—INTERSTATE COMMERCE—REGULATION—PUBLIC SERVICE COMMISSION—ORDERS.

An order of a Public Service Commission directly interfering with or directly regulating interstate commerce is not merely erroneous, but is absolutely void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

6. COMMERCE (§ 58*)—REGULATION—RAILROADS—STATE COMMISSION.

A Public Service Commission may compel an interstate railroad to put on additional trains in certain cases, as well as companies operating wholly within the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-81; Dec. Dig. § 58.*]

7. CORPORATIONS (§ 394*)—REGULATION—PUBLIC SERVICE COMMISSION—ORDERS—APPEAL.

The act creating the Public Service Commission and defining its powers does not give any right of appeal to any other body or court with power to substitute its order or judgment for that of the commission.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 394.*]

8. RAILROADS (§ 9*)—PUBLIC SERVICE COMMISSION—ORDERS—REVIEW ON CERTIORARI.

Code Civ. Proc. N. Y. § 2120, provides that certiorari is issued to review the determination of a body or officers only where the right to the writ is expressly conferred or authorized by statute, and, where the writ may be issued at common law, by a court of general jurisdiction, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right to the writ or the court's power to issue it is not expressly taken away by statute. *Held*, that certiorari was not available to review an order of the Public Service Commission requiring certain interstate trains to stop at a specified station.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

9. RAILROADS (§ 9*)—REGULATION—PUBLIC SERVICE COMMISSION—NATURE OF ACTS.

Where the Public Service Commission, on complaint after hearing and the taking of evidence, entered an order requiring that complainants stop certain of its interstate trains at a station, the commission's act was legislative, and not judicial.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.*]

10. RAILROADS (§ 9*)—PUBLIC SERVICE COMMISSION—FEDERAL COURTS—JURISDICTION.

Where an order of the New York Public Service Commission, requiring interstate trains to stop at a station, was complete with the denial of the railroad company's application to modify the order, the requisite jurisdictional facts being present, the railroad company was not bound to apply to the state courts for relief before filing a bill in the federal court to restrain the operation of the order, being entitled to select, at will, any tribunal having jurisdiction of the parties and subject-matter.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.*]

11. RAILROADS (§ 9*)—PUBLIC SERVICE COMMISSION—ORDER—CONCLUSIVENESS.

An order of the Public Service Commission directing a railroad company to stop two of its interstate trains at D., being legislative in character, was not *res judicata*, and hence the railroad company's failure to object at the hearing, before the commission, that such an order would be unconstitutional and an unwarranted interference with interstate commerce, did not estop the railroad company from insisting thereon as a basis of a bill to restrain the enforcement of the order.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.*]

12. CONSTITUTIONAL LAW (§ 73*)—LEGISLATIVE ACTS—PUBLIC SERVICE COMMISSION—ORDERS—INJUNCTION.

Where the Public Service Commission or other body possessing legislative authority with executive power to put its acts into effect enacts an unconstitutional rule or order, it may be enjoined by the courts from enforcing it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 19; Dec. Dig. § 73.*]

Bill by the Delaware, Lackawanna & Western Railroad Company against Frank W. Stevens and others, constituting the Public Service Commission of the Second District of the state of New York. Defendants' amended plea to the bill overruled.

Hearing on amended plea to bill of complaint which seeks, pending the suit, an order suspending an order of the Public Service Commission, Second District, of the state of New York, made September 17, 1908, and enjoining and restraining proceedings thereunder, and praying a final decree setting aside and annulling such order and perpetually enjoining proceedings thereunder and for general relief.

F. W. Thomson (W. S. Jenney, of counsel), for complainant.
Ledyard P. Hale, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. The Public Service Commission of the state of New York was created by the statutes of the state with the powers and jurisdiction hereafter referred to. The Delaware, Lackawanna & Western Railroad Company is a railroad and public service corporation organized under and pursuant to the laws of the state of Pennsylvania, but owns, leases, and operates railroad lines in New Jersey, Pennsylvania, and the state of New York, amongst others a trunk line extending from Jersey City, state of New Jersey, through and across New Jersey, the eastern part of Pennsylvania, and the southern-central and western part of the state of New York, terminating at Buffalo, N. Y., where it has other connections extending into or through some of the states of the Middle West. It carries and transports express, United States mails, freight and passengers with their baggage, and does an extended and immense interstate trade and commerce business. By local, so-called, trains and others it does an interstate business between New Jersey and Pennsylvania, and Pennsylvania and New York. It also has trains and does an intrastate business in such transportation wholly in the state of New York. It has local trains and also through trains stopping only occasionally for fuel and water or to accommodate passengers from the great centers. In respect to the intrastate transportation wholly in the state of New York, the bill alleges that it is subject to the provisions of chapter 429, p. 889, Laws 1907, of the state of New York, except in so far as they may be repugnant to and invalid by the provisions of the Constitutions of the United States and the state of New York. The bill also alleges:

"Your orator further says: That it is now lawfully operating, and for many years last past has lawfully operated, a main trunk line of double-tracked railway, extending from Hoboken, N. J., in a northwesterly direction, through the states of New Jersey, Pennsylvania, and New York, via Paterson, N. J., Dover, N. J., Scranton, Pa., Binghamton, Elmira, and Owego, N. Y., to Buffalo, in the state of New York. That said line of railroad constitutes one of the principal arteries, through which ebbs and flows an immense interstate commerce—the interstate transportation of passengers and property from Buffalo and points west thereof to the seaboard. That upon said trunk line of railway the complainant has installed and for many years last past maintained and operated, and is still maintaining and operating, a fast through interstate passenger service from Hoboken to Buffalo, and with its connecting lines, to Chicago, and other points in the West, and from Buffalo, and, with its connecting lines, from Chicago and other points in the West, to Hoboken. That trains Nos. 9 and 12 hereinafter referred to are, among others, employed in such through service. That said trains are specially designed and equipped for such service, and the great bulk of the business thereof consists of such through interstate travel. That said train No. 9, which is a west-bound train, is obliged to run at a high rate of speed in order to make connections at Buffalo with lines running to points west thereof. That the east-bound trains performing such through service, including No. 12 hereinafter referred to, are companion or return trains, making equally fast or nearly as fast schedule time. That complainant's said line of railroad from Dover, N. J., through New Jersey and Pennsylvania, to the New York state line, passes through a rough, mountainous country, and surmounts between Stroudsburg and Scranton in each direction a grade of eighty (80) feet per mile. Taking into consideration said facts, and the fact that trains are peculiarly subject to delay while traversing such country, especially in winter seasons, the running time of said trains cannot with safety be materially reduced. That, in order to maintain the necessary schedules for the operation of said interstate trains, it is impossible and wholly impracticable to stop at all stations, and that said

trains only stop regularly at junction points and at such points of importance which are necessary and which justify said stops."

The bill also sets out the stops of interstate trains Nos. 9 and 12, and the reasons and necessity therefor. No stop of either of the trains at Dansville, N. Y., is made or provided for. The bill also sets out the fact that in carrying United States mail under contract with the government and also passengers, etc., going to distant points, it is compelled to run these trains at a high rate of speed, and make as few stops as possible so as to make important and necessary connections. Dansville is a small village of about 3,500 inhabitants situated on complainant's railroad about 76 miles east of Buffalo. Since February 1, 1905, five passenger trains per day on complainant's road have stopped at Dansville going west to Buffalo, two in the morning and three in the afternoon, and five passenger trains have stopped per day at Dansville going east from Buffalo, three in the morning and two in the afternoon. The total number of passengers between Dansville and Buffalo in both directions for the year ending June 30, 1908, per month was 558, or 18.3 passengers per day, or an average of less than 2 passengers for each train. There is no commuter travel or travel by person obliged to be present in Buffalo on business or otherwise daily. This has been the business practically since February 1, 1895. Prior to the making of the order complained of, the board of trade of Dansville entered a complaint to the said Public Service Commission, alleging (1) that the inhabitants of the village had frequent occasion to travel from Dansville west to Buffalo and intermediate points and return, and east to Elmira and intermediate points and return; (2) that the arrangement of time schedules on the road of the Delaware, Lackawanna & Western Railroad Company for passenger trains between Buffalo and Elmira, Dansville being an intermediate point, was such that trains which stop at Dansville to take on or let off passengers do not afford to the residents of such village adequate and convenient service; also (3) that formerly it was the practice of the company to afford to Dansville the daily service and accommodation of interstate passenger train No. 9 bound for Buffalo leaving Dansville at about 6 a. m., and reaching Buffalo at 7:45 a. m., whereas now the only morning passenger train to Buffalo, No. 7, leaves at the inconvenient hour of 4:42 a. m. and reaches Buffalo at 7 a. m.; also (4) that formerly it was the practice of the company to afford to the citizens of Dansville the daily service and accommodation of the interstate passenger train No. 12 south-bound to Elmira leaving Dansville at 10:30 p. m., and reaching Elmira at 12:12 midnight, while at the present time the only south-bound passenger service after 7:16 p. m. is by train 14, leaving Dansville at 1:20 a. m. and reaching Elmira at 3:04 a. m. The complainant alleged the interstate character and business of these trains. The complainant also stated:

"That the withdrawal of the former service afforded by the trains Nos. 9 and 12, as aforesaid, is unjust, unreasonable, and discriminatory, and works great hardship and loss upon the residents of Dansville, and that the stops of said trains at Dansville should be restored or corresponding independent service should be provided. That, by reason of the premises, defendant has been and is subjecting complainant and the residents of Dansville, N. Y., to undue and unreasonable prejudice and disadvantage and unjust discrimination, and

depriving residents of Dansville of reasonable and adequate train service, in violation of the provisions of the Public Service Commissions law, chapter 429, p. 889, of the Laws of 1907 of the state of New York."

The relief demanded was:

"Wherefore complainant prays that the defendant be required to promptly answer the charges herein; that, after due hearing and investigation, an order be made commanding said defendant to wholly cease and desist from the aforesaid violation of the provisions of said law, and to the full extent thereof; that a further order be issued requiring said defendant to operate passenger trains which shall afford service for the residents of Dansville, north-bound and south-bound, at or about the same time of day that was formerly afforded by the trains designated as Nos. 9 and 12, aforesaid, and that such other and further order or orders may be entered as the commission may deem necessary in the premises and the complainant's cause may appear to require."

To this complaint the railroad company answered (1) that the residents of Dansville had occasion to travel by rail from Dansville to Buffalo westward and eastward to Elmira. It then set out the present train service in detail, showing passenger trains leaving Dansville for Buffalo and Elmira, and from those parts to Dansville as follows:

West-Bound:

Train # 15	leaves Dansville	11:13 a. m.	Arrives Buffalo	1:05 p. m.
Train # 27	leaves "	3:27 p. m.	Arrives Buffalo	6:00 p. m.
Train # 3	leaves "	6:14 p. m.	Arrives Buffalo	7:58 p. m.
Train # 5	leaves "	11:48 p. m.	Arrives Buffalo	1:45 a. m.
Train # 7	leaves "	4:42 a. m.	Arrives Buffalo	7:00 a. m.

East-Bound.

Train # 2	leaves Buffalo	3:15 a. m.	Arrives Dansville	5:15 a. m.
Train # 28	leaves "	8:00 a. m.	Arrives "	10:20 a. m.
Train # 6	leaves "	9:30 a. m.	Arrives "	11:15 a. m.
Train # 8	leaves "	5:30 p. m.	Arrives "	7:26 p. m.
Train # 14	leaves "	11:30 p. m.	Arrives "	1:20 a. m.
* * *				

East-Bound.

Train # 6	leaves Dansville	11:15 a. m.	Arrives Elmira	12:48 noon
Train # 28	leaves "	10:20 a. m.	Arrives Elmira	3:30 p. m.
Train # 8	leaves "	7:26 p. m.	Arrives Elmira	9:47 p. m.
Train # 14	leaves "	1:20 a. m.	Arrives Elmira	3:04 a. m.

West-Bound.

Train # 15	leaves Elmira	9:26 a. m.	Arrives Dansville	11:13 a. m.
Train # 27	leaves Elmira	1:15 p. m.	Arrives Dansville	3:27 p. m.
Train # 3	leaves Elmira	4:45 p. m.	Arrives Dansville	6:14 p. m.
Train # 5	leaves Elmira	10:12 p. m.	Arrives Dansville	11:48 p. m.
Train # 7	leaves Elmira	2:45 a. m.	Arrives Dansville	4:42 a. m.

It also set forth the daily passenger travel on all these trains from Dansville to Buffalo and beyond, and intermediate points, and from Dansville to Elmira and beyond, and intermediate points. The answer denied that it did not furnish adequate service for the people of Dansville. The complaint of the board of trade states that trains 9 and 12 are interstate trains, but did not ask that the company be ordered to stop either train at Dansville. Neither answer nor proof was required to establish that fact before the Public Service Commission. The commission stood informed of it by allegation and want of denial.

The bill of complaint here states that prior to February 1, 1905, trains 9 and 12 had been accustomed to stop at Dansville and other points of about the same importance, but it was found that these trains

were frequently late at junction and terminal points, and it was also found that, to meet the exigencies of its interstate business and the demands and requirements of modern commerce and passenger transportation, it was necessary to eliminate some of the less important stops which these trains had been making, and accordingly this was done as to several points named, Dansville being among the number; also, that there is no turntable at Dansville or other facilities which can be used for making up trains at Dansville to run from or to that place as a terminal. The bill also alleges that to stop such trains at Dansville and like stations would render it impossible to make schedule time; that fines for delay in carrying the mails would be exacted, mail contracts withdrawn, and that said trains would have to be abandoned as through fast trains; also, that frequent stops impair its service as compared with its competitors, and would result in great financial loss. The alleged unreasonableness and unconstitutionality of the order complained of is also set forth. The bill also sets forth the impossibility of installing and operating local trains from Dansville to Buffalo without great loss, amounting to about \$65 per day on each train. In short, the bill of complaint here alleges in substance that the enforcement of the order will result practically in the confiscation of complainant's property for the alleged convenience of a very few people in Dansville. After a hearing on the complaint of the board of trade and answer thereto, the commission made the order complained of, which so far as material reads as follows:

"Now, upon the aforesaid complaint, answer, reply, and evidence at the hearings, and after due deliberation, and it appearing that the passenger train service now given by said company at its Dansville station is unjust, unreasonable, and inadequate, in that the said company fails to give a just, reasonable, and adequate passenger train service from Dansville westward to Buffalo between the hours of 5 o'clock and 11 o'clock in the forenoon, and from Buffalo eastward to Dansville between the hours of 6 o'clock and 11 o'clock in the afternoon, it is

"Ordered: (1) That such just, reasonable, and adequate service be given at said Dansville station by said the Delaware, Lackawanna & Western Railroad Company by regularly stopping thereat its west-bound train known as train No. 9, which now passes said station at approximately 6 o'clock in the morning, and by stopping upon signal or request to receive or discharge passengers at the said station its east-bound train known as No. 12, which now passes said station at approximately half past 10 o'clock in the afternoon.

"Ordered: (2) That the said the Delaware, Lackawanna & Western Railroad Company may at its option omit stopping the said trains 9 and 12 at Dansville upon condition that it provides and operates a regular passenger train with suitable and adequate accommodations which shall leave Dansville for Buffalo each day, except Sundays, not earlier than 6 o'clock nor later than 7 o'clock in the morning, and run to Buffalo upon a time schedule of approximately two hours, and another such regular passenger train with suitable and adequate accommodations which shall leave Buffalo each day, except Sundays, not earlier than 8 o'clock nor later than 9 o'clock in the evening, and run to Dansville upon a time schedule of approximately two hours, the said trains to be placed in service on the 30th day of November, 1908, and their operation to be continued until the further order of this commission."

The complaint to the commission, the answer of the company, and its order are all attached to the bill of complaint, and by reference made a part of the amended plea. Attached to the defendants' amended plea herein is a copy of the evidence given before the commission.

The substance of defendants' amended plea is as follows:

"That neither by its answer to the petition, nor by written or oral objection, nor by oral or documentary evidence, nor by argument, oral or written, or otherwise, did the said railroad company make any claim that the commission was without jurisdiction to make an order requiring trains No. 9 and No. 12 to stop at Dansville because so to do would be in violation of the Constitution or laws of the United States as an unreasonable or unlawful interference with interstate commerce or with the transportation of the United States mails; that neither by its said answer to the petition, nor by written or oral objection, nor by documentary or other evidence, nor by argument, oral or written or otherwise, did the said railroad company make any claim that the commission was without jurisdiction to make an order requiring that new local trains from Dansville to Buffalo and return should be put on if the said railroad company elected not to stop said trains No. 9 and No. 12 at Dansville; that the said railroad company has not applied to the commission for a rehearing in respect to any matter determined in said order Exhibit C; that the determination of the question of the adequacy and reasonableness of the train service furnished by the complainant herein between Dansville and Buffalo was legislative in character, and defendants' jurisdiction, powers, and duties in respect thereto under said Public Service Commissions law were legislative in character; that the said railroad company might as a matter of right have applied to these defendants as such commission for a rehearing in respect to the matters, and each matter determined in said order complained of in this suit, and may yet as a matter of right so apply; that said railroad company, complainant herein, ought not as a matter of equity or right to be allowed to maintain its said bill in equity herein because of its said failure either to allege or claim before said commission that said commission might not order said trains No. 9 and No. 12 to stop at Dansville because such order would be in contravention of the Constitution and laws of the United States as an unwarranted and unreasonable interference with interstate commerce or the transportation of the mails, and because of its said failure to apply for a rehearing under said section 22 of the Public Service Commissions law; all of which matters and things these defendants aver to be true, and they plead the same to the whole of said complainant's bill as aforesaid, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer to the said bill, and pray to be hence dismissed, with their costs and charges in that behalf most wrongfully sustained."

The allegation of the amended plea that the defendant in that proceeding, the complainant in this suit, did not apply for a rehearing, is in my judgment fully met and answered by a stipulation modifying the plea from which it fully appears that within the time fixed by the order of the commission the railroad company did orally ask for a reconsideration; that it was requested to put the request in writing, which it did by a formal and explicit letter to the commission asking a modification of the order in certain particulars; that the commission considered the request, and then denied, refused, the modification of the order. It was not necessary to give more evidence, as the company stood on that given before the commission. It asked a reconsideration of the whole subject and a modification of the order, which request was entertained by the commission; and, after consideration, the modification was refused and notice given. Thereupon, and on the day the order took effect, this suit was instituted. It stands admitted that the Public Service Commission of the State of New York, Second Division, made and was about to enforce an order requiring the Delaware, Lackawanna & Western Railroad Company to stop one through interstate train running from Jersey City, N. J., to Buffalo, N. Y., carrying the mails of the United States and interstate passen-

gers, at Dansville, N. Y., under the circumstances and conditions stated in the bill, and that it made and was about to enforce an order requiring said company under the circumstances and conditions named to stop on signal another interstate train carrying United States mails and interstate passengers at Dansville. It is conceded that the benefits derived by or accruing to the people of Dansville are as stated, and that the damages and detriment to the company and impracticability of a compliance are as set out in the bill. There is nothing in the amended plea to modify or ameliorate the conditions and results alleged. The whole substance of the plea is that the defendant there, complainant here, did not plead and prove that to stop such trains as required by the order would interfere with interstate trains and the carrying of United States mails, and that available remedies in the courts of the state of New York have not been resorted to and exhausted; that it did not plead in its answer that such an order was confiscatory or in contravention and violation of the Constitutions of the state of New York and of the United States, etc. But how can it be contended that the defendant there, this railroad company, was bound to plead any such defense when there was no suggestion in the complaint made and relief demanded that such an order was or would be asked for, or would be made by the commission if no defense was interposed? Was the company to presume that the commission would make an order interfering with and crippling its interstate business and the carrying of the United States mails and inflicting great pecuniary damage? It is true that the complaint of the board of trade of Dansville stated that the stops of said trains 9 and 12 should be restored or corresponding independent service provided, but in the demand for relief this was not asked or demanded even by implication.

It is also contended that the defendant there, complainant here, should have sought a review of the action of the commission by certiorari or otherwise in the state courts before resorting to the federal court; that the proceedings before the commission and its determination were legislative in character, and, while they may be reviewed in the courts, the legislative action is not complete until the courts of the state have passed on the question; that resort should not be had to a bill in equity until all these remedies are exhausted. This assumes that, if there may be a review of the action of the commission by the state courts, such courts are acting legislatively, and not judicially. But I fail to find any statute conferring legislative powers on the courts of the state of New York as to these matters. I am not pointed to any decision so holding or to any statute giving the power, and fail to find any. Counsel for the defendants here cites the court to and relies largely upon *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 223, 226-230, 29 Sup. Ct. 67, 53 L. Ed. 150; *Honolulu v. Hawaii*, 211 U. S. 282, 291, 29 Sup. Ct. 55, 53 L. Ed. 186; *Knoxville v. Water Co.*, 212 U. S. 1, 8, 18, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, 29 Sup. Ct. 192, 53 L. Ed. 382. It safely may be assumed, I think, that the Constitution of the United States having given to the Congress of the United States sole jurisdiction over and to regulate interstate and foreign commerce, and having created a tribunal, the Interstate Commerce Commission, to regulate

same, etc., the state has no power or jurisdiction to directly interfere with or directly regulate same by its Public Service Commission or otherwise. *Atlantic Coast Line R. R. Co. v. Wharton et al.*, 207 U. S. 331, 334, 28 Sup. Ct. 121, 52 L. Ed. 230, and cases there referred to. Any order made by the Public Service Commission which does this is not merely erroneous, but obviously void. Same case. It is also decided that some orders of such commissions "which cause" a stoppage of interstate trains, but which do not directly regulate such commerce, may be valid. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. In that case the statute of the state of Ohio relating to railroad companies in that state required such companies to stop three trains each way, if so many were run carrying passengers, at every village of over 3,000 population, for a sufficient time to let passengers on and off, and imposed a penalty for a failure to make such stops in such cases. The defendant company there was incorporated under the laws of the state of Ohio, and again the statute was not aimed at or directed against interstate trains or any particular train. The order of the commission in the case at bar was aimed at and applied directly to two interstate fast trains and known to the commission to be such. It is a question whether this is not a direct interference with interstate commerce. But it is not now necessary to decide that question.

In *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, it seems to be decided that the state commission may compel the putting on of additional trains in certain cases and under certain conditions. This undoubtedly applies to all companies operating in the state.

In *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186, it is held that:

"The power to regulate the operation of railroads includes regulation of the schedule for running trains, that such power is legislative in character, and the Legislature itself may exercise it or may delegate its execution in detail to an administrative body, and, where the Legislature has so delegated such regulation, the power of regulation cannot be exercised by the courts."

It was accordingly held that the courts could not independently regulate the schedule for running trains without deciding whether or not the courts had power to review the action of the administrative officers. This case is not to be construed as a holding that a state commission may directly control and direct the running or schedule time of interstate trains. If so construed it would be in direct conflict with *Atlantic Coast Line R. R. Co. v. Wharton et al.*, 207 U. S. 331, 334, 28 Sup. Ct. 121, 52 L. Ed. 230, and cases there cited.

In *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 224, 227, 29 Sup. Ct. 67, 70, 53 L. Ed. 150, the court held that the state had directly and expressly given a right of appeal from the State Corporation Commission to the Supreme Court of Appeals, with power to substitute such order as in its opinion the commission should have made. It also held that the court on such appeal would have been acting legislatively, and not judicially. The court said:

"If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the Supreme Court of Appeals is given of

right to any party aggrieved upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct, or annul the action of the commission, and in collateral proceedings the validity of the rates established by it cannot be called in doubt. * * * The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co. v. Commonwealth*, 102 Va. 599, 621, 46 S. E. 911. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See *Southern Ry. Co. v. Commonwealth*, 107 Va. 771, 772, 60 S. E. 70, 17 L. R. A. (N. S.) 364."

But here there is no right of appeal given by the act creating the commission and defining its powers to any other body or to any court with power to substitute its judgment and order for that of the commission. It is a necessary consequence that the legislative act and function of the commission ended when its order was made and a modification thereof denied. No other body, or court, had power to legislate over the head of the commission or substitute its order for that of the commission. If under the provisions of Code Civ. Proc. N. Y. §§ 1901, 2120, 2122, 2140, the order could be reviewed by the appellate courts of the state, such action would be judicial, and not legislative. It would be an independent special proceeding or action judicial in its very nature. But it is not the judgment of a court, and no appeal is provided for.

I do not think this action of the Public Service Commission could have been or can be reviewed by certiorari. Such review is not given by special provision of law, and the writ does not lie to review the action of a board, body, or commission acting in a legislative capacity in the absence of such special provision of law. By section 2120, Code Civ. Proc., it is provided:

"Cases where certiorari may issue.

"The writ of certiorari regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

"(1) Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.

"(2) Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute."

In *People ex rel. v. Board of Supervisors of Queens Co., N. Y.*, 131 N. Y. 468, 30 N. E. 488, the Court of Appeals held:

"The writ of certiorari is appropriate only to review the judicial action of inferior courts or public officers or bodies exercising judicial functions. It is not available to review the action of a public officer or body, which is merely legislative, executive or administrative, although it may involve the exercise of discretion."

In *People ex rel. v. McWilliams et al., Constituting Civil Service Commission*, 185 N. Y. 92, 77 N. E. 785, it was held:

"Classification by municipal civil service commission not reviewable by certiorari. The determination of a municipal civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion, is more of a legislative or executive character than judicial or quasi judicial, and therefore is not reviewable by certiorari."

The court in giving its opinion, per Chief Justice Cullen, said:

"It is a well-settled principle that the common-law writ of certiorari issues to review only the decisions of inferior judicial or quasi judicial tribunals. *People ex rel. Copcutt v. Bd. of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *People ex rel. Trustees of Jamaica v. Supervisors Queens Co.*, 131 N. Y. 468, 30 N. E. 488; *People ex rel. O'Connor v. Supervisors Queens Co.*, 153 N. Y. 370, 47 N. E. 790. The question, therefore, is whether the action of the commissioners in classifying the relator's position in the civil service was judicial or quasi judicial. Here we must not be misled by names. The term 'judicial' is used in judicial literature, in opinions, and text books in two distinctly different senses. The action of an administrative or executive officer or board may involve the exercise of judgment, and their action is quite often termed judicial. Thus in *Mills v. City of Brooklyn*, 32 N. Y. 489, it was held that the municipality was not liable for the insufficiency of a system of public sewers because the action of the municipal authorities in designing the system of sewerage was judicial. The word was here employed in an entirely different sense from that which is meant when we speak of judges as judicial officers, and the fact that public officers or agents exercise judgment and discretion in the performance of their duties does not make their action judicial in character so as to subject it to review by certiorari. *People ex rel. Corwin v. Walter*, 68 N. Y. 403; *People ex rel. Second Ave. R. Co. v. Bd. of Commissioners*, 97 N. Y. 37."

To the same effect is *People ex rel. v. Department of Health, etc.*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894, reversing 117 App. Div. 856, 103 N. Y. Supp. 275. See, also, to same effect, *People ex rel. v. Van Alstyne*, 53 App. Div. 1, 65 N. Y. Supp. 451; *People ex rel. v. Maxwell*, 123 App. Div. 591, 594, 108 N. Y. Supp. 49; *People ex rel. v. Hubbell*, 38 App. Div. 194, 56 N. Y. Supp. 642; *People ex rel. v. Brady*, 166 N. Y. 44, 59 N. E. 701; *People ex rel. v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 318; *People ex rel. v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *People ex rel. v. Supervisors, etc.*, 153 N. Y. 370, 47 N. E. 790; *People ex rel. v. Board of Supervisors*, 113 App. Div. 773, 99 N. Y. Supp. 348—all to the same effect. The only case in the Court of Appeals of this state giving color to the contention that the proceedings of the Public Service Commission is reviewable by certiorari, that the acts of the commission are judicial, and not

legislative, is that of *People ex rel. v. Board of Railroad Com.*, 160 N. Y. 202, 54 N. E. 697, decided by a divided court, four to three.

I am not prepared, as at present advised, to concur in any holding that a commission is a judicial or quasi judicial body, or that it acts judicially, and not legislatively, for the reason it hears evidence, considers, exercises its best judgment, and then decides what order it will make, and makes it accordingly if the final act is legislative. All legislative bodies are accustomed, if wise, to take evidence, consider it, and then decide what law it will enact. In so doing it acts in a legislative capacity. Its acts are legislative, and not judicial. On this point the language of the Supreme Court of the United States in *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226, 227, 29 Sup. Ct. 67, 69, 53 L. Ed. 150, is pointed and conclusive. It is there said among other things:

"And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up. * * * The nature of the final act determines the nature of the previous inquiry."

In this case it is the very contention of the defendants that the action and determination of the Public Service Commission were legislative, and not judicial. The cases cited from the Supreme Court of the United States settle the proposition that the acts of this commission were legislative, and not judicial or quasi judicial. In *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186, the court decided as already quoted:

"The power to regulate the operation of railroads includes regulation of the schedule for running trains. Such power is legislative in character, and the Legislature itself may exercise it or may delegate its execution in detail to an administrative body."

In *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 499, 17 Sup. Ct. 900, 42 L. Ed. 243, the court said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is, a judicial act—but an entirely different thing to prescribe rates which shall be charged in the future; that is, a legislative act" (citing cases).

In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, the court held:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under existing laws, while legislation looks to the future and changes conditions, making new rules to be thereafter applied."

So here the Public Service Commission was called upon to act and to compel by investigation and determination what was just and reasonable for the company to do in the future, the service it should give, not to adjudge as to the propriety and reasonableness of what had been done, the service that had been afforded, and enforce liabilities for any violation of law. That was the act it was to perform, and the act it did perform, and it is the nature of the final act that determines whether the commission acted judicially or legislatively, wheth-

er its action was judicial or legislative. To hold otherwise would be to ignore the plain and repeated decisions of the Supreme Court of the United States. It is true that, as an incident to what it was to do, the act it was to require, the commission would very properly inquire as to the service being rendered, but its final act was not to condemn or punish for this if found inadequate. Whatever the commission found and decided in that respect was not the subject of any order, and could not affect the railroad company. The act it complains of is the fixing of a schedule for its two interstate fast trains, and the alternative of putting on other trains at a great loss amounting to confiscation.

It is urged, also, that the complainant company should not be permitted to come into the United States Circuit Court as it could sue or pursue a remedy in the courts of the state. If the legislative act was complete with the denial of the application to modify the order, and the day had come when the order of the commission was to go into effect, as it had, the complainant here had the right to go into the courts, and it had the right to select its tribunal, any tribunal having jurisdiction of the parties and subject-matter. The complainant is a non-resident of the state of New York, and hence there is the necessary diversity of citizenship to give this court jurisdiction and a federal question is also involved. In such case, as matter of equity and of law, the complainant may go directly to the federal courts, and is under no obligation to first test the questions in the state courts. The rule on this subject is well stated in *Reagan v. Farmers' Trust & Loan Company*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, where it was held:

"A citizen of another state who feels himself aggrieved and injured by the rates prescribed by that commission may seek his remedy in equity against the commissioners in the Circuit Court of the United States in Texas, and the Circuit Court has jurisdiction over such a suit under the statutes regulating its general jurisdiction with the assent of Texas expressed in the act creating the commission."

And, where Mr. Justice Brewer in giving the opinion of the court, said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state; for it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. 663, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546."

As to what the court may do in such cases is well expressed in the same case at page 397 of 154 U. S., and page 1054 of 14 Sup. Ct. (38 L. Ed. 1014), where the court said:

"The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission. They do not determine whether one rate is preferable to another, or what under all circumstances would be fair and

reasonable as between the carriers and the shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

This case is cited with approval and followed in *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218, 23 Sup. Ct. 498, 47 L. Ed. 778, and *Ex parte Young*, 209 U. S. 123, 144, 153, 28 Sup. Ct. 441, 451, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. In *Ex parte Young*, *supra*, the *Reagan Case* is commented on and the points decided stated. In *Prentis v. Atlantic Coast Line*, *supra*, at page 228 of 211 U. S., and page 70 of 29 Sup. Ct. (53 L. Ed 150), the court, speaking on this subject, said, citing authority:

"A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts."

I find nothing to the contrary of this rule, or which in any way modifies it in *Prentis et al. v. Atlantic Coast Line*, *supra*. There it was also held that the action of the State Railroad Commission was legislative, and not judicial; that an appeal to the Supreme Court from such legislative action was permitted; that the action of the court on such appeal was also legislative in its nature, as it had the right to consider the whole subject and substitute its own action and judgment and order for that of the commission; and that, while an action in equity in the courts will lie, it should not be instituted or proceeded with until the body—in that case the Supreme Court of the state—having the last legislative word had pronounced it. Such is not this case. Here, as already stated, the Public Service Commission had and gave the last word so far as legislation was concerned when it denied a modification of the order. The Supreme Court of the United States has applied the same principle in the Chinese cases holding that, where appeals from an immigration officer are not given directly to the courts of the United States, but are given to the Department of Commerce and Labor, the appeal to that department must be taken and decided before a resort is had to the courts. *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917. This, however, affords no basis for a contention that the constitutionality of a completed legislative act may not be tested in the federal court having jurisdiction in the first instance and without resort to a suit in the state court. It is urged that the complainant here, defendant before the Public Service Commission, has not treated the commission fairly; that it did not raise by answer or evidence or argument and press on the attention of the commission the fact that its action was unconstitutional as a direct regulation of interstate commerce, did not raise or press the question that its act in making such an order as it did make was confiscatory, etc.; that for this reason, because of this inequitable action or conduct on the part of the railroad company, it should not be permitted to maintain this action. If, for this reason, the railroad company cannot maintain this action in equity in the federal courts, it cannot maintain it or a like action in the state courts. To so decide would be to hold that the complainant is estopped from

maintaining its rights and defending its property from confiscation for the reason that the Public Service Commission, advised of the interstate character of these trains, on its own motion and on a complaint which asked no such order, made one assuming to regulate their time schedule and place of stoppage. I am not prepared to so hold. The Public Service Commission is to investigate and legislate; and, when it assumes to regulate the time schedules of fast interstate trains, it is bound first to investigate and ascertain whether or not its action will directly regulate interstate commerce or confiscate property. This was a legislative act; and an unconstitutional act of the Legislature or of any legislative body, whether directed against the public generally or against an individual, is no less unconstitutional and void for the reason that public notice was given and also notice to the individual and evidence taken and the public or the individual did not come before the legislative body and raise the constitutional questions. The acts of such a legislative body as the Public Service Commission are not *res adjudicata*, and cannot be made so in a suit by the person affected thereby brought in the courts. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227, 29 Sup. Ct. 67, 53 L. Ed. 150; *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

In *Prentis v. Atlantic Coast Line*, *supra*, the court held:

"The making of a rate by a legislative body, after hearing the interested parties, is not *res judicata* upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a state make such legislative action *res judicata* in subsequent litigation."

In giving the opinion of the court Mr. Justice Holmes, after stating what are judicial questions and what legislative, said:

"The decision upon them (legislative questions) cannot be *res judicata* when a suit is brought."

This to me is a self-evident proposition. The constitutionality of legislative acts may always be tested in the courts, even if the legislative body should assume to make them *res judicata* by express provision, and enact that they should not be tested in such tribunals. To hold otherwise would be to say that the Legislature may at will overthrow the Constitution.

It is too well settled to require extended comment or citation of authority that, when a commission or other body possessing delegated legislative authority with executive power to put its acts into effect enacts an unconstitutional or void law, or rule of action, it may be enjoined by the courts from enforcing it. *Prentis v. Atlantic Coast Line*, *supra*, 211 U. S. 230, 29 Sup. Ct. 71, 53 L. Ed. 150, and cases there cited; *Ex parte Young*, 209 U. S. 123, 155, 156, 28 Sup. Ct. 441, 452, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. In *Ex parte Young*, *supra*, the court says:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal

nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

It follows that the plea must be overruled. So ordered.

In re L. M. ALLEMAN HARDWARE CO.

(District Court, M. D. Pennsylvania. August 25, 1909.)

(No. 920, in bankruptcy.)

1. CORPORATIONS (§ 88*)—LIABILITY OF STOCKHOLDERS—STOCK SUBSCRIPTIONS —PAYMENT IN PROPERTY—FRAUDULENT VALUATION.

The capital stock of a corporation is a trust fund for the benefit of creditors, and stock subscriptions are primarily payable in money, but may be paid in property contributed and accepted in good faith at a fair valuation. If, however, the valuation of the property is so extravagant as to make the transaction practically fraudulent, while it is good as between the corporation and stockholders who consent, it is not binding upon creditors, who have the right to assume that the stock stands for property of substantial value, and who presumptively deal with the corporation on that assumption.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 338, 342, 361; Dec. Dig. § 88.*]

Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell & M. Foundry Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.]

2. CORPORATIONS (§ 76*)—CONTRACT OF SUBSCRIPTION TO STOCK—REQUISITES.

A formal subscription is not necessary to create a liability for stock of a corporation, but whoever accepts shares allotted to him undertakes to pay for them, if necessary to meet the demands of creditors; and, when the only payment that can be shown is by property fraudulently overvalued, he is not relieved from liability thereby.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 197; Dec. Dig. § 76.*]

3. BANKRUPTCY (§ 318*)—CORPORATIONS—CLAIM PROVED BY DELINQUENT STOCKHOLDER.

Partners who owned a mercantile business, the liabilities of which in fact exceeded the value of its assets, organized a corporation with an authorized capital stock of \$50,000. They subscribed and paid for practically all of the \$5,000 of stock necessary to be issued to comply with the law, and then made a contract with the corporation, through the other stockholders, by which it purchased from them the business and property of the partnership for \$25,000, paying in cash the \$5,000 received for the stock, and issuing to them \$20,000 of stock for the remainder. One of the partners then, in accordance with a prior agreement, took over the stock and interest of the other and agreed to protect him from liability. The corporation was shortly after adjudged bankrupt, and such stockholder sought to prove a large claim against its estate for money lent. *Held*, that the entire transaction was clearly fraudulent, and that, having given no value whatever for his stock, he was liable to the estate therefor, and not entitled to the allowance of his claim until other creditors were satisfied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 481; Dec. Dig. § 318.*]

In Bankruptcy. On exceptions to report of J. E. Vandersloot, referee.

See, also, 158 Fed. 119.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Allen C. Wiest, for exceptions.

John D. Keith and W. C. Sheely, opposed.

ARCHBALD, District Judge. The L. M. Alleman Hardware Company was incorporated under the laws of Pennsylvania in February, 1903, with an authorized capital of \$50,000, on which 10 per cent.—\$5,000—required by law was paid in, and stock issued for it accordingly, \$2,400 to H. M. Gitt, \$2,450 to S. L. Johns, and \$50—one share each—to L. M. Alleman, George D. Gitt, and C. J. Spalding. The corporation was formed for the purpose of taking over the mercantile business of a partnership of the same name at Gettysburg, Pa., belonging to Johns and H. N. Gitt, which had in turn succeeded L. M. Alleman individually, under whose management it had been running at the same place since 1899, having almost from the beginning been involved in legal and financial difficulty. Johns and Gitt had been drawn in by loaning money to and indorsing for Alleman, and in July, 1905, were compelled to take over the business, after which it was run as a partnership, with Alleman in charge, with whom there was an understanding that he should have it back again when he was in shape to pay them. At the time of the incorporation the partnership was indebted on merchandise account and outstanding paper some \$65,000 or \$70,000, and if forced into liquidation would have been hopelessly insolvent. The situation was so desperate, and Johns so dissatisfied with the management of Alleman, that he offered Gitt \$10,000 to get out and be relieved from liability, and this was agreed to; Johns promising to remain for the time and assist in the organization of the company.

The company having secured its charter, at a meeting of the directors March 9, 1903, Johns and Gitt, in pursuance of their plans, submitted a formal offer to sell and transfer the partnership property and business for \$5,000 cash and \$20,000 common stock of the company; the company to assume the partnership liabilities, as well as the claims of Ebert & Son and Sargent & Co. against Johns and Gitt, growing out of their connection with the concern, which were then in litigation. By a statement which accompanied the offer, the assets were scheduled at \$73,305.33, and the liabilities at \$64,383.16, showing net assets of \$8,922.17, which did not, however, take into consideration the claims of Ebert or Sargent. The offer as so made was accepted, and a check for \$5,000 drawn in favor of Johns and Gitt, and a certificate for \$20,000 of stock issued to them, half to one and half to the other. In the balanced statement of assets and liabilities entered upon the minutes in that connection, in addition to the figures just given, the capital stock was put in at \$25,150, and the good will, on the opposite side, valued at \$16,077.83; there being also \$150 added to the accounts receivable to make things even.

That the balance so shown was a forced and fictitious one there can be no question. No one could honestly have believed that it correctly represented what it purported to. No allowance was made in it for a depreciation on stock, nor was anything deducted for bad debts; everything being put in at its book value. And neither was any account taken of the Sargent and Ebert claims, aggregating \$11,000,

both of which were then in judgment, although one of them was subsequently thrown out, which, although to a certain extent contingent, could not be left out in the reckoning. But, more than that, the good will, which was put in at \$16,077.83, and was absolutely necessary to justify the stock issue, was the purest fiction, for which we need go no further than the offer of Johns, referred to above, to give \$10,000 to get out and be released, which Gitt accepted and subsequently exacted.

The new company thus started out with an admitted indebtedness of \$64,000 (including a \$500 over-draft) and contingent liabilities of \$11,000 more, \$5,000 of which it had very soon to settle for; and with nominal assets of \$73,000, but after necessary deductions probably by several thousands short of that; and for this munificent bargain it parted with \$5,000 in cash and \$20,000 in stock, Johns and Gitt, in the \$5,000 so paid them, getting back the very money which they had put in, to comply with the law, when the company was incorporated, this more than stripping it of its last dollar.

Burdened with this load, the company could not be expected to prosper, and did not. Gitt came to its rescue by indorsements; and it was helped out by a fire in March, 1906, from which \$40,000 or \$50,000 of insurance was realized. But Gitt got the most of this; the obligations of the company, on which he was liable, being reduced by means of it to \$17,500. The company stocked up afterwards on credit, incurring merchandise debts of nearly \$70,000, the most of which it is still owing. But, with the drain upon it, it did not last long; the present proceedings in bankruptcy being instituted in December following. The trustee has managed to realize \$35,000 out of the assets, as against which there is an indebtedness, in round numbers, of \$100,000, included in which are two claims proved by Gitt for rent due, money advanced, and indorsed notes taken care of, the one for \$18,111.46 and the other for \$2,982.67; and it is over these that the controversy arises. The contention is that the arrangement by which Gitt and Johns got \$25,000 in cash and stock for the partnership assets was a fraud on creditors, who had a right to rely on the capital stock being representative of value; and that Gitt and Johns are in the position of having secured stock which they did not pay for, the amount of which they now owe to the trustee in consequence, the burden of this falling on Gitt as between him and Johns, Johns having turned over his stock to Gitt and being merely a nominal party; and that this excludes Gitt from participating in the bankrupt estate until he has paid up what he owes, or the other creditors have been put on an equality with him.

The capital stock of a corporation, as has been many times declared, is a trust fund for the benefit of creditors, which cannot be juggled with. *Handley v. Stutz*, 139 U. S. 417, 427, 11 Sup. Ct. 530, 35 L. Ed. 227. A stock subscription is primarily payable in money, but by arrangement may also be paid in property, contributed and accepted in good faith, at a fair valuation. This is expressly allowed by statute in Pennsylvania (Act April 29, 1874, § 17; P. L. 81), but would be good without that (*Coit v. Gold Amalgamating Company*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420), and is not open to objection,

unless there is such a discrepancy as to be practically fraudulent. *American Tube Company v. Baden Gas Company*, 165 Pa. 489, 30 Atl. 940; *Pennsylvania Tack Works v. Sowers*, 2 Walk. [Pa.] 416; *Coit v. Gold Amalgamating Company*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420. Nor does the holder become liable, as for unpaid stock, because the statutory formalities have not been complied with. *In re Duryea Power Company (D. C.)* 20 Am. Bankr. R. 219, 159 Fed. 783. It is not open to creditors to take advantage of this, whatever may be said as to the state, or other stockholders. As between corporation and stockholder, also, a valuation, however extravagant, all parties consenting, is binding; but not as to creditors, who have the right to assume that the capital stock stands for property of a substantial value, and who presumptively deal with it on the strength of that. The corporation has no right to give away stock, without getting a fair equivalent, and where creditors are concerned an agreement that it should be treated as fully paid or nonassessable, or otherwise limiting liability thereon, is invalid. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363. The Constitution of Pennsylvania expressly prohibits a fictitious issue of stock (article 16, § 7), as does the general corporation act following it. Act April 29, 1874; P. L. 73. And it offends against the law, where everything is problematical and prospective, and there is nothing to sustain the stock but an extravagant estimate of benefits to come. *In re Wyoming Valley Ice Company (D. C.)* 153 Fed. 787, *Wiegand v. Lumber & Mfg. Co.*, 158 Fed. 608, 85 C. C. A. 430. A formal subscription is not necessary to create a liability for stock. Whoever accepts shares allotted to him undertakes to pay for them, if necessary, to meet the demands of creditors; and, when the only payment that can be shown is by property fraudulently overvalued, it is the same as no payment whatever. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Elyton Land Company v. Birmingham Warehouse Company*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65. And this is true, because of the fraud, in bankruptcy, as well as elsewhere.

Applying these principles, which are well settled, the liability of Gitt for the \$25,000 of stock, which he got without paying for it, is not open to question. The hollowness of the transaction, by which there was an apparent payment, appears upon the most casual consideration. It was not merely a case of excessive valuation, in which the parties were led away by an oversanguine view of the situation, if this would excuse it. The conditions were too plain and too fully understood to admit of any such misconception. There was nothing of substance to represent the stock, the good will being all, which practically had no existence. And with this taken out, while the capital stock had a nominal support of \$9,000, of itself not enough to justify it, upon any fair adjustment of the other items even this was disposed of. The identity of the participants, also, is not to be lost sight of. It was Johns and Gitt as partners, on the one side, and Gitt and Johns, as the corporation, on the other, or rather Gitt alone on both; that being the effect of the arrangement between them. The fact that Johns and

Gitt withdrew from the meeting while the other directors, who had one share each, voted on the offer, was the merest formality, and deceived no one. Taking it altogether, the arrangement being a fraud on creditors, however good between themselves, the parties must account for the stock they got as though unpaid for.

The case is not like that of *Sternbergh v. Duryea Power Company*, 20 Am. Bankr. R. 625, 88 C. C. A. 482, 161 Fed. 540. The transaction there was a fair and honest one, entered into without any purpose to evasion; the patent rights turned over to the corporation in exchange for stock being of substantially the value assigned to them, and the mere failure to comply with the provisions of the Pennsylvania statute, mentioned above, with regard to the taking of property in payment of stock, not making the holders liable. But that is altogether different. Here the transaction was not fair. There was no value contributed for the stock received, and the parties knew it; there being a mere shuffling off of the affairs of an insolvent concern to escape further individual responsibility.

Being clearly liable, therefore, to the bankrupt estate, for the unpaid stock which he holds, Gitt has no right to come in on it until the other creditors have been satisfied. He may be entitled to set off his claims against his stock. But, conceding this right, and limiting his liability to the stock which he got direct, and not to that which was made out to Johns in the first instance, he would still have a far greater percentage than is in sight for other creditors; while, if he is held responsible for Johns' stock also, there would be considerable of a balance against him, and in either case the order of the referee postponing his claims is justified.

The referee was also of opinion that, taking advantage of his position as a director, Gitt got an unwarranted preference by the payment of obligations on which he was indorser, which he must therefore surrender. But, without entering upon that question, the other reason is sufficient, and the case may properly rest there.

The exceptions are overruled, and the order of the referee is affirmed, at the cost of the exceptant.

UNITED STATES v. BURLEY et al.

(Circuit Court, D. Idaho, C. D. March 29, 1900.)

1. EMINENT DOMAIN (§ 66*)—GOVERNMENT IRRIGATION WORKS—CONDEMNATION PROCEEDINGS.

In a proceeding by the United States to condemn land for reservoir purposes under Irrigation Act June 17, 1902, c. 1093, § 1, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial; the determination of the proper government authorities being conclusive.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EMINENT DOMAIN (§ 14*)—GOVERNMENT IRRIGATION WORKS—CONSTRUCTION OF STATUTE.

The fact that an irrigation scheme projected by the government under Irrigation Act June 17, 1902, c. 1093, § 1, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), contemplates the irrigation of private lands, as well as a large tract of government land, and that the owners of the private lands are assisting and co-operating therein, does not render the project illegal, nor deprive the Secretary of the Interior of the power given by the act to condemn lands necessary to carry it out.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 54; Dec. Dig. § 14.*]

C. H. Lingenfelter, Hugh E. McElroy, C. E. Stoutemyer, and S. L. Tipton, for the United States.

John G. Willis and J. L. Niday, for defendants.

DIETRICH, District Judge (orally). This is a proceeding in eminent domain, brought by authority of the Attorney General, on behalf of the United States, to condemn certain lands of the defendant for reservoir purposes, pursuant to an application made therefor by the Secretary of the Interior, proceeding under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories for the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902. Act June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511).

By agreement of counsel, all issues excepting that of the value of the lands taken were submitted to the court without a jury. Two general questions are presented by the record: Does the law authorize the Secretary of the Interior to construct a project of the character of that for which these lands are sought? And are the lands reasonably necessary to such construction?

The latter question may be summarily disposed of. Without conflict, the evidence conclusively shows that the reservoir, which is an essential feature of the projected irrigation system, cannot be utilized to its full capacity without submerging the defendant's lands. Leaving out of consideration lands privately owned, it will be necessary to maintain the impounded water at a level above the lands in question in order to reach tracts the title to which is still in the government. It follows that the taking of these lands is necessary, if the plan of irrigation adopted by the Secretary of the Interior is to be carried out. Whether, as has been suggested, an equally feasible, or more feasible, scheme might not be devised, and whether some other reservoir site might not be selected, are immaterial inquiries. The record discloses no circumstances or conditions taking the case out of the general rule that, in the absence of bad faith, the judgment of the party exercising the right of eminent domain as to what and how much land shall be taken is conclusive.

The other point, the authority of the Secretary of the Interior to engage in such an enterprise, involves somewhat different, though kindred, considerations. Upon the part of the defendant it has been earnestly and persistently urged that the question is foreclosed, ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

versely to the government, by the "Kansas-Colorado Case." *Kansas v. Colorado*, 206 U. S. 91, 27 Sup. Ct. 655, 51 L. Ed. 956. But I am unable to yield to this contention. The point in that case was that the government was claiming some dominant right to the waters of the Arkansas river, which was conceded to be a nonnavigable stream, and hence not within the jurisdiction of the general government as a natural highway. The contention for the government was that, for the purposes of reclaiming arid lands, it has superior authority over, and supervisory control of, the waters in such streams, to the exclusion of state jurisdiction. The conclusion of the court was that "each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." Here no such issue is tendered. The congressional act, from which alone the Secretary of the Interior derives his authority, expressly provides that in appropriating, distributing, and using water he shall proceed in conformity with the laws of this state; and it is not pretended here that the officers of the government claim, or have claimed, exemption from the limitations of such laws. Without going into details, it may be stated generally that the plaintiff, in prosecuting its work, has followed substantially the same course which, under the laws of Idaho, a private corporation, in appropriating and diverting public waters for the purposes of irrigation, must pursue.

The precise point upon which defendant chiefly relies in urging that the proceeding is without authority of law is that one of the purposes for which the reservoir is to be used is the irrigation of lands which had passed into private ownership prior to the inception of the project. Whether or not, under the Constitution, Congress is without the power to authorize the expenditure of public money and the expropriation of private property for the irrigation of private lands exclusively, it is unnecessary at this time to inquire. As I view the act under which the plaintiff is proceeding, it was not intended thereby to confer upon the Secretary of the Interior such authority. At the time the act was passed, the government was the proprietor of boundless tracts of arid lands, practically worthless in their natural condition. The smaller, more accessible, streams had been largely appropriated for the irrigation of private lands. Private capital had not, to any considerable extent, looked with approval upon the usually speculative and often perilous enterprise of lifting from the deep canyons, in which they not infrequently flow, the waters of the larger streams, for the irrigation of great bodies of land, as yet either wholly unoccupied, or at most but sparsely settled; and as a rule such lands would not be purchased or entered without some assurance of water for their future irrigation. Contemplating these conditions, Congress passed this act, primarily for the reclamation of these public lands. The government, as a proprietor, was directly interested in a pecuniary way in improving and rendering marketable that for which, in its natural condition, there was neither use nor demand.

But in carrying out this purpose it was foreseen that the administrative officers would encounter conditions where it would be both impracticable and unjust for them to proceed without the co-operation

of private owners. Of any specified tract, a considerable portion may have passed into private ownership before the law was enacted, or, after the enactment, before the land could be preliminarily withdrawn from entry. It might be impracticable for the government to proceed to the irrigation of the residue of public land in such a tract, unassisted by private owners, because of an inadequate acreage to justify the expense necessarily entailed by the magnitude of the enterprise. There would be no practicable relation between the cost of the project and the value of the lands owned by the government when supplied with water for irrigation. And, if practicable for the government to proceed alone, injustice might be done to private owners, where the aggregate of private lands is so small that an enterprise intended exclusively for their irrigation is not feasible. Generally speaking, the larger the area supplied, the less the acreage charge for water; and hence, as a usual thing, it is highly desirable, and not infrequently absolutely essential to success, that all owners of lands embraced in the same general tract join in the construction and maintenance of the primary irrigation works. That the act clearly contemplates such cooperation between the government and private owners is not open to discussion; and I am unable to yield to the view that Congress, by reason of any constitutional limitations, is precluded from authorizing such a sensible and necessary mode of procedure, if the government is to render available for use, and marketable, large tracts of its own land.

It remains briefly to state the facts pertinent to this point, as disclosed by the record. To the original complaint, which was silent as to the ownership of the lands to be irrigated from the reservoir, a demurrer was sustained; and, complying with the suggestions of the court, the plaintiff, in its amended complaint, alleged that the project was primarily for the irrigation of public lands, which were described in a general way. This allegation was denied, and upon the issue thus joined much evidence was received; wide latitude being given to both parties. It appears that, long prior to the commencement of this cause, the Secretary of the Interior, proceeding under authority of the act referred to, caused to be surveyed and located the Boise-Payette irrigation project, a feature of which is the reservoir in question, and determined that the same was practicable, and let contracts for the construction thereof. The reservoir, designated as the "Deer Flat," is in a natural basin comprising approximately 10,000 acres of land. Of the land embraced within the site, the plaintiff owns only a small portion; but of the lands adjacent thereto and in the vicinity thereof, and susceptible of irrigation therefrom, it was the owner of approximately 45,000 acres, and about the same amount, in the aggregate, was owned by private individuals, all being arid lands.

At the time the project was first surveyed and its feasibility considered, all the natural flow of the Boise river, the only available source of supply for the irrigation of these and other lands during the larger portion of the irrigating season, had been appropriated and was being diverted by private corporations for the irrigation of agricultural lands, and no considerable additional area could be irrigated, except

by storing and conserving waters flowing in the river during the winter months and during the high-water season. The project as finally decided upon involved the taking over of an existing system, called the "New York Canal," which was to be improved, enlarged, and extended, and through which water was to be carried to the reservoir during the season of the year when there was an adequate supply in the river for such purpose, and for delivering water to parties who already had the right to receive water therefrom by reason of existing contracts, and also to furnish water for the irrigation of lands belonging to plaintiff, and for the irrigation of unreclaimed lands belonging to private individuals; but the entire project was for the irrigation and reclamation of arid lands.

After the government had made some investigation, but before the project was finally decided upon, property owners and citizens of Ada and Canyon counties, where the lands are situated, entered upon a systematic agitation to promote the plan; and certain individuals, acting on behalf of the public, and complying with the laws of this state relative to the issuing of licenses for the appropriation of water, secured permits for such appropriation from the Boise river, and afterwards assigned the same to the United States, and the owners of arid lands, for the irrigation of which there was no available water, proffered to the government their assistance and co-operation, agreeing that if the government would undertake the project, and thereby furnish water for the irrigation of their lands, they would bear their proportion of the expense. In consideration of the large tracts of public land to be irrigated, and such assistance and co-operation by private owners, the project was adopted.

Upon the record, there can be no question that the primary purpose of the project is the irrigation of public lands, and that the officers of the government are not engaged in a scheme which is ostensibly for the irrigation of public lands, but which is, in reality, for the irrigation of private lands. The government's holdings are so extensive, and it has such a substantial pecuniary interest in the project, and it would receive such a direct benefit from it in the improvement of its own lands, that it cannot be said that its officers have resorted to the subterfuge of including a few acres of government lands in the scheme for the purpose of basing a claim, in bad faith, that its purpose is the irrigation of government land. There is no evidence of any design to evade the provisions of the law, or by indirection to exceed the authority thereby conferred. The government had large tracts of land of its own, which it was impracticable to irrigate unless it could receive the assistance and co-operation of private owners. It sought that assistance. At least, it gave out that it would not undertake to irrigate its own lands unless it did have such co-operation from private owners. The latter agreed to join in the enterprise, and the work was commenced. My conclusion, therefore, is that the project is within the law.

The jury having already determined the value of the lands to be taken, there remains no other question, and an order for judgment of condemnation will be entered in accordance with plaintiff's prayer.

In re FENN.

(District Court, D. Vermont. August 25, 1909.)

1. BANKRUPTCY (§ 324*)—CLAIM FOR MONEY LENT—INTEREST.

Where claimant lent money to a bankrupt, who was engaged in selling liquors, for use in conducting his business under an agreement that no interest should be charged, but that the bankrupt should buy all of the ale and beer required from claimant, the latter was entitled to interest on the amount owing during a part of the time when the bankrupt was not engaged in such business, and also on a part of the loan falsely represented by the bankrupt to be required to pay for his license, but which was not so required or used.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. § 324.*]

2. BANKRUPTCY (§ 340*)—CLAIMS—VALIDITY OF CONTRACT.

Evidence considered, and *held* to show that a bankrupt who was engaged in selling liquor under a license in Vermont made the contract for the purchase of certain liquors from claimant in New York, and not from claimant's salesman in Vermont, where claimant had no license to sell.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

In Bankruptcy. On review of decision of referee.

Lawrence & Lawrence and T. W. Moloney, for claimants.

W. B. C. Stickney and W. H. Botsford, for trustee.

Chas. D. Horn, for bankrupt.

MARTIN, District Judge. Reference is had to the referee's report and the record of the evidence for a more specific statement of the facts. The Mr. Fenn hereinafter mentioned is a resident of the city of Rutland, and for several years had a license there for the sale of liquors. All the items of the claimants' specifications are for money loaned and goods sold in connection with said license business. The same Mr. Fenn has since been adjudicated a bankrupt. This cause has been heard by the referee, and comes into this court upon the claimants' petition for review.

Two questions were raised on hearing before me, the first upon the referee's disallowance of interest on loans made by the claimants to Mr. Fenn, and the second upon the finding of the referee that the contract for three car load shipments in the late spring and early summer of 1907 was made in Rutland with the agent of the claimants, who had no license to sell intoxicating liquors in Vermont, and it therefore was an unlawful sale.

On the first question the referee finds that there were several loans made by the claimants to Mr. Fenn, one of which was for \$4,000, in April, 1903; that two of the several loans were secured by mortgages; that at the time of the first loan in 1903 it was agreed by the claimants that they would not charge interest on said loan, and by Mr. Fenn that he would purchase of them all the ale and beer that might be necessary to supply his customers; and, further, that Mr. Fenn performed his part of the contract, wherefore the referee disallows interest on said loans. I am not inclined to reverse the referee's finding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of facts as to this agreement of the parties, especially in view of the reasons set forth in his report and his opportunity to observe the appearance of the witnesses, yet I do not concur in his application of this contract in disallowing interest in toto. I hold that this contract should not be construed as a waiver of interest by the claimants during the time when Mr. Fenn was not carrying on the license business. I understand that there was a year that the city of Rutland granted no licenses, and that a portion of this indebtedness remained unpaid during that year. Interest should be allowed for that year on the cash loans then due and owing. I hold further that the loan of \$2,200, negotiated in New York April 29, 1907, was made under circumstances whereby Mr. Fenn knew that the claimants understood that the whole of it was for license fees, when, in fact, only \$1,200 was required for license. Upon this point observe the language of Mr. Fenn in his testimony as appears on pages 6 to 15, inclusive, of the record. He admitted that Mr. Eden, the business manager of the claimants, understood that the whole \$2,200 was necessary for license fees. He was so evasive in stating what he wanted the extra thousand for, or what he did with it, that I am unable to find that he used it in connection with that business. Mr. Fenn also testified that he and Mr. Fessenden, a traveling salesman for the claimant, at first arranged for a loan of \$2,700. From a careful reading of this testimony I am clearly of the opinion that Mr. Fenn was either fraudulently colluding with Mr. Fessenden to get \$1,000 to \$1,500 from the claimants more than was necessary for the payment of his license or that he obtained the extra \$1,000 of Mr. Eden through deceit. If the original contract as to interest is to be construed as a waiver of interest on this loan by the claimants, it should apply only to that part of the loan necessary to pay his license, which was \$1,200. I hold that interest must be allowed the claimants on \$1,000 of the \$2,200 note from the date thereof. In coming to this conclusion, I have not considered the question presented on argument as to the admissibility of parol evidence to vary the legal intentment of a written instrument, first, because there was no objection or exception to the admission of that evidence; second, if this agreement was made between the parties and Mr. Fenn performed his part of the contract, the claimants acquiesced in that performance, made no claim for interest on other notes since retired, given under the same arrangement, worded the same, "On demand I promise to pay P. Ballantine & Sons or order — Dollars. Value received," all silent as to interest, it would appear that there was a mutual mistake as to the legal effect of the language used in the wording of the notes, which mutual mistake the court of equity should correct.

The second question is as to the disallowance of three car load shipments of beer and ale shipped in the spring and early summer of 1907. The agreement of Mr. Fenn to purchase beer and ale of the claimants must stand and be construed with the facts found by the referee as to interest on loans. The circumstances indicate that this contract continued right along. From year to year thereafter while Mr. Fenn had a license the claimants furnished him with necessary

funds to pay for the same. In the line of that business they owned his patronage. There was no necessity for them to send their agent to the city of Rutland to make sales to Mr. Fenn. They had already sold him his full supply in that line. Mr. Fenn testified that he went to New York on the 28th day of April, 1907, and while there, on the last Monday of the same April, which was the 29th, he negotiated a loan of \$2,200 with the claimants, and at the same time discussed matters relating to freight, the shipping in car load lots, the prices of different kinds of beer and ale, and their business affairs in general; that he ordered a part of a car load at that time, but swears that he did not order the three subsequent car load shipments, and that those were bought in Rutland of the claimants' traveling salesman, Fessenden. This statement is contrary to all the circumstances, and in conflict with the agreement on the part of Mr. Fenn to buy all his supply of beer and ale of the claimants in consideration that said loan should not bear interest. Mr. Fenn testified that his first contract with the claimants was made in 1903 at Rutland, but he admits that he went to New York prior to that for the purpose of obtaining a loan of \$4,000 to be used in connection with his liquor license business in Rutland, and that it was at that time that the agreement was made relating to interest, but states that no prices were then fixed, that the prices were fixed at Rutland when Mr. Eden went to Rutland with the \$4,000 and the first mortgage was executed. Mr. Eden testifies that at the time of this agreement in New York the prices were given by him to Mr. Fenn, and that Mr. Fenn then agreed that, if they would make said loan to him, he would purchase of them all his supply of beer and ale. Mr. Fenn admitted that this same agreement was made in New York. I quote from his testimony verbatim:

"Q. 176. Now, Mr. Fenn, in point of fact, was there any such agreement made? A. There was, and he agreed to it in New York.

"Q. 177. He agreed you were to pay no interest? A. Yes.

"Q. 178. Mr. Eden undertook in New York to let you have \$4,000 without any interest for you to keep up a saloon and never made any arrangement that you were to buy a penny's worth of his beer and ale? A. That was understood, I think.

"Q. 179. Or was there an agreement of purchase in New York? A. Yes."

He also stated that no prices were talked about in New York, but that the price was agreed to in Rutland. It is apparent that the claimants would not furnish Mr. Fenn \$4,000 without interest unless there was an agreement on the part of Mr. Fenn to purchase their goods; and it is improbable that Mr. Fenn agreed to such purchase without prices being stated. The circumstances corroborate Mr. Eden. I find that contract was made in New York, and that the contract covering the three car loads in question was made in New York when the loan for \$2,200 was obtained. True it is that Mr. Fessenden was in Rutland and figured with Mr. Fenn as to what a car load composed of certain goods would cost him, and a copy of those figures was left with Mr. Fenn, but he then knew that he must go to New York soon to see if he could borrow money with which to pay his license. Both Fessenden and Fenn knew that Fenn must make that trip. Is there any likelihood that Fessenden would enter into a contract with Fenn at

Rutland when he knew that his principal had already made a contract that was binding upon Fenn, and that Fenn was about to apply for another loan, and that subsequent purchases would depend upon his success in getting it? Mr. Eden swears positively that this contract was made in New York, and Mr. Fessenden swears that he made no such contract with Mr. Fenn in Rutland, and further they both swear that Fessenden had no authority to make contracts of sale with Mr. Fenn, as he was an office patron. The circumstances so strongly corroborate Mr. Eden that I am constrained to reverse the finding of the referee relative to said three car load shipments. Besides, the bankrupt had the goods at a time when he had authority to sell intoxicating liquors under a license. He bought them as a matter of trade for profit, converted them in his trade, and the justice of it all is that the purchase price thereof should be allowed against his bankrupt estate; and it is so ordered.

Except as above set forth, the decision of the referee is affirmed. The cause is referred to Referee O'Brien, as special master, to find the amount due in accordance with the views above stated.

In re HAYDEN.

(District Court, D. Massachusetts. May 28, 1908.)

No. 12,477.

BANKRUPTCY (§ 288*)—JURISDICTION OF COURTS—PROCEEDING AGAINST ADVERSE CLAIMANT.

On the filing by a trustee in bankruptcy of a petition against third persons to whom it was alleged the bankrupt sold and transferred property belonging to his estate after the bankruptcy, asking a summary order requiring respondents to turn over such property, the referee had jurisdiction to inquire whether respondent's claim was substantial and really adverse and not merely colorable, but on a finding that it was adverse he was without jurisdiction to proceed further, and such jurisdiction was not conferred by the fact that respondents entered a general appearance, and, after a motion to dismiss was overruled, without further objection entered on a hearing on the merits.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In Bankruptcy. On petition for review of order by referee dismissing trustees' petition asking that the bankrupt and others be required to turn over certain property.

Henry P. Brown, for trustee.

F. Galloupe Woodbury, for bankrupt and Helen M. Hayden.

James P. Richardson, for C. H. & H. T. Robinson.

DODGE, District Judge. The trustee's petition, filed October 8, 1907, alleged that, before the bankruptcy, the bankrupt was tenant of a house in Boston under an unexpired lease; that before and after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bankruptcy he conducted a lodging house business therein; that the lease, furniture, possession of the house, business, and good will were sold and transferred after the bankruptcy, without the trustee's knowledge or consent, to one Robinson and his wife for \$1,480; that the bankrupt or his wife had part of this money in their possession; that the property so sold belonged to the estate in bankruptcy and was omitted from the bankrupt's schedules in violation of law; that it had been wrongfully sold; and that the sale had passed no title to it as against the trustee. The petition prayed (1) that the bankrupt be ordered to pay over such proceeds of the sale as were in his possession or that of his wife; (2) that his wife be ordered to pay over such proceeds as were in her possession, enjoined from parting with such proceeds, and required to account for any and all such proceeds disposed of by her; and (3) that the Robinsons be enjoined from disposing of any of said property and ordered to turn it over to the trustee.

The bankrupt, his wife, and the Robinsons were summoned to show cause why injunction should not issue on this petition. A general appearance was filed on behalf of all of them on October 8, 1907. This appearance on the Robinsons' behalf was withdrawn October 25th; a general appearance for them having been filed by other counsel October 18th. In a motion to dismiss filed October 24th and amended November 13th the Robinsons asked that the petition be dismissed as to them for want of jurisdiction in the referee to set aside a transfer of property by the bankrupt's wife to them in summary proceedings. In this motion to dismiss Mrs. Hayden joined. The motion was denied on November 13th.

Thereupon, on the same day, a demurrer was filed on behalf of the Robinsons, and also an answer, which reserved their rights under the demurrer. Neither the answer nor the demurrer stated any objection to the referee's jurisdiction or contained any reservation of such objection. An answer was also filed on Mrs. Hayden's behalf. In this answer also no objection to jurisdiction was expressly saved. In these answers it was alleged that the property never belonged to the bankrupt or to his estate in bankruptcy, but was Mrs. Hayden's separate property, lawfully sold and conveyed by her to the Robinsons, who had in good faith paid her a fair consideration for it. On these pleadings, filed after the motion to dismiss had been denied, the referee heard the matter in dispute, and decided in favor of the respondents. The trustee thereupon brought this petition for review. No appeal has ever been claimed or taken in any form from the referee's ruling that he had jurisdiction of the petition. The respondents, however, have raised the question at the argument on the petition for review.

It was the referee's duty to inquire whether any basis for such a claim to the property as that asserted by the three respondents above named actually existed at the time of the filing of the petition. He was bound to enter upon that inquiry, and in doing so undoubtedly acted within his jurisdiction. It was for him to ascertain whether the respondents' claim to hold the property against the trustee was really adverse, as would appear from their answers, or was merely color-

ble. *Mueller v. Nugent*, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405. For this purpose and to this extent he had jurisdiction to investigate the merits of the questions raised. If, however, as the result of his investigation he found the claim to be really adverse, it followed from that conclusion that he was without jurisdiction to proceed further. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051.

The evidence before the referee and transmitted here with his certificate sufficiently shows the respondents' claim to be really adverse, and not merely colorable. The bankrupt had never had any title to the property. The trustee had never had possession of it. It was Mrs. Hayden's separate property before the bankruptcy and until she sold it to the Robinsons. The trustee's claim to it was based on Rev. Laws Mass. c. 153, § 10, and the fact that she had never filed the certificate there required. The trustee contended that because it was thus open to attachment or levy of execution in the suit of any creditor of her husband when the petition in bankruptcy was filed the adjudication vested title to it in him by virtue of section 70a (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). He relied on *Re Hammond* (D. C.) 98 Fed. 845, 860. The respondents relied upon later decisions of the Supreme Court among which *York Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, may be particularly mentioned, and the fact that no creditor had ever attached the property or taken it on execution.

The referee went further than to ascertain that the respondents' claim was really adverse. He determined the merits of their claim in their favor, and dismissed the trustee's petition, holding that the adjudication had not vested the trustee with any rights in the property. Without consent on the respondents' part, not only had the referee no jurisdiction to make such a decision either in their favor or against them, but there was no jurisdiction in the bankruptcy court to pass upon the merits of the claim whether upon summary proceedings or in a plenary suit. The suit was not such a suit as is brought within the jurisdiction of the court by sections 23b, 60a, 67e, or 70e of the bankruptcy act as amended in 1903 (Act Feb. 5, 1903, c. 487, §§ 8, 13, 16, 32 Stat. 798, 799, 800 [U. S. Comp. St. Supp. 1907, pp. 1028, 1031, 1032]).

I do not think the respondents' consent can be inferred from the fact that the appearance for them was general in form instead of being special, nor from the fact that they entered into a hearing on the petition and answer. The referee was not wholly without jurisdiction, as has been pointed out, and, for the purposes of the hearing which it was within his province to conduct, the respondents were obliged to appear, answer, and attend before him. They could not rest upon their denial of jurisdiction alone because of the fact that, within the limits referred to, there was jurisdiction. I do not think that I ought to hold their consent to a decision on the merits implied, under such circumstances, from their general appearance, answer, and participation in the hearing, or to regard their objection to the jurisdiction, taken before their answer was filed or the hearing had, as waived. See *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 26, 22 Sup. Ct. 293, 46 L. Ed. 413; *First*

National Bank v. Title, etc., Co., 198 U. S. 280, 289, 290, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Re Horgan et al.*, 158 Fed. 774, 777, 86 C. C. A. 130. Of course, they cannot consent if the decision is to be in their favor, and object if it is to be against them. It is true in the two last cases cited, as it is in other cases which might be cited, that objection to the jurisdiction was taken under a special appearance for that purpose. But in *Louisville Trust Co. v. Comingor*, no objection to the jurisdiction was taken in any form until after much progress had been made under the order to show cause. 184 U. S. 22, 23, 22 Sup. Ct. 295, 46 L. Ed. 413. The court said that the respondent "was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter; that is, jurisdiction to proceed summarily." That he had made formal protest before the final order was entered was held enough to prevent the court from finding implied consent on his part. 184 U. S. 26, 22 Sup. Ct. 296, 46 L. Ed. 413.

In the same case the opinion that the respondent had not consented to jurisdiction is expressly stated to be given upon the assumption, "even if *Comingor* could have consented to be pursued in this manner." Upon the question whether he could so have consented or not no opinion is given. This was before the amendments of 1903. According to *Re Teschmacher et al.* (D. C.) 127 Fed. 728, section 23 of the bankruptcy act as then amended has not given to the adverse claimant in such cases the power to consent to a summary proceeding, although his consent may give jurisdiction in a plenary suit.

I am on the whole obliged to hold that the jurisdiction here claimed on the trustee's behalf to exist is not sufficiently well established to afford a satisfactory basis for proceedings wherein the court might be called upon to enforce its order, if against the respondents, by punishment for contempt. No opinion is therefore expressed as to the correctness of the referee's decision on the merits. The petition, however, must be dismissed for want of jurisdiction.

SPRINGS et al. v. JAMES.

(Circuit Court, N. D. Georgia, W. D. August 21, 1900.)

No. 83.

JUDGMENT (§ 928*) — ACTION IN FEDERAL COURT ON JUDGMENT OF COURT OF ANOTHER STATE—PROCEDURE.

An action in a federal court in one state on a judgment rendered in the courts of another state is governed by the practice and procedure in the courts of the state where the action is brought, and under Civ. Code Ga. 1895, § 5126, which provides that "no trial in any civil cause shall be had at the first term except specially provided for by law," the plaintiff in such an action is not entitled to a judgment at the first term, even though no sufficient answer is filed.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 928.*]

On Motion to Strike the Answer.

Brown & Randolph and John R. Abney, for plaintiffs.

Hawes & Pottle, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. This case is now before the court on a motion by the plaintiffs to strike the answer filed by the defendant, and have a judgment at the present term in the suit, which is on a judgment rendered in favor of the plaintiff against the defendant in the state of New York. The answer sets up that the judgment referred to in the declaration "is based on a claim arising out of a series of wagers, known to be such by the plaintiffs, and which they actively participated in the making thereof, and to which, by certain devices, well known to them and unknown to defendant, they became parties opposed to the defendant. And it is for the winnings on wagers that plaintiff's claim is made." And further that:

"The recovery of all such is contrary to the policy of the state of Georgia and to its laws, and hence, even if the plaintiff's claim was otherwise perfect, the same cannot be enforced in the courts of this state or of the United States situated in this state."

It is further claimed that there has been an appeal from the judgment in New York to the Appellate Division of the Supreme Court of New York, and that the appeal is there pending and undisposed of. I shall not pass at present on the question raised as to the sufficiency of the plea, but will do that at a later date, when I have had time to take the matter under more careful advisement. For the present, it is only necessary to determine the question of the right of the plaintiffs to have judgment, if they be entitled to the same at all, at this term of the court.

The argument of plaintiffs' counsel in favor of their right for judgment at the first term of the court is based on the "full faith and credit" clause of the Constitution of the United States. The history of this clause and of the statute passed in pursuance thereof, as appears to be correctly set out in the brief of plaintiffs' counsel, is as follows:

"When the Articles of Confederation were entered into by the thirteen colonies, which had declared themselves independent states, they placed in article 4 thereof the following language: 'Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.'

"This provision, like some of the other provisions of the Articles of Confederation, was not carried out by the states; and Washington and others of great influence in the country met to form a more perfect union and to provide ways of enforcing the Constitution and the acts of Congress. In this regard the Constitution was made to read as follows:

"Article IV.

"Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.'

"2 Annals of Congress, 1548, shows that a bill to carry out that article of the Constitution was brought in the House of Representatives on April 28, 1790; and

"1 Annals of Congress, 969-990, shows that the Senate received from the House of Representatives a message that they had passed a bill 'to prescribe the mode in which the public acts, records, and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state.' And it was passed by the Senate.

"1 United States Statutes, page 122, contains the law thus passed to carry out that article of the Constitution; and it is entitled: 'An act to prescribe

the mode in which the public acts, records and judicial proceedings, in each state, shall be authenticated so as to take effect in every other state.'

"It reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the acts of the Legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any states, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.

"And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'

"2 United States Statutes, p. 299, section 2, contains a provision that the above act shall apply as well to the public acts, records and judicial proceedings in the territories of the United States and countries subject to the jurisdiction of the United States. Both of these acts have been combined in the Revised Statutes of the United States, which reads as follows:

"Section 905. The acts of the Legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country, affixed thereto.

"The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form.

"And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

"Thus it will be seen that the language in section 905 does not change the law as it stood originally in regard to judicial proceedings in a state; and those proceedings when authenticated as therein prescribed and presented to a court in any other state, were to 'take effect.'"

The argument then based on this provision, as I understand it, is that the filing of the record of a judgment of one state properly certified in a court of competent jurisdiction in another state entitles the plaintiff in the judgment to a judgment in the latter state at once as a matter of right. The suit is brought to the May term, 1909, of the Circuit Court of the Western Division of this District. The next term (December, 1909) will be the regular trial term under the Georgia statutes. These statutes, so far as deemed material here, are as follows:

"Section 5076. The court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing, where an issuable defence is not filed under oath, or affirmation." Civ. Code Ga. 1895.

Section 5077 is as follows:

"When any defendant shall fail to appear and answer at the return term of the petition and process, the court shall enter default on the docket, which shall be considered a judgment by default, without a formal entry thereof, and the plaintiff's claim, allegation, or demand, shall be tried in all cases of default by a jury, except as provided elsewhere in this Code. No such trial shall in any case be had at the first term, except specially provided for by law."

Section 5126:

"No trial in any civil cause shall be had at the first term except specially provided for by law."

There is no special provision of law in the state of Georgia with reference to the trial of suits brought on foreign judgments; consequently such trials must be controlled by the general provisions of law above referred to. In my view of the matter, the plaintiff is not entitled to a judgment here except in accordance with the practice and procedure in the courts of this state. This question as to how judgments of one state may be enforced in other states has been before the Supreme Court, and was first there in the case of *McElmoyle v. Cohen*, 13 Pet. 312, 324, 10 L. Ed. 177. In the opinion of the court by Mr. Justice Wayne in reference to the rights of a plaintiff in a case like this, suing on a judgment of one state in another, this is said:

"Upon the first of them, we observe, though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment in this, that by the first section of the fourth article of the Constitution, and by Act May 26, 1790, c. 11, § 1, 1 Stat. 122, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given when authenticated as the act of Congress has prescribed. It must be obvious, when the Constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause as it relates to judgments was intended to provide the means of giving to them the conclusiveness of judgments upon the merits when it is sought to carry them into judgments by suits in the tribunals of another state. The authenticity of a judgment and its effect depend upon the law made in pursuance of the Constitution. The faith and credit due to it as the judicial proceeding of a state is given by the Constitution, independently of all legislation. By the law of the 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state it must be made a judgment there; and can only be executed in the latter as its laws may permit."

In *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, in the opinion of the court by Mr. Justice Gray, it is said:

"Nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence. *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. Ed. 177. But, when duly pleaded and proved in a court of that state, they have the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby adjudicated."

The meaning of these authorities I think is that suits brought on judgments in another state are to be reduced to judgment in the state where the suit is brought in accordance with the practice and procedure of the latter state. This is clearly indicated by the expression in the *McElmoyle Case*, "To give it the force of a judgment in another state, it must be made a judgment there"; and in *Huntington v. Attrill*, this expression, "But they leave the manner in which they may be enforced to the law of the state in which they are sued," etc.

In my judgment, even if the pleas were stricken and the case stood without proper answer, the plaintiffs would not be entitled to a judg-

ment at the present term of the court. The case will stand for hearing at the December term, and in the meantime the motion to strike the answer as insufficient will be disposed of and an order made therein.

BLASSINGAME v. BOARD OF COM'RS OF HAYWOOD COUNTY,
N. C., et al.

(Circuit Court. W. D. North Carolina, Asheville Division. January 29, 1909.)

EQUITY (§ 405*)—PERFORMANCE—CONTRACT FOR BUILDING ROADS—DETERMINATION OF QUANTITY OF WORK DONE.

A master in determining a disputed issue as to the number of yards of earth moved by a road contractor held not justified in ignoring the measurement made by engineers, which was the method provided by the contract, and finding the quantity by assuming that each team employed on the work moved a certain number of yards per month, especially where it appeared from the evidence that the estimate of the engineers was the more reliable.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 405.*]

In Equity. On exceptions to master's report.

Merrimon & Merrimon, for plaintiff.

S. E. Welsh and Norwood & Norwood, for defendants.

NEWMAN, District Judge. This case was referred back to the special master for two purposes—one to have a remeasurement made of the work in controversy, and the other to ascertain more definitely the amount upon which the 10 per centum provided by the contract was reserved by the road commissioners. After some difficulty two civil engineers, W. A. Park and P. M. Feltham, both apparently quite competent for the work, and found to be so by the master, were selected and entered upon the work of remeasurement. They finished the work, and made a report, in which they agreed that, while they had considerable difficulty in making this remeasurement, it was at least approximately correct. Mr. P. M. Feltham, one of the civil engineers, says that 90 per cent. of it is reasonably correct, and the other 10 per cent. was as nearly so as they could make it. In his second report the special master rejects this remeasurement entirely, and goes back to his original method of reaching the amount due Blassingame; that is, by assuming that a team attached to a scraper would remove 40 cubic yards of earth per day, and allowing 25 working days to a month. Adhering to this method, he finds that Blassingame was underestimated for work done of the Pigeon road \$1,015.08, for work done of the Clyde road, \$1,409.10, and for work done on the Jonathan Creek road, \$1,474.33, making a total of \$3,898.51. I was not satisfied on the former hearing, and before the remeasurement was made, with this method of finding out whether or not Blassingame was underestimated, and the extent of the same, if there was such underestimate. A more careful examination of the matter and further reflection has convinced me that this method of reaching the truth of the case is wholly unreliable. In the testimony given by Mr. Park, one of the civil en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

gineers employed by the special master to make this remeasurement, he states that he allows for the amount of earth to be removed by a team and scraper 600 cubic yards per month. He stated, further, that his estimate is that there will be an average of 22 working days to a month, and that is what he counts on in making contracts. Allowing this number of working days to the month (22) and the amount of cubic yards per month stated by Mr. Park, a team would only remove $27\frac{3}{11}$ cubic yards per day. If these figures be taken as a basis for calculation (while I have not gone through it carefully), I suppose it would show that Mr. R. S. Payne's estimates were more favorable to Blassingame than he was entitled to. That is, allowing that a team could move in round numbers $27\frac{1}{2}$ cubic yards of earth in a day for 22 working days per month, it would appear to make a less amount than the original estimate. Even if there was allowed as much as 30 cubic yards per day, with 23 working days to the month, it would not amount to Payne's original estimate. While every presumption should be given in favor of the correctness of the master's report, yet, where the method provided for in the contract for ascertaining the amount of earth removed is departed from, and a new and original method is adopted, such as that used by the master in this case, I do not feel that it is necessary to follow it unless it is shown with reasonable clearness to be a proper plan for reaching a correct result; and certainly not unless the plan provided in the contract for estimates by an engineer proves to be wholly unsatisfactory and unreliable.

Here we have the opinion of a civil engineer of ability and 25 years' experience, and who has done a large amount of work such as that now under investigation, who says that he allows 22 working days to a month, and $27\frac{1}{2}$ cubic yards in round numbers of earth removed by a team per day, which shows, assuming him to be fair and unbiased, which I think he is, how unsafe it would be to adopt the figures used by the special master in his calculation as to what Blassingame's estimate should have been. In view of the fact that we have now something upon which we can properly act and base a calculation as to the state of the account between Blassingame and the road commissioners, and inasmuch as this is in line with what was contemplated by the contract, it seems to me it would be clearly wrong to adhere to the master's method of reaching a result.

Upon the remeasurement, these engineers agree in finding a difference in favor of Blassingame, as I find it, of \$843.32 $\frac{1}{2}$. They make certain deductions for drain openings and rock upon all the roads and for yardage from Main street to Richland Creek bridge on the Jonathan Creek road. They do not make any deduction for what counsel for the road commissioners call "foundation excavation." I do not clearly understand this latter claim. The contention is that it should reduce the amount of difference in value between the present measurement and the old measurement to \$648.10. In view of the fact that the master finds that Blassingame was underestimated in a much larger amount than this, I shall yield something to that, and allow the whole amount of the difference between the report of the engineers making this remeasurement and the amount allowed Blas-

singame by the original estimate of \$843.32. It is reasonably clear that this work was done in 1904, so interest should be allowed on this amount from January 1, 1905, which I calculate to be \$206.47, making a total of principal and interest of \$1,049.80. I shall add to this \$1,889.26, the amount of the 10 per cent. reserved by the road commissioners as ascertained and found by the master. While there is some doubt under the evidence as to the correctness of this, and whether there should not be a deduction on account of the work done under Ferguson's supervision in 1906, still I do not think it is so clear that the master erred in this as to justify the court in interfering with this finding. This \$1,889.26 should bear interest, in my opinion, from March 13, 1907. This interest would be \$212.53, which would make a total amount of principal and interest to this date of \$2,101.79. That is:

10 per cent. reserved.....	\$1,889.26	
Interest at 6 per cent. to January 29, 1909.....	212.53	\$2,101.79
Underestimate according to remeasurement.....	843.325	
Interest at 6 per cent. from January 1, 1905, to date.....	206.478	1,049.80

Making a total of.....\$3,151.59

Costs in this case should be apportioned as heretofore ordered; that is, each party should pay half of the costs incurred including the amount allowed the master, stenographer's fee, witness fees, and all court costs. Of course, the amount paid the engineers to make this remeasurement must be paid by the road commissioners as they agreed in open court. The special master will be allowed an additional sum of \$200 for his services in connection with the rehearing. The result of what has been stated is that the exceptions to the report of the special master must be sustained, except as to his finding as to the amount of the 10 per cent. reserved (\$1,889.26.) in the hands of the road commissioners. This exception will be overruled.

A decree will be entered in accordance with what has been stated above.

Decree will be entered in favor of the complainant for:

10 per cent. reserved.....	\$1,889.26	
Interest at 6 per cent. to January 29, 1909.....	212.53	\$2,101.79
Underestimate according to remeasurement.....	843.325	
Interest at 6 per cent. from January 1, 1905, to date.....	206.478	1,049.80

Making a total of.....\$3,151.59

In re E. I. FIDLER & SON.

(District Court, M. D. Pennsylvania. September 24, 1909.)

No. 996, In Bankruptcy.

1. BANKRUPTCY (§ 368*)—RESIGNATION OF TRUSTEE IN LIEU OF REMOVAL—COMPENSATION.

Where a bankrupt's trustee was allowed to resign to avoid the odium of removal because of his friendly attitude to the bankrupts, and his apathy to proceedings instituted to compel the bankrupts to turn over property

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which they had withheld, his claim for compensation should be at least partially denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. § 368.*]

2. BANKRUPTCY (§ 482*)—ADMINISTRATION OF ESTATE—ATTORNEY'S FEES.

Where attorneys for a bankrupt's trustee took a position antagonistic to the creditors and in favor of the bankrupts, and by their advice concerning proceedings to compel the bankrupts to turn over withheld property probably brought about the trustee's resignation, they were not entitled to more than a nominal sum for their services.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

3. BANKRUPTCY (§ 248*)—EXPENSES OF ADMINISTRATION—APPRAISEMENT.

In the ordinary case, appraisers of a bankrupt's estate are entitled to but \$5 a day for three days; the trustee being required to justify any greater allowance.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 248.*]

4. BANKRUPTCY (§ 482*)—ADMINISTRATION OF ESTATE—COUNSEL FEES.

At the commencement of the administration of a bankrupt's estate, D. represented certain creditors, and took steps to recover concealed property from the bankrupts, necessitating a removal of the trustee and the appointment of another, which he accomplished in the face of serious opposition. After the appointment of the new trustee, D. acted as attorney for the estate, and prosecuted a rule on the bankrupts, by which they were ordered to return \$3,400 worth of property. The bankrupts, for failure to comply with the rule, were imprisoned, and thereafter released on payment of \$500. *Held*, that D. was entitled to an allowance from the state for his services of \$250, being entitled to recover from the estate only for such services as he rendered after he appeared as attorney for the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

5. BANKRUPTCY (§ 482*)—ADMINISTRATION—REMOVAL OF TRUSTEE—EXPENSES.

Where an attorney for creditors took steps to procure the removal of a trustee which he subsequently accomplished, and was employed to represent the trustee's successor, he was entitled to reimbursement for disbursements necessarily made from the time he took steps to have the original trustee removed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

In the matter of E. I. Fidler & Son, bankrupts. Heard on certificate of referee on objections to the account of J. C. Loose, trustee. Modified.

See, also, 163 Fed. 973.

Frank M. Decker, for trustee.

E. O. Nothstein, opposed.

ARCHBALD, District Judge. As was well understood at the time, the former trustee was allowed to resign in order to avoid the odium of a removal. If not actively opposed to the prosecution of the proceedings which had been instituted to compel the bankrupts to turn over property which they withheld, his attitude was such that it was necessary to have him retire in favor of some one who could be unquestionably relied on. Unfortunately he does not seem to have been well advised; his counsel having been in apparent sympathy with the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupts. No doubt, the rule on them was taken and considerable of the testimony to support it developed during his incumbency. But the proceedings were at a standstill, with no prospect of their resulting in anything, until Mr. Decker intervened and brought them to a successful issue. It is not pleasant to say these things, but they are in the case and have to be passed upon.

If the trustee was removed for cause, it was optional to allow compensation. In *re Leverton* (D. C.) 19 Am. Bankr. Rep. 434, 155 Fed. 931. And it should at least, under the circumstances, be in part denied him. The showing was such that he was called on to act vigorously. And, if he had, the estate would not have been involved, as it has, in unending litigation. The bankrupts had plainly made away with their goods, and yet he practically did nothing to recover them. It was only as creditors overriding his supineness took the matter in hand through their own counsel that anything was accomplished, in order to succeed in which the resignation of the trustee was necessary. As a matter of discipline, therefore, the case is one which calls for action; the only way of reaching the trustee being through his compensation. He claims \$105 in his account, which the referee, upon exception, cut down to \$72. All things considered, this in my judgment should be still further reduced to \$50; that of the present trustee being increased accordingly.

There also should be a similar reduction in attorney fees, and for even stronger reasons. As already intimated, the position of the trustee was probably not so much his own, as it was influenced by counsel. Had not counsel inclined to favor the bankrupts, the trustee no doubt would not have done so either. The amount to be allowed on this account will therefore be reduced to \$25.

The expense of taking the inventory is outrageous; each appraiser receiving \$40. This is an extravagance which cannot be countenanced. The cost of appraisements is getting to be an abuse, which, if not taken in hand by the courts, will lead to radical action by Congress. A per diem fee of \$5 is all that is allowed in this district, and it must be an extraordinary case where over two or three days are necessary. If there is occasion for anything more than that, the trustee must justify it. For anything that appears here \$15 apiece, or \$45 in all, is all that there was occasion for; and the amount will be reduced accordingly.

A claim of \$1,000 was made by Frank M. Decker as counsel in prosecuting the rule on the bankrupts by which they were ordered to turn over \$3,400 of property. The referee allowed \$200 and rejected the balance. It may be, as things go, that the services of Mr. Decker would ordinarily entitle him to the amount asked for. But having regard to the benefit to the estate, by which his compensation is largely to be measured, he cannot be said to have earned anywhere near that. In the beginning, he acted, not for the trustee, but for his clients, and he must look to them therefore for anything that is lacking. It is only from the time when he became counsel for the new trustee whom he succeeded in having appointed that either fees or expenses can be allowed him. But, having regard to what he did after that, \$250—a little more than was given by the referee—would seem to be about what he is entitled to. With much labor, and in the face of serious opposition, he secured

an order on the bankrupts to turn over a large amount of property which they had made away with, and, while only \$500 was in fact obtained, that much at least was realized. And the effect of the example on other cases is not to be lost sight of. The compromise by which the bankrupts were let out of jail on payment of that sum is made the subject of criticism. But, if counsel who think that more could have been obtained will suggest how it can be done, it is not too late even yet to enforce the order in toto. Mr. Decker also claimed \$295.53 for disbursements, of which the referee allowed only \$142.18. Complaint is made of this, that nothing was considered before January 3, 1908, whereas he began to act for the estate in November previous. The first trustee resigned December 2, 1907, and the present one qualified a week later. Mr. Decker, however, is entitled to be regarded as representing the estate from the time he took steps to have the former trustee removed, and to have his expenses taken care of accordingly. The disbursements to be allowed him should therefore be increased to \$202.18.

As the result of these conclusions, the exceptions must be sustained to the extent indicated, and the case sent back to the referee to settle the account of the trustee according to the views expressed in this opinion.

And it is so ordered.

UNITED STATES v. JOHNSTON.

(Circuit Court, N. D. California. March 10, 1908.)

No. 13,772.

PUBLIC LANDS (§ 19*)—"UNLAWFUL INCLOSURE"—ACTS CONSTITUTING.

Defendant owned a tract of 5,000 acres of grazing land with a mountain range to the east and north of it. He built a fence from the range on the east westward to the south of his land, and then northwestward to the north range, inclosing between such fence and the mountains his own land and also public lands, which he used for a pasture. There were two breaks in the fence through which, as well as over the mountains, trails led into the pasture, but for practical purposes the fence and mountains prevented defendant's stock from straying out and other stock from coming in. *Held*, that such fence did not constitute an unlawful inclosure of public lands within Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524).

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 25; Dec. Dig. § 19.*]

R. T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.
Cushing, Grant & Cushing, for defendant.

DE HAVEN, District Judge. Upon consideration of the evidence, I find the following facts:

First. The defendant, at the time of the commencement of this action and for many years prior thereto, was maintaining a fence, the line of which is approximately described as follows: Commencing near the southeast corner of township 11 north, range 4, Mt. Diablo Merid-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

ian, running thence westerly to a point on the county road near the southwest corner of section 35, of said township, thence in a northwesterly direction, following the line of the county road, to a point near the northwest corner of section 6, in said township. This fence is all constructed upon lands owned by the defendant, and is a continuous line of fence, with the exception of a gap or opening therein in section 22, about one-half mile in width and another gap about a mile in length commencing near the northeast corner of section 21, and ending near the northeast corner of section 17, from which last point the fence of defendant extends in a northwesterly direction to the northwest corner of section 6 of said township. The land where these gaps or openings in the fence occur is mountainous and covered with thick brush and timber which for all practical purposes will turn cattle, but cattle can be driven through such openings, and may occasionally find their way through them and onto the land described in the bill without being driven. The fence thus maintained connects at the southeast corner of the alleged inclosure with a mountain range known as the Blue Ridge, lying east of the land described in the bill of complaint, and at the northwest corner of the alleged inclosure said fence connects with a spur of said Blue Ridge lying upon the north of said lands. There are two or more trails crossing the Blue Ridge range of mountains on the east and the spur of said Blue Ridge on the north, but stock running upon the land lying between the said fence maintained by the defendant and the mountain ranges on the north and east of the land described in the complaint seldom stray from such land by passing over these trails. The Blue Ridge range of mountains and the spur connecting therewith and the fence maintained by the defendant inclose in the manner above set forth the lands described in the bill of complaint and some 5,000 acres of land owned by the defendant; and this inclosure is ordinarily and for all practical purposes sufficient to keep stock from straying onto or from said lands, although it is possible for cattle to so stray by going in or out over the trails above referred to or through the openings in the defendant's fence above described; and persons desiring to enter upon the lands described in the complaint can do so by going through said openings in the fence and by means of the trails above mentioned, but it would be difficult to go through said gaps or openings in the fence without clearing the brush away and grading a road or trail for that purpose.

Second. The lands described in the complaint as belonging to the United States are of little value, and the main purpose for which the defendant maintains the fence described in finding No. 1 is to keep stock belonging to other persons from straying upon the land owned by him and to keep his own stock upon said lands, although all of the public lands described in the complaint lying between said fence and the ranges of mountains on the north and east with which said fence connects are used by the defendant as a range for his cattle in connection with the lands owned by him.

Third. The defendant does not assert any claim or title to the public lands described in the complaint, and the fence, mentioned in finding No. 1, is maintained by him because by so doing he is enabled to sufficiently inclose the lands owned by him to keep his own stock on,

and the stock of others off of, said lands at less cost and expense to him than would be required to inclose his lands on all sides by an artificial fence.

As a conclusion of law from the foregoing facts, I find:

(1) That the fence described in finding No. 1 does not constitute an unlawful inclosure of public lands within the meaning of section 1 of the act of February 25, 1885 (chapter 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524]). (2) That the maintenance of said fence in the manner described in the above findings is not in violation of section 3 of said act of February 25, 1885. (3) That the plaintiff is not entitled to the relief prayed for nor to any relief; that defendant is entitled to judgment, dismissing the bill, and for his costs.

Let such a decree be entered.

RIGGS et al. v. BROWN et al.

(Circuit Court, S. D. New York. May 13, 1909.)

COURTS (§ 322*)—FEDERAL COURTS—CITIZENSHIP OF PARTIES—PLEADING—AMENDMENT OF BILL.

The power of a federal court of equity to allow the amendment of a bill by changing the parties to give the court jurisdiction, and the propriety of exercising such power if it exists, should only be determined on a formal application and due notice and hearing.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 322.*]

In Equity. On demurrer to bill.

See, also, 172 Fed. 638.

Don R. Almy, Benj. S. Catchings, and Thos. C. McDonald, for complainants.

Kellogg & Rose, Wm. K. Hartpence, Philbin, Beekman & Menken, Garvan, Armstrong & Conger, and Bowers & Sands, for defendants.

NOYES, Circuit Judge. The demurrers to the complaint are sustained, with costs. The want of the necessary diversity of citizenship is obvious.

Upon the argument the counsel for the complainants informally asked to amend by striking out the name of one of the parties complainant. In a supplemental brief he asks in an equally informal manner to be permitted to make certain other amendments. But the power of the court to allow the desired amendments, and the propriety of the exercise of the power, if existing, should only be determined upon regular application and due notice and hearing. I am unwilling to dismiss the bill without giving the complainants an opportunity to make such application; but at present the only matter properly before me is the disposition of the demurrer.

The bill will be dismissed, with costs, unless within 30 days the complainants obtain leave to amend, and do amend, it by changing or rearranging the parties.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RIGGS et al. v. BROWN et al.

(Circuit Court, S. D. New York. June 16, 1909.)

In Equity. On motions to amend order, etc.

See, also, 172 Fed. 637.

Don R. Almy, Benj. S. Catchings, and Thos. C. McDonald, for complainants.

Kellogg & Rose, Tom. K. Hartpence, Philbin, Beekman & Menken, Garvan, Armstrong & Conger, and Bowers & Sands, for defendants.

NOYES, Circuit Judge. The parties in this case seem to have wholly misapprehended the order filed May 21, 1909, sustaining the demurrer. The court did not order the complainants to pay any costs. The order provided that the demurrer be sustained, and that, if the bill were not amended, it should be dismissed; but no costs were awarded, and, not having been awarded, were not allowed. The only provision concerning costs was that providing that, in case the complainants choose to again invoke the jurisdiction of the court to allow an amendment to the complaint, they should pay the defendants' costs. But the complainants were not required to do this, and any payment of costs was to be merely a prerequisite to a voluntary invocation of jurisdiction.

The complainants have not complied with the conditions of the order. They have not paid the costs, but attach checks therefor under protest, and object to making such payments. As they are not required to make them, and have not chosen to avail themselves of the privilege granted, the motions to amend the bill are denied. It was not the intention of the court, however, to bar the complainants, or any of them, after the dismissal of the bill, from bringing a new suit in a court of competent jurisdiction, if they desire to do so. Any dismissal of the bill, therefore, under the order of May 21, 1909, will be without prejudice to the rights of all the complainants in that regard. The separate motion of Mary Hatch Riggs, administratrix, to dismiss, is denied.

It would appear from the papers that judgments for costs in this case have been entered. If so, they are unauthorized, and are vacated and set aside. Through inadvertence the memorandum of decision contained a clause regarding costs. But this was corrected in the order as already noted. And the latter, which determines the rights of the parties, would seem to make the intention of the court entirely clear.

PEALE v. MARIAN COAL CO.

(Circuit Court, M. D. Pennsylvania. September 25, 1909.)

No. 55, May term, 1909.

1. COURTS (§ 274*)—FEDERAL COURTS—JURISDICTION—CORPORATE DOMICILE.

Where a corporation was organized under the laws of Delaware, the fact that its principal place of business was within the middle federal district of Pennsylvania did not give the corporation a domicile there for the purpose of determining the jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*]

Jurisdiction over corporations, see note to *St. Louis, I. M. & S. R. Co. v. Newcom*, 6 C. C. A. 174.]

2. COURTS (§ 276*)—FEDERAL COURTS—VENUE—WAIVER.

The right to be sued in a particular federal district is a privilege which may be waived by the parties appearing and pleading to the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

Waiver of right as to district in which suit may be brought, see notes to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 87 C. C. A. 634.]

3. COURTS (§ 276*)—FEDERAL COURTS—APPEARANCE—EFFECT.

The right of a defendant to be sued in the federal district of its residence was waived by its appearance and demurring to the bill on the ground that plaintiff was not entitled to the relief asked, a decision of which would necessitate an exercise of jurisdiction over the controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

4. SPECIFIC PERFORMANCE (§ 5*)—DEFENSES—ADEQUATE REMEDY AT LAW.

A bill for specific performance of defendants' agreement to deliver coal from their washery, which defendants had agreed to do in return for money advanced by plaintiffs to make necessary developments, was not objectionable because plaintiff had an adequate remedy at law, and this, though plaintiff, in addition, asked damages for coal diverted, and the discovery of the amount as the basis for determining such damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*]

Right to specific performance as affected by adequacy of remedy at law, see note to *Marthinson v. King*, 82 C. C. A. 368.]

5. SPECIFIC PERFORMANCE (§ 127*)—ENTIRE CONTROVERSY—DETERMINATION.

Equity, having taken jurisdiction in a suit for specific performance, will dispose, if possible, of the entire controversy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 407; Dec. Dig. § 127.*]

6. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

A bill for specific performance of an agreement to deliver coal in return for money advanced by complainant was not multifarious in that it prayed for foreclosure of a mortgage, by which the loan was secured, as alternative relief, in case specific performance could not be granted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 367; Dec. Dig. § 148.*]

Bill by John W. Peale against the Marian Coal Company. On demurrer to the bill. Overruled with leave to answer.

Frank E. Donnelly, for demurrer.

John P. Kelly, opposed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ARCHBALD, District Judge. The first ground of demurrer is that the court has no jurisdiction; neither party being a resident of the district. The plaintiff is a citizen and resident of New York, and the defendant is a citizen of Delaware, where it was incorporated, and where it is consequently domiciled. The fact that it has its principal place of business here does not make it a resident of the district. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *In re Keasbey*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402. Had the defendants, therefore, stood squarely upon this objection, they would have undoubtedly been entitled to a dismissal.

But the right to be sued in a particular district is a privilege which may be waived. And this is done by appearing and pleading to the merits. *Interior Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. It was waived of necessity, therefore, in the present instance by the third ground of demurrer set up, which was that, as appeared by the bill, the plaintiff was not entitled to the relief prayed for. This called for a judgment on the merits, which the court could not undertake to render, except as it first assumed jurisdiction of the controversy. *St. Louis Railroad v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Western Loan Company v. Butte Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. If sustained, it amounted to a decision that the plaintiff had no case on his own showing, and the defendants could not call on the court for this, and in the same breath insist that the bill should be dismissed because the parties were not rightly before it. The court could not, in other words, decide that the case was bad, if, as contended, it had no right to decide anything, except to dismiss it.

As to the further ground of demurrer, that the plaintiff had a complete remedy at law by action for damages, it is sufficient to say that the bill seeks the specific performance of the defendants' agreement to deliver coal from their washery at the Holden culm dump, which they undertook to do in return for the money advanced by the plaintiff to make the necessary developments. For this it is evident that damages for a breach of the contract would not be at all adequate. Nor is this disturbed because the plaintiff in the same connection asks damages for the coal so far diverted, and calls for a discovery of the amount as the basis for determining them. Equity, having taken jurisdiction, will dispose, if possible, of the whole of the controversy, and the plaintiff is entitled to be made good for the commissions which he has lost as a part of it. It may not be altogether consistent to further pray for a foreclosure of the mortgage by which the loan was secured, but this is brought in, as I understand it, more as an alternative in case the primary relief which is sought should not for any reason be able to be granted. It does not vitiate the rest of it; and in no sense is the bill on this account multifarious.

The demurrer is overruled, and the defendants are allowed 20 days to answer.

COBB v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 13, 1909.)

No. 1,702.

1. ATTORNEY AND CLIENT (§ 52*)—SUSPENSION OF ATTORNEY—INFORMATION.

Where an information against an attorney alleged that he inspired the publication of an article in a newspaper which was willfully and maliciously false, and procured its publication with intent to bring into contempt and disgrace the federal District Court for the District of Alaska, in violation of his duty as an attorney and officer of the court, and prayed that he show cause why he should not be punished according to law, the court properly treated the information as one for suspension or disbarment for misconduct which is made a ground therefor by Pol. Code Alaska, § 743, and not for contempt of court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.*]

2. ATTORNEY AND CLIENT (§ 57*)—SUSPENSION OF ATTORNEY—REFERENCE OF CAUSE—REVIEW—ESTOPPEL TO OBJECT.

Where an attorney against whom proceedings had been instituted was present when the court ruled that the proceeding was for suspension or disbarment, and not for contempt, and thereafter applied to have the cause referred to three disinterested attorneys for hearing and determination as provided by Pol. Code Alaska, § 750, relating to disbarment proceedings, he thereby assented to the ruling.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 81; Dec. Dig. § 57.*]

3. ATTORNEY AND CLIENT (§ 54*)—SUSPENSION OF ATTORNEY—PROCEEDINGS—REFERENCE—STATUTES.

Pol. Code Alaska, § 750, providing for reference to three disinterested attorneys of proceedings for disbarment and suspension of an attorney for misconduct, is confined to cases where the accusation is made on the knowledge of the court or the judge thereof, and is inapplicable to proceedings instituted on the information of a third person as authorized by section 744.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

4. ATTORNEY AND CLIENT (§ 53*)—SUSPENSION OF ATTORNEY—PROCEEDINGS—JUDGMENT ON PLEADINGS.

An information charged defendant, an attorney, with willfully and maliciously causing the publication of a false article attacking the court. Defendant admitted that he wrote the communication and sent it to the publisher, but denied that he did so willfully or maliciously, or that the article was willfully or maliciously or otherwise false or untrue, or that he intended to scandalize or disgrace the court. After defendant's motion to refer the cause had been denied, defendant and his counsel refused to proceed further. *Held*, that the burden was on defendant to prove that the communication, which was scandalous on its face, was not willfully or maliciously published, or that the contents thereof were not false, and hence, on his failure to do so, the court properly rendered judgment against him on the pleadings.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 74; Dec. Dig. § 53.*]

5. ATTORNEY AND CLIENT (§ 43*)—SUSPENSION OF ATTORNEY—"MISCONDUCT."

Misconduct of attorney as used in Pol. Code Alaska, § 743, authorizing suspension or disbarment therefor, is not confined to misconduct in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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attorney's relation to his client, but includes as well misconduct toward the court or a judge in or out of court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 60; Dec. Dig. § 43.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4531, 4532, vol. 8, p. 7722.]

6. ATTORNEY AND CLIENT (§ 43*)—SUSPENSION—MISCONDUCT.

While a lawyer may criticize in a legitimate manner the conduct and rulings of judges, an attorney's deliberate publication of a false accusation against a judge in a newspaper of general circulation, accusing a judge of being under the sinister influence of a gang which had paralyzed him for two years, and of having made a public promise to give a square deal which he had not kept, was misconduct justifying suspension in the absence of proof sustaining the statement as made.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 60; Dec. Dig. § 43.*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Proceeding by the United States against J. H. Cobb for disbarment. From an order suspending defendant for 18 months, he brings error. Affirmed.

The district attorney of Alaska, Division No. 1, filed an information against the plaintiff in error, alleging that while the latter was an attorney at law and a member of the bar of the District Court for the District of Alaska, and engaged in the active practice of his profession therein, he did on September 3d willfully, wrongfully, and maliciously publish and cause to be published at Juneau, in a newspaper of general circulation there published, the following article: "Communicated. Editor of the Despatch: I am informed that the Record on yesterday, among other things charged the firm of which I am a member, with having written or dictated a notice of the decision in the disbarment case. This is not true and I wish you to so state. I do not care to discuss the case at all at this time since the whole matter will in the near future be made the subject of a thorough investigation in other disbarment proceedings. Of course, I realize that if there had been the slightest grounds shown for my disbarment, I would certainly have been disbarred. As no such grounds were shown the best the Court could do for the gang whose sinister influence has paralyzed the Judge for the past two years, was to seek an excuse to save their faces and the costs. If he had kept the 'square deal' promise he made to the public in 1905, there would have been some disbarments in Juneau before this, but mine would not have been one of them. Under the shameful conditions from which Southeastern Alaska is suffering so much, I suppose I should be thankful, and continue to wait." The information alleged that the said article was willfully and maliciously false and untrue, and was published with the intent to scandalize and bring into contempt and disgrace the said court by the plaintiff in error, "contrary to and in violation of his duty and obligation as an attorney and officer of said court"; that the publication was willful misconduct upon the part of the plaintiff in error in his profession of attorney at law, and as a member of the bar of the court, and the same constituted contempt of the court. The prayer was that the plaintiff in error be cited to appear before the bar of the court, and show cause why he should not be punished according to law for said misconduct. Upon the filing of the information an order to show cause was issued and served upon the plaintiff in error directing him to appear and answer the allegations of the information, and show cause why he should not be punished for said misconduct as provided by law. He appeared in person, and filed an answer to the order to show cause, in which he challenged the jurisdiction of the court, and raised the objection that the facts alleged in the information did not constitute as a matter of law contempt of court or any violation of personal or professional duty. The objections were overruled. The plaintiff in error then

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appeared by his attorneys, and filed an answer to the information, and filed also a motion that the cause be referred to three disinterested attorneys of the Alaskan bar for hearing and determination under the provisions of the statutes of Alaska. The motion was denied. Thereupon the plaintiff in error by his attorneys filed a written motion to dismiss the proceedings on the ground that the information did not state facts sufficient to invoke the jurisdiction of the court. That motion was also denied. The plaintiff in error then declining to proceed further with his defense, the district attorney moved the court for judgment on the pleadings. The motion was taken under advisement, and on December 19, 1908, was allowed. Judgment was rendered suspending the plaintiff in error as an attorney of said court for the period of eighteen months, but postponing the entry of the decree until February 1, 1909, in order that the plaintiff in error might make proper arrangements, as he might be advised, in respect to litigation pending in the court.

Winn & Burton and W. C. Sharpstein, for the plaintiff in error.

John J. Boyce, U. S. Atty., and Alfred P. Black, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that a judgment of suspension was rendered upon a proceeding which was instituted for contempt. It is true that the information which was filed against the plaintiff in error contains the allegation that his conduct was contempt of court, but it contains a full statement of the facts of the case, and asks for a judgment appropriate thereto. The court below, properly we think, regarded the proceeding, not as one for contempt, but as one for suspension or disbarment for misconduct, which is made a ground therefor by Pol. Code Alaska, § 743, which provides that an attorney may be removed or suspended, among other causes, "for being guilty of any willful deceit or misconduct in his profession." Although the information did not in express terms demand a judgment of suspension or disbarment, the plaintiff in error was present when the court ruled that such was the nature and purpose of the proceeding, and thereafter he had ample opportunity to make his defense. He assented to the ruling that it was a proceeding for disbarment or suspension by moving that the cause be referred under section 750. Said the court in *Randall v. Brigham*, 7 Wall. 523-540, 19 L. Ed. 285:

"It is not necessary that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon formal allegations against them. * * * All that is requisite to their validity is that, when not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

It is assigned as error that the court below overruled the motion of plaintiff in error to refer the case to three disinterested members of the bar under the provision of section 750 of the Alaskan Code. That provision is expressly confined to a case where the accusation is made upon the knowledge of the court or the judges thereof. In such a case the accused may controvert the accusation, and thereupon the issues of fact must by the court be referred to at least three disinterested members of the bar, who shall report their findings of fact

upon the issues, and the judgment of the court shall be entered accordingly. The present proceeding is instituted under section 744, which provides that the proceeding to remove an attorney shall be taken by the court "of its own motion for matters within its knowledge, or that of any of the judges thereof; otherwise it may be taken upon the information of another." This proceeding was taken upon the information of another.

The only question requiring any extended discussion is that which is presented upon the assignment of error that the court rendered judgment upon the pleadings. The plaintiff in error admitted in his answer that he wrote the communication and sent the same to the publisher, but he denied that he did so willfully or maliciously, or that the article was willfully or maliciously or otherwise false or untrue, or that he had any intent to scandalize or traduce or disgrace the court. Upon the issue so raised, the plaintiff in error might, had he so chosen, have adduced testimony to sustain his denials, but upon the refusal of the court to refer the case to a committee of three members of the bar the plaintiff in error by his counsel announced in open court that he would not further appear in the case, or have anything further to do with the same. The burden was upon him to show that statements made in the communication which were scandalous upon their face were not maliciously or willfully published, or were not false, and he cannot complain that upon his refusal to sustain such burden of proof, or to adduce any testimony whatever, the court took the information to be true. But it is contended that the "misconduct" of an attorney referred to in section 743 is misconduct in his relation to his client only, and not misconduct in his relation to the court. We find no ground for placing so narrow a construction of the statute. An attorney owes a duty to the court not less important than his duty to his client, and misconduct toward the judge, whether in or out of court, is not less reprehensible than misconduct toward the client. But if, indeed, the offense with which the plaintiff in error is charged is not among those enumerated in the statute, the court is not by such enumeration deprived of its inherent power to suspend or disbar an attorney for such unprofessional conduct as renders him unworthy to be a member of the bar. *Ex parte Secombe*, 19 How. 13, 15 L. Ed. 565; *Beene v. State*, 22 Ark. 149; *State v. Chapman*, 11 Ohio, 431. In *Ex parte Cole*, 1 McCreary, 405, Fed. Cas. No. 2,973, Mr. Justice Miller said:

"In the case of an attorney of the court he may be removed from his office of attorney absolutely, or for a limited period of time, or, in the common phrase, may be suspended or disbarred for any matter or thing proved against him which shows that he is unfit to practice in the courts as one of its officers."

In *Ex parte Steinman and Hensel*, 95 Pa. 220, 40 Am. Rep. 637, Mr. Justice Sharswood said:

"No question can be made of the power of the court to strike a member of the bar from the roll for official misconduct in or out of court."

A published communication reflecting upon the character or integrity of the judge of the court is conduct unbecoming an attorney for which he may be summarily disbarred. This general rule is well

established. "It is the duty of an attorney, not merely to observe the rules of courteous demeanor in open court, but also to abstain out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. For a breach of this duty the attorney may be suspended or disbarred." 4 Cyc. 908; *Beene v. State*, 22 Ark. 149; *In re Mains*, 121 Mich. 603, 80 N. W. 714; *Matter of Philbrook*, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59; *People v. Brown*, 17 Colo. 431, 30 Pac. 338; *People v. Green*, 7 Colo. 244, 3 Pac. 374, 49 Am. Rep. 351; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Ex parte Secombe*, 19 How. 13, 15 L. Ed. 565. The right of lawyers and others to criticize in a legitimate manner the conduct and rulings of judges is not to be questioned, but the right is transcended, when, as in this case, a judicial officer is subjected to scandalous and libelous charges and indignities. The deliberate publication of the accusation against the judge in a newspaper of general circulation gave it a gravity which a verbal criticism would not have possessed. The disclaimer of malice is of no avail when the contrary appears upon a fair interpretation of the language which was used. The communication was false, scandalous, and libelous, and tended to degrade and insult the judge, and to impair the respect and authority of the court and bring it into disrepute, and destroy its efficiency in the administration of justice. Conceding the rule to be, as it has been stated in some of the authorities, that an attorney is answerable only for conduct calculated to influence and affect the judge judicially in the discharge of his official duties, it is obvious that the communication which was published here was of that character. Its evident tendency was to annoy and embarrass the judge in the discharge of his duties. It refers specifically to other disbarment proceedings that are to be under investigation in the near future. It accuses the judge of being under the sinister influence of a gang which has paralyzed him for two years, and of having made a public promise to give a square deal, which he had not kept; in other words, it accuses him of having dealt unfairly with litigants in his court, and the inference is plainly suggested that he will continue so to do in the future. These are charges which no attorney with a proper sense of his professional duty would make unless he were prepared to prove and sustain them. He must know that the publication and circulation of false and libelous charges against judges tends to deter from accepting the judicial office all save those who are insensible to abuse and insult, and to undermine confidence in the integrity of the courts on which rest respect for and obedience to the law itself.

The judgment is affirmed.

RENIGAR v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. June 3, 1909.)

No. 834.

1. INDICTMENT AND INFORMATION (§ 2*)—NECESSITY OF FORMAL PRESENTMENT—PROVISIONS OF FEDERAL CONSTITUTION—"INDICTMENT."

The fifth constitutional amendment in providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" intends not merely an indictment in form, but a valid indictment found and presented according to the settled usage and established mode of procedure.

[Ed. Note.—For other cases, see Indictment and Information; Cent. Dig. § 5; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3551-3555.]

2. INDICTMENT AND INFORMATION (§ 11*)—RETURN INTO COURT.

To constitute a valid indictment for an infamous crime in a federal court, it must have been publicly presented in open court, all the grand jurors being present and answering to their names, the indictment then being delivered by the foreman to the clerk of the court, and the fact entered of record.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 62; Dec. Dig. § 11.*]

3. INDICTMENT AND INFORMATION (§ 11*)—VALIDITY—RETURN INTO COURT—"INDICTMENT."

A paper purporting to be an indictment, indorsed as a true bill by the foreman of a federal grand jury, and delivered by him alone to the clerk of the court in the courtroom when court was not in session, is not an indictment, and confers no jurisdiction on the court to try the accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 62; Dec. Dig. § 11.*]

4. INDICTMENT AND INFORMATION (§ 194*)—DEFECTS OF FORM—SCOPE OF CURATIVE STATUTE.

Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that "no indictment found and presented by a grand jury * * * shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only," has no application to an indictment not duly found and presented; the defect in such case not being one of form, but of substance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 627; Dec. Dig. § 194.*]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg.

Waller R. Staples, for plaintiff in error.

Thomas L. Moore, U. S. Atty. (Samuel H. Hoge, Asst. U. S. Atty., on the brief).

Before PRITCHARD, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. The case is before us upon a writ of error to review a judgment of the United States District Court for the Western District of Virginia, whereby plaintiff in error was sentenced to serve two years in the penitentiary at Atlanta, Ga., and to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay a fine of \$5,000, for the violation of section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676). There are numerous assignments of error, but we have deemed it unnecessary to consider any except that presented in defendant's bill of exceptions No. 15, wherein the facts relating to the return of the alleged indictment as certified by the court are as follows:

"Defendant's Bill of Exceptions, No. 15.

"Be it known that on the 21st day of March, 1908, after the above W. H. Renigar had been put upon trial, and several of the witnesses for the government had been examined, the clerk of this court entered an order herein, dated March 18, 1908, which said order reads as follows:

"'Order as to Finding Indictment by Grand Jury.

"'Entered March 18, 1908.

"'The grand jury again appeared and reported (among others) the following indictment, to wit:

"'Indictment vs. Pinkney Ayers, W. H. Renigar, W. H. Phillips and Jas. N. Bordwine, for vio. sec. 5440, R. S.

"'A True Bill.'

"Which order was spread upon the order book, and for the first time known to counsel for the defendant on this the 21st day of March, 1908.

"Whereupon counsel for the defendant moved the court to correct said order, and to have the same to conform to the facts in reference to the alleged return of the alleged indictment, which said facts the court here certifies were as follows:

"On the 17th day of March, 1908, in the trial of the case of The United States v. Pinkney Ayers, the evidence was concluded on the afternoon of said March 17th, and court was adjourned until 10 o'clock a. m. March 18, 1908. On March 18th the judge of this court, in his office beneath the courtroom in the Federal Building in the city of Lynchburg, by appointment, met counsel for government and for the said Pinkney Ayers, at or about 9 o'clock a. m., and the said judge and counsel were engaged in the consideration of the instructions in the case of The United States v. Pinkney Ayers until about 2:30 o'clock p. m., with the exception of about one hour, during which they were separated and were at lunch. While the judge and counsel were so engaged, in the office of the judge beneath the courtroom, the paper herein, purporting to be an indictment, was by the foreman of the grand jury, who came alone into the courtroom, handed to the clerk at his desk in said courtroom, and by him marked 'Filed,' about 12 o'clock noon, while the judge and counsel for Pinkney Ayers, who were also of the counsel for the defendant in this case, were engaged in the judge's chambers; the judge of this court never having at that time been in the courtroom at any time during that day and did not make his appearance in the courtroom until about 2:30 o'clock p. m., an hour or more after the said filing of the said alleged indictment, since which appearance of the judge in the courtroom no proceedings have been had upon the said indictment, except such as appear of record herein.

"Counsel for defendant moved the court to correct its order above set forth, and to make the same conform to the state of facts herein set out, and at the same time stated to the court the fact that the indictment had been handed to the clerk and marked 'Filed' in the absence of the judge from the courtroom was known to counsel for defendant on the 18th day of March, 1908, at 1:30 o'clock p. m., and before pleading in abatement or in bar of the said alleged indictment; the court stating that the jury, clerk, marshal, and other officers of the court did meet in the courtroom at 10 o'clock a. m. on the 18th day of March, and were simply awaiting the return of the judge until he could finish the consideration of the instructions, which for convenience was being done in the judge's chambers, on the floor below; also that the court has, at a previous term, given instructions to the clerk and to the assistant district attorney that no further announcement should be made of an indictment found by the grand jury, and that the same, after indorsement, should be brought by the

foreman and handed to the clerk, who would thereupon mark the same 'Filed,' and proceed to make the regular order of entry; the reason for such instruction being that frequently parties who were indicted learned of the facts through the public announcement thereof in the courtroom before capias for their arrest could be served, thus leading to difficulties in making arrests and to flights. But the court certifies that the defendant W. H. Renigar was in attendance upon this court on a bond not to depart without leave of court, and that nothing contained in the direction hereinbefore referred to in any manner applied to this particular case.

"It being conceived, therefore, by the judge of the court that the indictment was in legal effect returned into court and entered, and that the order as written by the clerk is in proper form, and as the court does not conceive that the defendant would be prejudiced by its refusal to now change the said order, did overrule the motion of counsel for defendant."

The fifth amendment to the Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. As the statute authorized, and the court imposed a sentence of two years in the penitentiary, there can be no question that the defendant was charged with an infamous crime (*Ex parte Wilson*, 114 U. S. 426, 5 Sup. Ct. 935, 29 L. Ed. 89; *Mackin v. United States*, 117 U. S. 352, 6 Sup. Ct. 777, 29 L. Ed. 909), and a fundamental prerequisite to the defendant's trial was an indictment by the grand jury. Does a paper purporting to be an indictment upon which the foreman has indorsed "A True Bill," handed to the clerk, when the court is not in session, and when none of the grand jury except the foreman are present, conform to those settled usages and modes of proceeding which from the earliest days have governed the finding of indictments? 1 Chitty on Crim. Law, 324, describes the mode in which the grand jury returns the results of their inquiries to the court, by indorsing "A True Bill" if found, and "Not a True Bill" if rejected; and says:

"When the jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of peace or clerk of assize."

4 Blackstone, 306, also describes the functions of the grand jury and the methods of its proceedings, the necessity of 12 at least assenting to the accusation, and adds:

"And the indictment when so found is publicly delivered into court."

A later text-writer (1 Bishop on Crim. Procedure, § 869) says:

"When the grand jury has found its indictments, it returns them into open court, going personally in a body."

The Compilation, 22 Cyc. 210, cites cases from 15 states to support the proposition in the text that the "finding by a grand jury of a true bill and indorsement thereon to such effect are not alone sufficient to render it valid as an indictment, but it is found necessary that the bill should be presented or returned by the grand jury in open court." It would unduly extend this opinion to cite all of these cases, and we lim-

it ourselves to an examination of cases in this, the Fourth circuit, and, first, as to the practice in the state of Virginia, where this case arose.

In *Commonwealth v. Cawood*, 2 Va. Cas. 541, decided in 1825, Judge Brockenbrough, delivering the opinion of the court, says:

"The accusation in due and solemn form is as indispensable as the conviction. What, then, is the solemnity required by law in making the accusation? The bill of indictment is sent or delivered to the grand jury, who, after hearing all the evidence adduced by the commonwealth, decide whether it be a true bill or not. If they find it so, the foreman of the grand jury indorses on it 'A True Bill,' and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury, that is the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the indorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented. * * * The circumstance that this bill is indorsed a true bill and signed by David Campbell, foreman, affords no record proof that the bill was found by any grand jury, nor particularly by this grand jury. That gentleman may have been frequently the foreman of other grand juries in the same court, and, though we all know as men that he would not sign any paper as foreman without being really so, yet as judges we must require record proof that he was authorized by the grand jury of which he was foreman to make the indorsement now before us, and that he presented it in their presence in open court as the accusation against this individual."

The judgment of the court was that:

"As it does not appear from the records that the grand jury had presented any bill of indictment against Benjamin Cawood for murder, in open court, as a true bill, that the subsequent plea of not guilty does not cure the defect."

In the case of *Price v. Commonwealth* (decided in 1872) 21 Grat. (Va.) 859, the court, through Moncure, its president, referring to the *Cawood Case*, says:

"That is a case of the highest authority. It was argued with great ability by very able counsel, both for the commonwealth and the accused, and was decided by very able judges."

In *Simmons v. Commonwealth*, 89 Va. 157, 15 S. E. 387, decided in 1892, the court says:

"It still does not appear that the indictment was delivered in court by the grand jury, and its finding recorded. This omission is a fatal defect. No man can be tried for a felony in the courts of this commonwealth except upon an indictment of the grand jury, and the indictment to be valid must be presented in open court and the fact recorded. Until this is done the accused is not indicted. This was decided in *Cawood's Case*, nearly three-quarters of a century ago. * * * It was held to be essential to the validity of an indictment that it be publicly delivered in open court, and that the fact be recorded; that this is the evidence required by law to prove that it is sanctioned by the accusing body; and that until it is so presented the party charged by it is not indicted. * * * That case has always been regarded as settling the rule in this state."

In the state of West Virginia the Supreme Court in *State v. Heaton*, 23 W. Va. 778, decided in 1883, says:

"The solemnity required by law in making a criminal accusation is thus stated by the court in the *Commonwealth v. Cawood*, 2 Va. Cas. 541."

There follows a quotation from the opinion in that case which is cited above. "There is no question but that this correctly describes the regular and proper mode of proceeding in the institution and presentation of criminal charges, both in England and in this state."

In North Carolina, the Supreme Court in *State v. Cox*, 28 N. C. 445, decided in 1846, refers to the proper practice. There was contention there that the presentment (which was a case of misdemeanor) had not been signed by 12 of the body, and it was held that that was not necessary, and the court says:

"The bill, however, being the act of the jury, they ought in every instance to be in court when one is returned, and so in making a presentment, and to ascertain that they are present they ought always to be called by the clerk."

And in *State v. Bordeaux*, 93 N. C. 563, the court says:

"We believe a loose practice prevails in many of our courts with respect to the returns of bills of indictment into court by the grand jury. It is often the case that bills are carried into court by the foreman alone, but this is a practice to be condemned, because it is not the legal mode of proceeding. The law requires that the grand jury should make their returns in a body that the court may see that they as a body assent to the returns made."

No case has been cited from South Carolina, but the writer of this opinion, who had many years' experience as a prosecuting officer, in that state, can say that the invariable rule in that state, both in the state and in the federal courts, has been that a grand jury, when it has any presentments to make, comes into court, and the clerk calls the names of all of the grand jury. The clerk then asks the foreman if he has any presentments, and the bills are handed to the clerk and the result of the finding as to each bill is announced by the clerk in open court. It has not infrequently happened that a mistake in such announcement has been corrected by some grand juror present. That the practice has been as stated is referred to in *State v. Creighton*, 1 Nott & McC. (S. C.) 256, where objection was made to the finding of the grand jury in writing which had been publicly announced by the clerk in their presence, but not signed by the foreman, and the court says:

"It has long been the custom in this state for the foreman of the grand jury to sign their finding, and perhaps it would still be advisable to adhere to it, but I concur in the opinion that this being in writing, and having been publicly announced by the clerk, as is invariably the case, in the presence of the grand jury, is a sufficient guard against misconception or perversion, and, as there is no positive law requiring it, it is not essentially necessary to its validity that it should be signed by the foreman."

The overwhelming weight of opinion and authority is that it is essential to the validity of an indictment that it be presented in open court and in the presence of the grand jury.

One of the cases cited by the attorney for the government as establishing a different rule is *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480, where it was held that the sworn bailiff is competent to make return in court of bills found by the grand jury. This is under a statute of Georgia, where a part of the oath of the bailiff of the grand jury is as follows:

"You do solemnly swear that you will * * * carefully deliver to that body all such bills of indictment or other things as shall be sent to them by the court, without alteration, and as carefully return all such as shall be sent by that body to the court."

In *Sampson v. State*, 124 Ga. 776, 53 S. E. 332, the Supreme Court of that state February 15, 1906, held as follows:

"An indictment must be returned into open court. Accordingly, when the judge of a superior court at 10 o'clock a. m. of a given day ordered that a recess of the session of the court for that day be taken from that time until 8:30 the next morning, and then left the courtroom, and did not return during the remainder of that day, an indictment returned during the afternoon of the same day by the bailiff of the grand jury to the clerk of the court while he was in the courtroom was not properly returned."

In its opinion the court refers to the practice which had always prevailed of grand juries returning indictments into open court until the adoption of the Code of 1882, after which it was held, as in *Danforth's Case*, that the bailiff might make such return, and says: "As under the old practice the grand jury was required to return indictments and presentments into open court, it follows that the bailiff must do likewise," citing *Gardner v. People*, 20 Ill. 430, where the court, after holding before a party can be tried on an indictment it must appear from the record that it was returned into open court, said:

"This requirement is proper for the protection of the citizen against being forced to defend himself against charges never acted upon or presented by a grand jury. If it were otherwise, by either accident or design, he might be compelled to make such defense."

And *Goodson v. State*, 29 Fla. 511, 10 South. 738, 30 Am. St. Rep. 135:

"The only recognized manner in which the findings of the grand jury can be authoritatively presented is in open court. Were the rule otherwise, it would render it possible for a designing and revengeful foreman of a grand jury to ruin any citizen by surreptitiously filing with the clerk in his office an indictment manufactured by himself alone upon which his fellow jurors had taken no action."

Very few cases are found which show the practice in the courts of the United States relating to the presentments of grand juries. In *United States v. Butler*, 1 Hughes, 457, Fed. Cas. No. 14,700, heard before Chief Justice Waite and Circuit Judge Bond, a motion was made by the defendants that they be not compelled to answer the indictment on the ground that it was not a legal instrument, as there had been no formal publication of the finding of the grand jury in court. Bond, Circuit Judge, stated that he remembered the circumstances of the finding of this indictment. It had been brought in by the grand jury. "The foreman had handed it to the clerk, by whom it was handed to the court for inspection, but afterwards it was handed back to the clerk for entry. The names of the grand jurors had been called out, and they had been asked if this was their finding and they had answered that it was, but the handing of the indictment to the clerk and the entry of it on the record was all the publication ever intended. It was not meant that the whole world should know who were indicted and for what offenses, because the accused could then escape." Chief

Justice Waite stated that he had never known any other practice. From this it clearly appears that the indictment had been brought into open court by the grand jury, and that their names had been called; the Chief Justice stating that he had never known any other practice.

In *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, the record showed an indictment, the appearance of the accused in person and by his attorneys, an order by the court that a jury come to "try the issue joined," the selection of a jury who was sworn to try the issue joined and a true verdict render, the trial and verdict, finding the prisoner guilty; but did not show that the accused was ever formally arraigned. The verdict was set aside on that ground, and section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) was considered. Justice Harlan, delivering the opinion of the court, says:

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty, nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused, are often prepared. * * * We may have a belief that the accused in the present case did, in fact, plead not guilty of the charges against him in the indictment, but this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form merely, but of substance in the administration of the criminal law; consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes, but involves the substantial rights of the accused. * * * The suggestion that the trial court would not have stated in its order that the jury was sworn to try and tried the issue joined unless the defendant plead, or was ordered to plead to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that a court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

Bishop, in his work on Criminal Procedure, § 131, defines an indictment as a "written accusation against a specified person or persons of some crime, the elements whereof it consists, made on oath, by not less than 12 of the grand jury, to be carried into court, and there become of record." Blackstone, 4 Comm., 309, says:

"The founders of the English law have with excellent forecast contrived that no man shall be called to answer the King for any capital crime unless upon the peremptory accusation of 12 or more of his fellow subjects, a grand jury, and that the truth of any accusation * * * should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbours, indifferently chosen and superior to all suspicion, so that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it by introducing new and arbitrary methods of trial. * * * And, however convenient these may appear at first (as doubtless all arbitrary powers and execution are the most convenient), yet will it be again remembered that de-

lays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters. For these inroads upon the sacred bulwark of the government are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedent will gradually increase and spread, to the utter disuse of jurors in questions of the most momentous concern." Pages 349, 350.

Mr. Justice Wilson (3 vol. 363) says:

"Among all the plans and establishments which have been devised for securing a wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution is at least in the present times the peculiar boast of the common law. The era of its commencement and the particulars attending its gradual progress and improvement are concealed behind a thick veil of a very remote antiquity, but one thing concerning it is certain. In the annals of the world there is not found any institution so well adapted for avoiding all the inconveniences and abuses which would otherwise arise from malice and rigor from negligence or from partiality in the prosecution of crimes."

Judge King in *Commonwealth v. Crans*, 2 Clark (Pa.) 172, says:

"Let any reflecting man, be he layman or lawyer, consider the consequences which would follow if every individual could at his pleasure throw his malice or his prejudice into the grand jury room. * * * Into every quarter of the globe in which the Anglo-Saxon race have formed settlements they have carried with them this time-honoured institution, ever regarding it with the deepest veneration, and connecting its perpetuity with that of civil liberty. In their independent action the persecuted have found the most fearless protectors, and in the records of their doings are to be discovered the noblest stands against the oppressions of power, the virulence of malice, and the intemperance of prejudice."

Mr. Justice Field, in his charge to the grand jury (2 Sawy. 667, Fed. Cas. No. 18,255), says:

"In this country, from the popular character of our institutions there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against the oppressive action of the government. Yet the institution was adopted in this country, and has continued from considerations similar to those which give to it its chief value in England, and is designed as means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from cause or be prompted by partisan passion or private enmity. No person should be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the highest crimes, unless this body consisting of not less than 16, or more than 23, good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial. From these observations it will be seen, gentlemen, that there is a double duty resting upon you as grand jurors of this district—one, a duty to the government, or, more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime should be held to answer the charge; and, on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than public clamour or private malice."

He refers to the impression which widely prevails that the institution of the grand jury has outlived its usefulness, an impression which had been created from a disregard of those qualities and the facility with which it has unfortunately often been used as an instrument for the gratification of private malice, saying:

"There has hardly been a session of the grand jury of this court for years at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties."

And, quoting from the charge of Judge King, above referred to:

"Let any reflecting man, be he layman or lawyer, consider the consequences which would follow if every individual could at his pleasure throw his malice or his prejudice into the grand jury room, and he will of necessity conclude that the rule of law which forbids all communication with grand juries engaged in criminal investigation, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community."

When the Constitution enumerated those guaranties intended for the security of personal rights, and among them that no person shall be held to answer for a capital or infamous crime unless on the presentment or indictment of the grand jury, it manifestly intended a valid indictment, found and presented according to those ancient rules and safeguards which the law and immemorial custom have provided for the conduct of grand juries. It did not mean a mere form of indictment, but it meant a formal accusation of the offense charged, of which at least 12 of the grand jury were satisfied of the truth, and publicly returned into court, indorsed as a true bill. Until and unless it is so presented, it is no indictment. The fundamental prerequisite to the trial of the defendant for the offense charged against him was an indictment by the grand jury. Every text-writer, from Chitty and Blackstone down to Bishop and Joyce, is in agreement as to the manner in which indictments should be found. They all agree that, when the grand jury has acted upon the bills submitted to them, they come publicly into court, their names are called, and the foreman hands the indictment to the clerk. It is not without reason that this formality is required and that the grand jury should be present when the indictment is presented to the court; for, before a man can be held to answer for a capital or infamous offense, at least 12 of the grand jurors must agree to the finding of a true bill. If the grand jury is present when the presentment is made, their assent is conclusively presumed, unless something to the contrary appears. If they are not present, there can be no such presumption.

As was said in *Cawood's Case*:

"It is necessary that it should be presented publicly by the grand jury; that is the evidence required by law to prove that it is sanctioned by the accusing body; and, until it is so presented by the grand jury, with the indorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented."

The foreman is not the representative of the grand jury. He is authorized to speak for it in its presence, when called on by the court to say whether the grand jury has any presentments to make. Any other rule would put it in the power of an individual who happened to be foreman of the grand jury to gratify personal or other malice by presenting in the form of an indictment for an infamous offense a person innocent of all crime, and subject him to the annoyance, expense, and infamy attendant upon such accusation. It is not enough to say that such a thing is improbable; that it is possible is sufficient

reason for adhering to those rules which have the sanction of time and immemorial usage.

That the court was not in session when this paper was handed to the clerk is admitted. The opening of a court is a solemn judicial act, and must be performed by the judge in person. The clerk is a mere ministerial officer, and without statutory authority can exercise no judicial function. As the court was not in session, it would be the same as if this paper had been handed to him on the street. As is well said by Mr. Justice Bradley:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of all the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments. Their motto should be 'Obsta principiis.'"

It is contended by the learned counsel for the government that this is a mere irregularity, and "relates to a defect or imperfection in matter of form only, not tending to the prejudice of the defendant, and is cured by section 1025 of the Revised Statutes." *Bram v. United States*, 168 U. S. 533, 18 Sup. Ct. 183, 42 L. Ed. 568; *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, are cited in support of this contention. Examination of those cases shows that they fall far short of supporting the view that the case under consideration falls within the curative provisions of section 1025. That section provides that "no indictment found and presented by a grand jury * * * shall be deemed insufficient * * * by reason of any defect or imperfection in the matter of form only, which shall not tend to prejudice the defendant." The defect here is not a matter of form, but of substance—not that the indictment was imperfect in matter of form, but that, in fact, no indictment was found or presented by a grand jury, which is a jurisdictional prerequisite. If a valid indictment can be dispensed with, so may that providing for a trial by a petit jury, and, to use a phrase of Mr. Justice Harlan, a person charged with a crime involving life might be tried before a judge "upon a rule to show cause why he should not be hanged." In *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657, a case much relied on by the government, the objection to the indictment was that it lacked the indorsement "A True Bill," and the signature of the foreman. The court held that as there was no mandatory provision in the federal statutes requiring such indorsement, and that the indorsement was no part of the charge against the defendant, and as the common practice in this country was that the grand jury "return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, the formal indorsement loses its essential character," and the defect was held to be upon matter of form only and was waived if the party went to trial without objections.

Joyce on Indictments, § 31, in considering the fifth amendment, says:

"It was manifestly designed and intended for the security of personal rights. It is an essential to the jurisdiction of the court, and, being a constitutional right of a party, cannot be waived by him so as to preclude him from subsequently setting up want of jurisdiction in the court to try him. A party cannot waive a constitutional right when its effect is to give the court jurisdiction."

And in section 32:

"So, where there has been no presentment of the grand jury, or bill of indictment, the fact that a person confessed in court to being guilty of a crime, which requires an indictment or presentment, confers no power upon the court to sentence him to imprisonment, and he can only be lawfully sentenced after he has been proceeded against in the manner provided in the Constitution."

The case before us falls within the reasoning of the opinion in *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. In that case the grand jury found a true bill against Bain November 13, 1886, and the court, after argument upon a demurrer, ordered the indictment to be amended by striking out the words, "the Comptroller of the Currency and"; the court holding those words to be surplusage. More than a year afterwards Bain was arraigned, pleaded not guilty, was tried, and convicted. The case came before the Supreme Court upon a petition for a writ of habeas corpus, and the prisoner was discharged on the ground that the indictment upon which he was tried had not been found by the grand jury. Mr. Justice Miller in his luminous opinion reviews the fifth amendment to the Constitution, and considers the nature and value of the institution of the grand jury, citing with approval the remarks of Chief Justice Shaw of Massachusetts in *Commonwealth v. Child*, 13 Pick. 198:

"It is a well-settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict; and that an indictment bad on demurrer must be held insufficient upon a motion in arrest of judgment."

And saying, among other things:

"It has been said that, since there is no danger to the citizen from the oppressions of monarchs or of any form of executive power, there is no longer need of the grand jury."

But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever, in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins*, 8 Gray (Mass.) 329, "individual citizens from open and public accusations of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of the grand jury, and in cases of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions"; and, concluding:

"We are of the opinion that an indictment found by a grand jury is indispensable to the power of the court to try the petitioner for the crime with which he was charged. It is of no avail under such circumstances to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the

crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he was then entitled to discharge, so far as facts originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed, or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."

In *United States v. Gale*, 109 U. S. 65, 71, 3 Sup. Ct. 1, 5, 27 L. Ed. 857, the court held that, where a defendant pleads not guilty to an indictment and goes to trial without making objection to the mode of selecting the grand jury, the objection is waived. Mr. Justice Bradley, who delivered the opinion of the court, says:

"There are cases undoubtedly which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them, or where they have not been sworn, or where some other fundamental requisite has not been complied with."

And on page 72 of 109 U. S., page 6 of 3 Sup. Ct., 27 L. Ed. 857:

"We think that the doctrine of waiver applies as well to cases where the objection appears of record as where it appears by averment, and that it applies to all cases of impaneling the jury, but it does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice therein."

In *Hopt v. Utah*, 110 U. S. 579, 4 Sup. Ct. 204, 28 L. Ed. 262, the court, after holding that it was not within the power of the accused to dispense with certain statutory requirements, says:

"The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his failure, when on trial and in custody, to object to unauthorized methods."

Thompson and Meriam on Juries, § 657, says:

"It is the general, and probably the universal practice to deliver all indictments to the court in the presence of the grand jury."

And in section 696:

"In his *Treatise on Criminal Law*, Mr. Chitty states that, when the indorsement 'A True Bill' is made upon the bill, it becomes a part of the indictment, and renders it a complete accusation against the prisoner. This must be understood with the qualification that the record further shows the indictment to have been publicly returned into court, as required by law. This recital is positively essential to establish the identity of the indictment found by the grand jury with that which appears in the record, and upon which the defendant is arraigned. The omission to make the proper entry of the return of the indictment cannot be cured by the production of a paper purporting to be the indictment duly indorsed and signed by the foreman of the grand jury, nor will this defect be cured by the defendant pleading upon the merits or by a verdict of guilty."

In *Regina v. Heane*, 9 Cox, C. C., 433, Chief Justice Cockburn, says:

"As regards the objection that the motion to quash cannot be made after plea pleaded, I think, if it is made to appear clearly that there was no jurisdiction, we have power to quash the indictment at any stage, and even for matter not apparent on the face of the indictment, brought to our notice by extraneous evidence upon affidavits."

We have been extremely reluctant to set aside the judgment in this case upon grounds which may appear technical, and for that reason have given unusual time to its consideration, and to an investigation of the practice in every state, where the institution of the grand jury is preserved. Nothing is more clear than that the "established mode of procedure" is for the grand jury to make its presentments publicly in open court all of the grand jurors being present and answering to their names. It follows that a paper purporting to be an indictment handed by the foreman to the clerk when the court is not in session, and, in the absence of the grand jury, is no indictment. This is not a question of irregularity, but of substantive law, based upon the direct terms of the constitutional guaranty that no man shall be "held to answer" for an infamous offense except on an indictment by a grand jury. The indictment—and that means of course a valid indictment found and presented according to the settled usage and established mode of procedure—is a prerequisite to the jurisdiction of the court to try the person accused, an indispensable condition and requirement, the absence of which renders the proceedings not simply voidable, but absolutely void.

The judgment of the court below must therefore be reversed.

Reversed.

ANGLE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. June 8, 1909.)

No. 841.

In Error to the District Court of the United States for the Western District of Virginia, at Danville.

James J. Britt and R. W. Peatross (Wm. P. Bynum, Jr., and Peatross & Harris, on the briefs), for plaintiff in error.

Thomas L. Moore, U. S. Atty., and Samuel H. Hoge, Asst. U. S. Atty.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. This court having decided, in the case of *W. H. Renigar v. United States*, 172 Fed. 646, that it is essential to the validity of an indictment that it be presented by the grand jury in open court, and it appearing that the indictment in this case was not so presented, it follows that, for the reasons set forth in the opinion filed at the present term, the judgment in this case must be set aside; and it is so ordered.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 6, 1909.)

No. 296.

SALES (§ 66*)—PROPERTY PURCHASED BY LESSEE—LESSOR'S LIABILITY.

The Metropolitan Street Railway Company having leased its road to the New York City Railway Company, the lessee's vice president and general manager received on May 10, 1907, from claimant a written proposal to furnish certain cables. This proposal was accepted and ratified by both parties on May 13th following. The agreement required formal orders to be sent from time to time by the purchasing agent of the railway company to claimants, stating the amount of cables needed and other details. Three orders were sent and signed, "Metropolitan Street Railway Company, per A. C. Tully, Purchasing Agent," and required the cable company to deliver specified cables to "New York City Railway Company" in accordance with proposal of May 10th and letter of acceptance, etc. Such orders were on the printed forms of the Metropolitan Company, and were accompanied by printed bill forms setting forth the Metropolitan Company as the one to be billed against. *Held*, that the purchaser of the cables was the New York City Railway Company, and that the Metropolitan Company could not be made liable therefor, though they were to be used as a part of the Metropolitan's property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 181; Dec. Dig. § 66.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Bill by The Pennsylvania Steel Company and others against the New York City Railway Company and others, in which the National Conduit & Cable Company filed claim. From an order of the Circuit Court (170 Fed. 623) overruling exceptions of claimant to the report of a special master disallowing the claim against the Metropolitan Street Railway Company, claimant appeals. Affirmed.

Johnson & Galston, for appellant.

Masten & Nichols (William M. Chadbourne, of counsel), for receivers of Metropolitan St. Ry. Co.

Before COXE, Circuit Judge, and HOUGH and HAND, District Judges.

COXE, Circuit Judge. The sole question presented by this appeal is whether the cables furnished by the National Conduit and Cable Company were delivered pursuant to a contract made with the Metropolitan Street Railway Company or with the New York City Railway Company. The master found that the Metropolitan Company did not make or authorize the contract of purchase. He, therefore, disallowed the claim and his report to this effect was confirmed by the Circuit Court. We see no reason why this conclusion should be disturbed.

The contract was unquestionably made by the New York City Railway Company. On the 10th day of May, 1907, the Conduit Company made a written proposal, addressed to Oren Root, Jr., vice president and general manager of the City Company, to furnish the cables in question. After a few unimportant modifications were made the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proposal was accepted and ratified by both parties and on May 13, 1907, became a valid, binding agreement.

Based upon the written contract alone the contention that the Metropolitan Company is liable for the cables is absolutely untenable. The name of the Metropolitan Company is not mentioned and the agreement is explicit "to manufacture and deliver * * * the following transmission cables for the New York City Railway Company." It was further provided that formal orders should be sent from time to time by the purchasing agent of the railway company to the Cable Company stating the amount of cable needed and other details incident to the order. Three of these orders were sent to the Cable Company signed, "Metropolitan Street Railway Co., per A. C. Tully, Purchasing Agent." They required the Cable Company to deliver the specified cables "to New York City Ry. Co. F. O. B. Dock N. Y. City * * * all to be in accordance with proposal of The National Conduit & Cable Co., dated May 10, '07, and letter of acceptance by the V. P. & G. M., dated May 11th, 1907."

It is argued by the claimant that because these orders are on the printed forms of the Metropolitan Company and were signed by that company by A. C. Tully, apparently its purchasing agent, and were accompanied by printed bill forms setting forth the Metropolitan Company as the party to be billed against, that the master should have found as a conclusion of law that the Metropolitan Company was the principal debtor. We cannot accede to this proposition. The orders in question were given ten days after the consummation of the agreement between the Cable Company and the City Company. The moment that agreement was ratified the rights of the parties thereto became fixed, neither could vary its conditions without the consent of the other. The Cable Company chose to make its agreement with the City Company. Whether the Metropolitan Company as lessor, could have entered into such an agreement it is unnecessary to decide. It is enough that it did not do so. The orders for cables are expressly provided for in the agreement and state on their face that they were made in accordance therewith. The City Company could, if it so desired, direct the installation of the cables purchased by it upon the property of the Metropolitan Company authorizing that company to give the necessary orders and to do any other act necessary to complete the work. In other words the mere fact that the cables were placed in position pursuant to the order and direction of the Metropolitan Company is wholly insufficient to establish liability on its part. The cables were at all times after delivery the property of the City Company; it could do with them as it liked. No other company could be made liable for their payment unless there was an agreement express or implied to that effect. No such agreement is shown.

The order is affirmed.

FWLER & WOLFE MFG. CO. v. NATIONAL RADIATOR CO.

(Circuit Court of Appeals, Third Circuit. July 1, 1909.)

No. 47.

1. PATENTS (§ 160*)—CONSTRUCTION—REFERENCE TO SPECIFICATION.

Where terms which are not technical terms of the art are used in the claims of a patent to differentiate between different tubes in the patented structure, the specification may be referred to for the purpose of ascertaining their meaning as so used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 160.*]

2. PATENTS (§ 328*)—INFRINGEMENT—RADIATORS.

The Fowler patent, No. 609,800, for a radiator, narrowly construed as required by the prior art, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

E. H. Hunter, for appellant.

Frank S. Busser, for appellee.

Before GRAY, Circuit Judge, and LANNING and YOUNG, District Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Western District of Pennsylvania, dismissing the bill of complaint brought for the alleged infringement of the Fowler patent, No. 609,800, dated August 30, 1898, for an improvement in radiators. The bill was dismissed on the ground of noninfringement. The bill also charged infringement of design patent No. 28,761, but this charge was withdrawn.

In May, 1899, the complainant brought suit against defendant for infringement of claims 1, 2, 3, and 4 of both of said letters patent. At that time, defendant was making a radiator which he says in his brief in this case was a clear infringement of the patent sued upon. Defendant consented to a decree and was licensed under the patents to make any and all forms of radiators embodying the inventions of said patents, saving and excepting one specific form. A few years after the execution of this license, the defendant, who makes a variety of styles of radiators, put on the market the radiator complained of in this suit. Subsequently, on July 13, 1904, complainant brought this suit and made application for a preliminary injunction, contending that the radiator involved the subject matters of claims 1 and 2 of said patent No. 609,800, and embodied the design of said patent No. 28,761, and also the specific form expressly excepted from the said license. Defendant contended, first, that its radiator did not involve the invention of either of the patents in suit; and second, that, assuming that it embodied the inventions of the patent in suit, it did not correspond to the form excepted from the license. The court sustained the latter defense, and refused the preliminary injunction, holding that the re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

spondent's form of radiator was covered by the license. When the suit came on to a final hearing, complainant contended that defendant's radiator was of the form of the patented invention excepted from the license, and that therefore the defendant was an infringer. The court below, in dismissing the bill, held as follows:

"On application for preliminary injunction, we refused to grant it, holding respondent's form was covered by the license. The case now comes on for final hearing. In the light of fuller proofs, we have now reached the opinion that, while we rightfully refused the preliminary injunction, we were mistaken in the ground we took for so doing, and that the refusal should have been based on the fact that the respondent's radiator does not infringe."

The invention is thus described by the patentee in the letters patent:

"My invention relates to radiators, and it consists of the improvements which are set forth in the following specifications and claims which are shown in the accompanying drawings. * * *

"In carrying out my invention, I form the radiator of cast iron sections, which may be used either singly or grouped together and coupled as herein-after set forth, according to the area of the radiating surface desired. * * *"

Claims 1 and 2 of the patent in suit, the only ones here involved, are as follows:

"1. A radiator-section composed of unitary hollow casting, consisting of four outer tubes communicating with one another at the corners, one or more intermediate cross-tubes between opposite outer tubes, and a series of connecting-tubes between each intermediate cross-tube and the opposite outer tube or adjacent intermediate cross-tube.

"2. A radiator-section composed of a unitary hollow casting, consisting of a tubular structure embracing outer tubes communicating with one another at the corners, one or more cross-tubes between the outer tubes, and a series of connecting-tubes between said cross-tubes and the adjacent outer tubes."

Owing to the decree entered in the former suit, and the license to the defendant, the validity of the patent is not in controversy. The sole question is one of interpretation; that is, what is the real invention covered and described by claims 1 and 2 of the patent in suit. The appellant complains, under different specifications of error, of the interpretation given by the court below to these claims and of the view taken by it of the real and substantive invention of the patent in suit. The opinion of the court below in this respect is as follows:

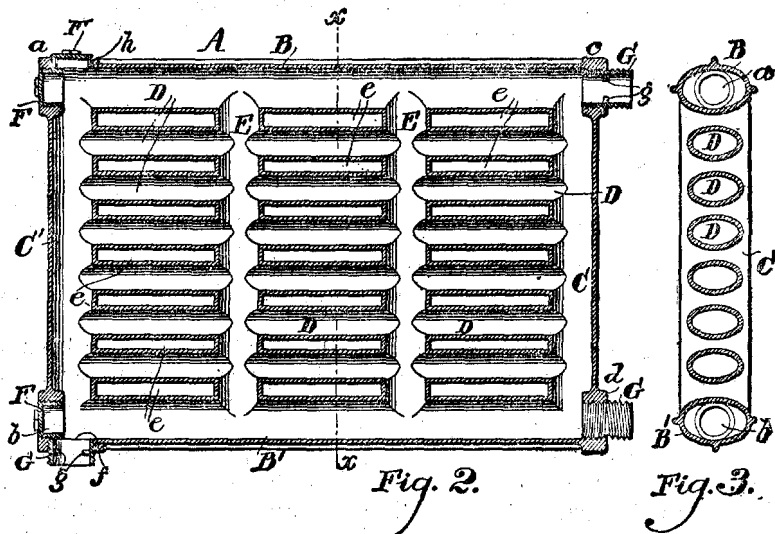
"While, as between these parties, the validity of the patent must be assumed, yet it is evident its scope is exceedingly narrow. In his specification Fowler sets forth, as his substantial advance in the art, the fact that the cross-tubes of his radiator are of larger size than the connecting tubes, which run at right angles. It is evident that these relative sizes are not mere preferential or illustrative constructions, but that they are the particular features which characterize the invention and are embodied in the claims in controversy. A study of the specification shows that unless based on this difference the patent has nothing to support it. Thus the patentee says: 'The sections are preferably rectangular in shape and composed of two longitudinal top and bottom tubes BB', united by two end tubes CC', which are connected by a series of smaller longitudinal tubes D. I prefer to employ intermediate cross-tubes E, connecting the tubes BB' and having the longitudinal tubes D connecting with them. In the construction shown there are two of these large intermediate cross-tubes E located between the end tubes CC and dividing the small longitudinal tubes D into three sets or series. The small longitudinal tubes D are located at sufficient distance apart to form intermediate openings or space *e* for the circulation of air between them. Each

section thus constructed is composed of a series of communicating tubes, forming a unitary rectangular hollow frame.' Now it is clear to us that the word 'preferably' refers to the rectangular shape and not to the relatively 'large intermediate cross-tubes' and the 'small longitudinal' or connecting tubes. No other sizes or modes of construction are shown or suggested and the larger sizes are designated as 'cross-tubes' and the smaller as 'connecting tubes,' and as such, both are carried into the claims. The very fact that the two sets of intermediate tubes are called in the claims, one 'cross-tubes' and the other 'connecting tubes', shows a purpose to differentiate them and the only ground of differentiation is found in the figures and specification in which latter the cross-tubes are described as 'large intermediate tubes,' and the connecting tubes as 'small longitudinal tubes'. These limitations, if carried into the claims, embody a different structure from that of the respondent and the claims so read fail to sustain the charge of infringement. So construing the claims infringement is not shown and the bill will be dismissed."

After a careful consideration of the record and arguments of counsel, we are of opinion that the court below were justified in the views thus expressed.

An examination of the prior art, as disclosed in the record, shows at once that the invention of the patent in suit is a narrow one. Arrangements of cast and wrought iron radiating tubes placed in juxtaposition, in sections, and parallel with each other, terminating and opening into larger tubes at the top and bottom, thus affording an uninterrupted circulation of steam or water through all of them, were quite old in the art. They constituted unitary hollow quadrilaterals or castings (where cast iron was used instead of wrought iron, though that is not material), consisting of four outer tubes communicating with each other at the corners, with a series of transverse and parallel radiating tubes, extending between two of the outer tubes and opening into them. Examples of such structures are shown in the Mills radiator patent, No. 154,651, the Safford radiator patent No. 355,216, and others, constituting in their general features a standard radiator structure in use long before the date of the patent in suit. In view of this standard form, the device of the patent in suit exhibits only a somewhat different arrangement of tubes and a division of the cast iron section into sub-sections, by what are called cross-tubes in the specifications and claims. The words "cross-tubes" convey no definite and adequate meaning, when taken alone. They necessarily are relative. The words of the claim are, "one or more intermediate cross-tubes between opposite outer tubes." They must be taken relatively, and therefore to require outer tubes, opposite to each other, between which they must continuously extend as unitary structures, and they must correspond structurally and in fact to what is connoted by the word "tube." We look at once at the drawings and specifications of the patent, as we are authorized to do in order to obtain a more definite conception of these cross-tubes relatively to the other parts of the structure, and we find in the drawing of the patent the two cross-tubes extending between the longer outer tubes of the section and corresponding in size therewith. This drawing also makes clear what is meant by a series of connecting tubes between the cross-tube and the outer tube, or between two cross-tubes, which was not clear from the claims themselves. When we turn to the specifications, the character and relation to each other of the tubes constituting the unitary hollow casting dealt with in the

claims, becomes entirely clear. We quote this part of the specifications, and insert a drawing taken from the patent in suit, illustrating complainant's radiator:



"A is one of the radiator sections, composed of a hollow cast-iron frame made up of a battery of tubes.

"The sections are preferably rectangular in shape and composed of two longitudinal top and bottom tubes BB', united by two end tubes CC', which are connected by a series of smaller longitudinal tubes D. I prefer to employ intermediate cross-tubes E, connecting the tubes BB' and having the longitudinal tubes D connecting with them. In the construction shown there are two of these large intermediate cross-tubes E located between the end tubes CC and dividing the small longitudinal tubes D into three sets or series. The small longitudinal tubes D are located at sufficient distance apart to form intermediate openings or spaces *e* for the circulation of air between them. Each section thus constructed is composed of a series of communicating tubes, forming a unitary rectangular hollow frame.

"I prefer to construct the section A with the tubes arranged in the manner described, because as the circulation of the steam and water is in horizontal planes the most free circulation should be permitted in those directions, and this is attained by the large horizontal tubes BB' and the series of small tubes D. The small tubes are preferably made of an area substantially equal to that of a one-inch pipe; but as tubes of that size are liable to offer considerable friction to the steam or water traversing them I prefer to shorten their length by the interposition of the intermediate transverse tubes E. While I prefer this particular arrangement of the tubes for the reasons stated, it is to be understood, however, that I do not mean to limit myself to this precise construction."

The frequent use of the word "preferably" throughout this part of the specifications, does not serve to extend the scope of the claims beyond the structure thus shown, where no alternative form is suggested and the relative sizes of the cross-tubes and connecting tubes shown in the specifications are essential to their respective functions. But, aside from this, it is noticeable that the words "preferably" and "I prefer" are immediately applicable to the rectangular shape of the section,

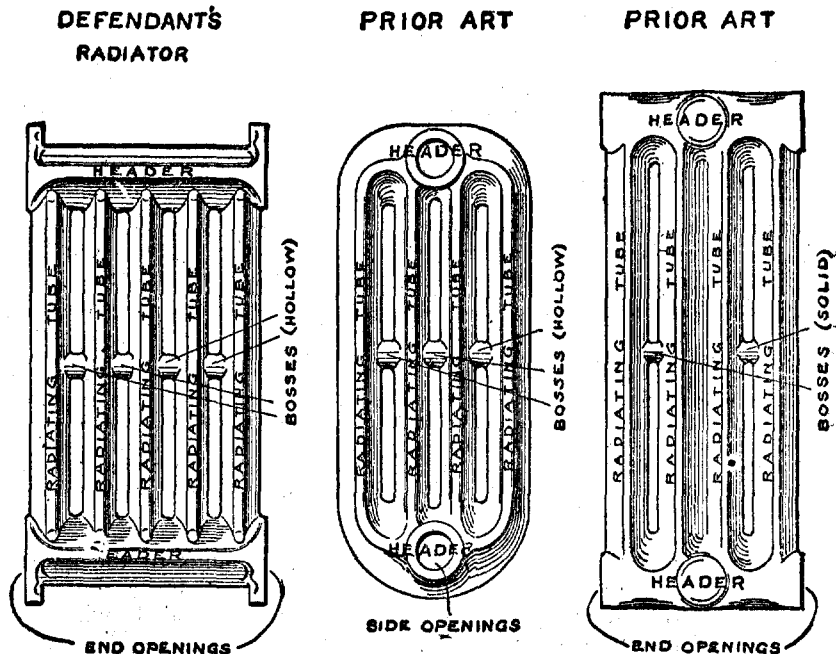
or to the mere arrangement of the tubes, as being horizontal or vertical. The "cross-tubes" are throughout referred to as larger, and the connecting tubes as smaller, which the latter must necessarily be, as there is a multiplicity of them, as indicated by the word "series." Indeed the presence and use of cross-tubes is due to the necessity of shortening the series of connecting tubes, which, by reason of their small diameter, would offer too much friction if they extended across the rectangle. They were therefore shortened by the interposition of the intermediate tubes. As these intermediate cross-tubes take the place of the large outer tubes, as features of the multiplicity of connecting tubes, they must of necessity be relatively larger. It is thus seen that, functionally this limitation is imposed upon the language of the claims. On this point, Mr. Bently, the expert witness for the defendant, says:

"Thus it seems but reasonable to understand that when Mr. Fowler refers in his claims to the cross-tubes 'between opposite outer tubes,' he means such cross-tubes as he describes and illustrates, to wit, tubes of substantial size and capacity, capable of supplying the small connecting tubes from the outer tubes at one or more intermediate points along the length of the radiator sections. Moreover, when he speaks in his claims of 'a series of connecting tubes,' he means such connecting tubes as he shows and describes, to wit, a substantial multiplicity of small tubes, having relatively large radiating surface, but short and having their conducting capacity reinforced by the cross-tubes."

It is true, as the appellant contends, that the claims of the patent are not to be limited beyond the clear import of their terms, but it is equally true that we may refer to the specifications and drawings to discover the meaning of the terms, as used in the claims. The terms "outer tubes," "cross-tubes" and "connecting tubes," are not technical terms recognized and employed in the art. They are terms used by the patentee to apply to a peculiar construction and arrangement of tubes unknown before his invention. "To ascertain the meaning of these terms, we must therefore go to the specifications, not for the purpose of importing anything into the claims, but for the purpose of ascertaining what characteristics are attributed in the specifications to the terms therein contained." *Consolidated Co. v. Walker*, 138 U. S. 132, 11 Sup. Ct. 292, 34 L. Ed. 920; *Turril v. Railroad Co.*, 1 Wall. 511, 11 L. Ed. 668; *Brooks et al. v. Fiske et al.*, 15 How. 215, 14 L. Ed. 665. To these authorities, cited in appellee's brief, many others might be added. The discussion of the claims of a patent is not to be confined to a mere logomachy, which could be set at rest at once by a reference to specifications and drawings. The radiator of the defendant is the old standard radiator of the prior art. That is, there are two horizontal headers united by a series of vertical radiating tubes, through which the steam or hot water circulates from header to header. Without more, it is not contended that such a structure infringes the patent in suit.

But it is contended by the appellant that the distinguishing feature of the radiator of the patent in suit, to wit, a cross-tube, is present in defendant's structure, inasmuch, as, halfway the length of the vertical tubes, and between them, are hollow bosses, which form a passage-way for the steam through the entire series of vertical tubes. Here

again, it is necessary to inspect complainant's exhibit of defendant's structure, in order to understand the meaning of this contention:



It would seem perfectly apparent from such an inspection, that there is nothing here to answer to the description of the cross-tube in plaintiff's claim, as explained in the specifications. Relying on the literal words of the claim, these connecting bosses do not singly or together constitute a "cross-tube between opposite outer tubes." They may constitute a passageway from one connecting tube to the other, and in connection with these tubes themselves form a passageway from one outer tube to the other, but this passageway is not a tube, nor is it created by a tube. Again, if this series of links in the passageway from one outer tube to the other could, by any ingenuity be interpreted as a cross-tube, it is evidently much smaller than the connecting tubes, instead of larger, as we have shown the cross-tubes of the patent in suit must be. It is sufficient to say, however, that the passageway thus created is not a cross-tube, or a tube of any sort, and neither literally nor functionally comes within the scope of the claims of the patent in suit. Again, if the passageway made possible by these small hollow bosses constitutes a cross-tube, then the vertical tubes of defendant's radiator are the connecting tubes "between such cross-tube and the opposite outer tube," but it is plain that these connecting bosses do not divide or shorten these so-called connecting tubes, which are integral between the headers and constitute structurally continuous tubes from one header to the other. It is an almost absolute reversal of the arrangement of the tubes of the patent in suit. It is curious to note that

the appellant's expert in the license suit, when discussing defendant's radiator, designated the vertical tubes between the outer headers of defendant's structure, as "cross-tubes," and the series of hollow connecting bosses as "connecting tubes," while the expert in the present suit, as we have seen, calls these vertical tubes extending from header to header, "connecting tubes," and the series of hollow bosses between them, "cross-tubes."

That the claims must be read in the light thrown upon the relative size of the outer cross and connecting tubes by the specifications, is confirmed by the significant statement made by the appellant company in its catalogue published after the issuance of the patent in suit. On the first page of this catalogue, under a picture of the patented radiator, representing the outer tubes and cross-tubes as large and the series of connecting tubes as small, there is the following statement:

"The large, outer and cross-tubes, connecting and intersecting the smaller, insure the most positive circulation, the quickest condensation and the most rapid heating under all conditions. These essential factors are covered by our patents. The dimensions insure the entire surface to be effective and efficient."

It is hardly necessary to say that the defendant's radiator presents none of these "essential features." In fact, the defendant's radiator is the radiator of the prior art. Of the "Safford" patent, No. 355,216, December 28, 1886, the expert witness for the defendant says this patent "shows a cast-iron radiator section of the type in question, having four parallel tubes connected across the top and bottom by headers, and moreover, the parallel tubes are in communication with one another by a perforated boss, just as in the defendant's radiator." The same witness also further testifies:

"Reed patent No. 347,127, August 10, 1886, shows another example of the defendant's type of radiator, comprising a number of parallel tubes connected across at their ends by headers. The Reed radiator is also a cast iron radiator. Moreover, it has the same incidental feature of perforated bosses which is found in the defendant's radiator, permitting communication between the parallel tubes."

A reference to these patents and the accompanying drawings, as shown in the record, fully confirms the testimony of defendant's expert. There was also the testimony of more than one witness qualified by foundry experience in the manufacture of cast iron radiators, to the effect that these connecting bosses were used solely as stays between the long parallel tubes. The result of this testimony is thus given by defendant's expert:

"The explanation for their presence is, that in casting these radiators, it is necessary to use what is known as a 'core,' which is a fragile rod of sand or similar material, placed in the mould to form the interior bore of the tube. When these cores are of small diameter and of considerable length, it becomes desirable to brace them, one against the other, by a small cross-core, and this cross-core, when removed, leaves a small opening from one of the parallel tubes into the next. It is obvious to any mechanic, that the presence of this opening between the adjacent parallel tubes of the defendant radiator, is merely an incident of the casting operation."

It is hardly necessary, after the foregoing statement of the interpretation to be given to the language of claims 1 and 2, and of the

view taken of the defendant's structure, to discuss the effect of the license upon the issues here involved, or the question, whether defendant's radiator is of the type, form, or design expressly excepted by said license, to wit:

"Of four outer tubes, one or more cross-tubes, extending parallel with the shorter outer tubes, and a series of connecting tubes extending parallel with the longer outer tubes."

Manifestly, the language of this exception does not describe defendant's radiator. We are of opinion that defendant's radiator is of a form old in the art, and "is nothing but the old fashioned arrangement of a series of parallel tubes of substantially the same dimensions, connected across at the ends by large transverse tubes or 'headers,'" and does not invade the narrow field occupied by the appellant's invention and defined in claims 1 and 2 of the patent in suit.

The decree of the court below should therefore be affirmed.

COFFIELD MOTOR WASHER CO. v. A. D. HOWE CO.

(Circuit Court, N. D. West Virginia. September 8, 1909.)

1. PATENTS (§ 148*)—REISSUE—INFRINGEMENT.

Under Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393), which provides that a reissue patent shall have the same effect and operation in law as if the same had been originally filed in such corrected form, those who use or sell after the date of the reissue patent articles covered thereby become infringers, although they had lawfully sold them prior to the reissue by reason of an omission which was thereby corrected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 221, 222; Dec. Dig. § 148.*]

2. PATENTS (§ 328*)—INFRINGEMENT—WATER MOTOR.

The Coffield reissue patent, No. 12,719 (original No. 806,779), for a water motor, held valid and infringed on a motion for a preliminary injunction.

[Ed. Note.—For other cases, see Patents; Dec. Dig. § 328.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—CROSS-BILL.

Conceding that the defendant in a suit for infringement of a reissue patent may by cross-bill set up an interfering patent, and obtain a decree cancelling complainant's reissue for fraud, such cross-bill must at least set out the specific facts relied on to constitute the fraud.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. On motion for preliminary injunction and motion to strike out cross-bill.

The complainant has filed its bill in this cause, alleging the issuance to Peter T. Coffield on December 12, 1905, of letters patent No. 806,779 for water motors, the assignment thereof on March 20, 1906, by Coffield to the firm of P. T. Coffield & Son, the surrender by this firm of this original and the issue to it on November 12, 1907, of reissue letters patent No. 12,719 for the same invention, the assignment on May 28, 1909, of said reissue patent by said firm of P. T. Coffield & Son to complainant, a corporation under the laws of Ohio; that the defendant, a West Virginia corporation, with full knowledge of the rights of complainant under such letters patent and in violation thereof, are manufacturing and selling water motors substantially the same as those manufactured by complainant and protected thereby; that the validity of said reissue patent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has been upheld by this court in the cause of P. T. Coffield & Son v. Spears & Riddle Company. The prayer of the bill is for injunction and accounting. Filed with the bill as exhibits and in support thereof are copies of the original and reissue letters patent, the assignment thereof to complainant, the affidavits of Frank C. Wagner, Peter T. Coffield, and James L. Coffield, various pamphlets and advertising matter used by the parties, and letters received and sent between them touching the controversy. Upon this bill and exhibits the order of this court issued June 12, 1909, requiring the defendant company to show cause on July 13, 1909, why the preliminary injunction prayed for should not be granted, and requiring copies of the bill and exhibits to be served forthwith upon defendant, and allowing it to file and serve copies, affidavits, exhibits, etc., on or before June 30, 1909, and allowing complainant to file reply affidavits, exhibits, etc., on or before July 8, 1909. Under this order complainant has filed as of July 8, 1909, the "file wrapper contents of Howe & Orndol patent" and affidavits of James L. Coffield, Mathew Siebler, John T. Hoban, William F. Minnich, Frank J. Walsh, W. H. Myers, Samuel Brown, and A. J. Pocock.

On July 13, 1909, at the hearing, the defendant filed its "answer and cross-bill," the certified copy of an affidavit of Peter T. Coffield filed in the Circuit Court of the United States for the Southern District of Ohio in a suit of The A. D. Howe Co. v. P. T. Coffield & Son, the affidavits of E. J. Orndol, Royce A. Ruess, Ralph W. Howe, W. T. Terry, H. C. Ulrich, and L. L. Cotton, with certain advertising pamphlets and correspondence. The defendant in its answer sets up title by assignment to a patent applied for May 7, 1906, and issued January 15, 1907, No. 841,649, to Ralph W. Howe and Edwin J. Orndol for a water motor which it insists does not infringe complainant's one, presents a distinct and patentable improvement upon the latter, and that, on account thereof, the firm of Coffield & Son resorted to the subterfuge of securing its reissue patent No. 12,719 in order to cover the Howe and Orndol improvement. It is further alleged that prior to issue of complainant's original patent No. 806,779 a patent had issued to one J. L. Stetz, No. 516,410, for the same invention which is now owned by defendant; that by reason of its intervening rights complainant's reissue patent is invalid and inoperative as to defendant, and, inasmuch as complainant is manufacturing and selling motors under it that infringe its patent, it prays affirmatively in this answer that complainant be enjoined from so doing. On July 10, 1909, complainant filed a formal motion in writing to strike out its answer purporting to be a cross-bill praying affirmative relief as being filed without notice and without leave of the court. The cause has been elaborately argued orally and in briefs filed and submitted upon complainant's two motions to strike out the answer and for preliminary injunction.

R. J. McCarty, for complainant.

John J. Coniff and H. E. Dunlap, for defendant.

DAYTON, District Judge (after stating the facts as above). In the case of Peter T. Coffield & Son v. Spears & Riddle et al. (C. C.) 169 Fed. 641, I fully considered the validity of complainant's reissue patent No. 12,719 in view of the prior art, and therein stated that I had no trouble "in reaching the same conclusion arrived at by the Board of Appeals in the Patent Office, that Coffield, the patentee, was the first to use in connection with the elements of the mechanism springs which complete the stroke of the valve, and that, taken as a whole, the device is new, useful, and patentable." I further said in that case:

"As to the technical defenses touching alleged irregularities in the Patent Office in the issuing of the original and reissue patents without proper affidavits and evidence of inadvertence, accident, or mistake, it is to be remembered that no such irregularities will be assumed to have occurred, but, on the contrary, the granting of the patent is prima facie evidence that the law has been complied with, and fatal irregularities in the Patent Office must not only

be aptly pleaded but shown by full and satisfactory proof. In case the original patent has been surrendered and a reissued one has been granted, it has been held that such office proceedings can only be impeached for fraud."

After a careful reconsideration of the question, I can find no reason for doubting the soundness of these legal principles. In *Seymour v. Osborne*, 11 Wall. 543, 20 L. Ed. 33, it is said:

"When the Commissioner of Patents accepts a surrender of an original patent, and grants a new patent, his decision in the premises in a suit for infringement is final and conclusive, and is not re-examinable in a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patents that it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent"—citing *Battin v. Taggart*, 17 How. 83, 15 L. Ed. 37; *O'Reilly v. Morse*, 15 How. 111-112, 14 L. Ed. 601; *Sickles v. Evans*, 2 Cliff. 222, Fed. Cas. No. 12,839; *Allen v. Blunt*, 3 Story, 744, Fed. Cas. No. 216.

See, also, *Rubber Co. v. Goodyear*, 9 Wall. 788, 797, 19 L. Ed. 566, and *Railroad Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535.

I also held in the *Spears & Riddle Case* that *Coffield & Son* have brought themselves within the rules laid down in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, governing reissue patents, and to this conclusion I still adhere. Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393), provides:

"Every patent so re-issued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form."

Under this statute it follows that novelty dates from the original invention, that those who use or sell after the date of the reissue patent articles covered by it become infringers, although they had lawfully sold them by reason of the omission in the original patent prior to the reissue correcting such omission. *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *Stimpson v. Railroad Co.*, 4 How. 380, 11 L. Ed. 1020; *Agawam Co. v. Jordon*, 7 Wall. 583, 609, 19 L. Ed. 177; *Bliss v. Brooklyn*, Fed. Cas. No. 1,544; *Carr v. Rice*, Fed. Cas. No. 2,440.

With these principles to guide us, it seems clear to me that upon the pleadings as they now stand the single question for me to determine is whether or not the motors manufactured and sold by defendant infringe the reissue patent of complainant. In the *Spears & Riddle Case* I have fully described the mechanism of the *Coffield* motor, which I upheld under the reissue patent, and I refer to that case for such description. It is here sufficient to say that it is clear that *Ornold*, a selling agent of the *Coffields*, with full knowledge of their motor, left their employ, associated himself with *Howe*, and they two set to work to devise a motor that would perform the same functions as the *Coffield* one without infringing its patent. They admit that two attempts of theirs in this direction were failures, and had to be abandoned because they were infringements. The third one upon which they now rely differs from the *Coffield* one practically only in two particulars. First, it provides for the movement of the cylinder instead of the piston; second, it substitutes a larger single coil spring mounted on the piston rod for the two smaller coil springs carried on the stems of the exhaust

and inlet valves. The idea of movable cylinders with stationary pistons is clearly old and not patentable, as disclosed by the proceedings in the Patent Office where the claim for this was rejected as covered by patents to Fairclough No. 68,721, September 10, 1887, or Lappe (German) No. 15,234 of 1886. The substitution of the single coil spring mounted on the piston rod performs precisely the same function as the two smaller coil springs carried on the stems of the exhaust and inlet valves in the Coffield motor; that is, of imparting the final movement to the valves after said valves have been given their initial movement by contact with the cylinder heads. This is done in the Coffield motor by a spring attached to the valve striking the cylinder head, in the Howe & Orndol motor by the valve striking a plate attached to the spring; the only difference being in the form and location of the spring. The latter simply amounts to a mechanical equivalent for the former, and presents in my judgment no improvement over it. I think the Howe & Orndol motor to be a clear infringement of complainant's reissue patent No. 12,719, and therefore the preliminary injunction will be granted.

Touching the motion to strike out the answer of defendant in the nature of a cross-bill, it follows from the conclusion above reached that the affirmative relief prayed for in the answer cannot now be granted, and that the patent of Howe & Orndol No. 841,649 must upon final hearing be held invalid as infringing complainant's reissue one, unless defendant can successfully assail for fraud the granting of said reissue patent. Whether this can be done otherwise than by an original bill setting forth fully the facts constituting such fraud I have grave doubt. It is true that under section 4918, Rev. St. (U. S. Comp. St. 1901, p. 3394), contrary to the rules of Federal Procedure in other equity cases, it is not necessary for the defendant to file a cross-bill praying that complainant's patent be declared void, as the court, under this statute, can grant affirmative relief and declare either patent void, and some decisions hold may declare both void. *Lockwood v. Cleveland* (C. C.) 6 Fed. 721; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858; *Electrical Accumulator Co. v. Brush Electric Co.* (C. C.) 44 Fed. 602; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.* (C. C.) 31 Fed. 466; *Foster v. Lindsay*, Fed. Cas. No. 4,976; *Potter v. Dixon*, Fed. Cas. No. 11,325; *Palmer Co. v. Lozier* (C. C.) 69 Fed. 346. While this is true, it would seem to be also true, under general equity principles, that complainant should be informed specifically of the facts constituting the fraud relied upon to impeach his patent, and that the affirmative relief allowed under this statute should be based upon technical defects apparent on the face of the patent and to interference. Be this as it may, I have determined to give defendant the benefit of all doubt in the matter and will allow its answer to remain, reserving, however, to complainant the right to move for a more specific statement of the grounds of fraud and of the facts upon which the same are based to be set forth in a supplemental answer or cross-bill, if the defendant shall desire to pursue such issue farther, at this time indicating my opinion that the allegations contained in the answer as it now stands are not sufficient, if objection be made, to raise such issue.

WATERBURY BUCKLE CO. v. ASTON.

(Circuit Court, E. D. New York. August 2, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—SUSPENDER BUCKLE.

The Peller patent, No. 847,811, for a suspender buckle, was not anticipated, and discloses patentable invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Robert B. Killgore (George D. Seymour, of counsel), for complainant.

David J. Wagner (George A. Clement, of counsel), for defendant.

CHATFIELD, District Judge. On the 8th day of January, 1902, one Morris Peller, a resident of the borough of Manhattan, city of New York, filed an application in the United States Patent Office, upon which he ultimately received a patent, No. 847,811, on the 19th day of March, 1907. The entire interval between the filing of the application and the issuance of the patent was taken up by interference proceedings in the Patent Office, appeals to the Commissioner, to the Circuit Court of Appeals for the District of Columbia, and numerous rejections, amendments, and substitution of claims. Some of the matters occurring in this interference proceeding will have to be considered when we reach the point of determining whether novelty was shown by the Peller application, and compare his specifications and drawings with the patents and applications considered during these interference proceedings.

It appears from the testimony that the Waterbury Buckle Company, the complainant, who acquired the rights under Peller's application by an assignment upon the 7th day of July, 1902, have been manufacturing suspender buckles for a considerable period, and one of the exhibits in evidence is a card of sample clasps or front plates for suspender buckles, issued to the trade in 1901, showing designs of buckles and representing the practical form of the art at that time. Some of the buckles upon the sample card must be considered later in connection with the subject of anticipation as well.

At the time Peller filed his application buckles for use upon suspenders were generally of two kinds: (1) Those in which the webbing passed through a space between the upper part of the wire or metal frame and the lower portion or plate to which the attaching end of the suspender was fastened, with a toothed clamp so hung upon the upper part of the frame as to cause the teeth to press the webbing of the suspender against the back portion of the frame when the clamp was closed; and (2) the various forms of suspenders embodying a double webbing in which the portions of the buckle coming next to the body were sewed into the end of the webbing, the holding being occasioned by a clamp or toothed plate, performing similar functions to those in the first style described. Peller's idea was to remove the metal plate or frame which had to be worn next to the body in the first style of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

buckle, and to obtain the advantage of a single thickness of webbing at the point of clamping, by applying the toothed clamp at such a point with reference to the lower edge of the space through which the webbing passed, as to deflect the webbing from a straight line and cause the teeth of the clamp to press the webbing down upon this lower part of the frame, which, in turn, would be covered by the webbing of the returned end, thus shielding the entire back face of the buckle, so that no metal is exposed on the back of the buckle, and undue thickness and bunching is avoided. The testimony shows that while the Peller form of buckle required a slight amount of extra webbing, in that it is necessary for the webbing to pass down through the attaching portion of the suspender and back to the buckle, and thus in the aggregate was slightly more expensive to the manufacturers than a single-web suspender, nevertheless the demand, as soon as what may be called the Peller form of buckle was placed upon the market, became so great that 85 per cent. of all suspender buckles at the time of taking testimony were said to be of this general style.

In filing his original application Peller submitted drawings showing three separate metal parts to his buckle, one of which consisted of the wire frame; second, the clasp or toothed plate turning upon the pintle ends of the wire frame; and, third, a metal strap fastened across the lower part of the wire frame so as to form the edge across which the webbing would be deflected and held under pressure by the movement of the teeth of the clasp. In his original specifications Peller described this strap in the drawings above referred to, but in stating his claims did not differentiate from the ordinary old-style buckle of two pieces, merely saying that his buckle consists of "a body section having an open portion near its top and a locking-cap hinged to the top of the body." This general form of description is present in each claim as originally asked for, and seems to be deficient and to fail to describe Peller's idea, in that it is not made plain that he intended to limit his buckle to one having the open space at such a position with reference to the webbing and to the clamp or teeth, that the webbing would be caused to press down upon the upper edge of the back plate of the buckle, rather than against this back plate itself. The difference between these two constructions is the difference between the so-called "rustless buckle" and the old-fashioned styles.

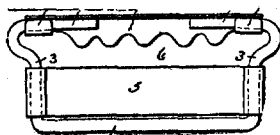
At various times in the Patent Office, nevertheless, amendments and changes were suggested and proceedings had with reference to applications filed by Stephen Percy Gibbons, Moses L. Rothschild, and Edward Cleary, Roswell A. Moore, Jr., Walter J. Siebert, George A. Weld, Dwight L. Smith, Ernest N. Humphreys, and Morris Peller. Peller was the senior applicant, and the result of the interference proceedings may be, so far as the other parties are concerned, disposed of by a reference to the final action of the Patent Office by which the patent was issued to Peller.

But during this interference proceeding the defendant Walter F. Aston on or about the 8th day of May, 1905, petitioned for the allowance of a patent upon the exact form of buckle now manufactured by the defendant, and substantially the exact buckle which the complainant has put upon the market under the Peller patent. It was called

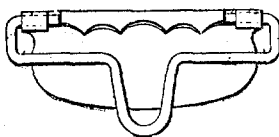
to the attention of Aston that the defense of over two years prior public use was urged against his application, and after some time he was substantially held in default, the interference proceeding went ahead, and nothing further was done upon his petition.

One of the parties to the interference proceeding, Dwight L. Smith, was represented by Messrs. Seymour & Earle, who represented Peller by substitution during the latter part of the proceeding, of which firm the counsel for the complainant in the present action is the senior member. Smith filed his application upon the 14th day of February, 1902, for what he called an improvement in "rustless buckles," stating that he did not claim to be the inventor of a rustless buckle, "in which the lever is constructed and arranged with reference to the buckle-frame so that the clamping edge of the lever will force the upper reach of the webbing over or substantially over the upper edge or top of the lower side of the frame, that being broadly the invention of Morris Peller and shown and described in his pending application, filed January 8, 1902, serially numbered 88,854." Smith's specifications and drawings did away entirely with the so-called strap of the Peller application, but carried the wire, forming the lower part of the frame of the Peller buckle, across in the position of the upper edge of the strap shown by Peller, with a loop or bend in the same plane with the rest of the frame, at the center of the webbing, and capable of insertion through the short end of the webbing in such a way as to both render unnecessary any stitching, and to furnish leverage to the various lengths of webbing and to the clamp itself when the strain was placed upon the various parts by the weight of the garment. The drawings inserted below will sufficiently show the points referred to.

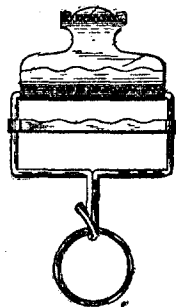
M. PELLER.
SUSPENDER BUCKLE.



D. L. SMITH.
BUCKLE.



G. LA CHAPELLE.
BUCKLE.



As a result of the substitution of Seymour & Earle as attorneys for Peller, and as a result of Smith's claim to an improvement upon the Peller buckle, the ultimate decisions in the interference proceeding seem to have been based upon the theory that Peller had in mind, and actually intended to describe, a buckle like that of the Smith application, with substantially but two members or parts, one of which was a clamp, and the other was the wire frame, the lower bar of this frame furnishing the clamping surface, but in the precise form in which

Peller first filed this application, he made this bar with the additional piece of metal or strap attached to the sides of the frame itself.

The defendant contends that it was merely mechanical improvement and not invention to remove the upper portion of the plate of the old two-piece buckle, and to furnish a clamping surface upon the upper edge of the plate so cut down. The complainant would seem to contend that it was merely mechanical improvement and not invention for Smith, or any of the other parties to the interference to see that Peller in his specifications and claims was describing in substance a suspender buckle of the form now manufactured by the various parties shown in the testimony. It is evident that Smith, who is shown by the testimony to have been the foreman of the factory for the Waterbury Buckle Company, which had been manufacturing buckles for Peller, and which purchased from him his invention, as has been stated, recognized the principle involved in the particular form of "rustless buckle" now on the market, and assumed that Peller's application disclosed this principle, even though Peller himself, and the solicitors who made the application for him did not at the outset claim the general form of the idea and device, and Peller even may not have been sufficiently familiar with such matters to realize the similarity between the general invention involved, and the particular form of the invention worked out in his specifications by means of a strap.

A number of patents which have been recited in the answer and testimony by the defendant as anticipatory, such as, Jones, No. 499,836, June 20, 1893, Abrams, No. 673,611, May 7, 1901, La Chappelle, No. 485,104, October 25, 1892, and others, would properly prevent Peller from obtaining a patent upon the claims which he originally submitted to the Patent Office. It is evident that Peller's claims as amended and modified within the rulings of the Patent Office would have anticipated the Smith application and those of every other petition brought into the interference, and the result of the interference proceeding, therefore, was correct in allowing Peller to so amend and substitute claims, and to finally obtain the issuance of his patent in broad enough language to cover the general principle shown in the present form of rustless buckle, unless it appeared from the record that Peller did not knowingly conceive an idea which necessarily involved the general proposition, and unless his original invention be limited to the particular form of the buckle with a strap, and it be held that he had no appreciation of the principle therein involved. In the latter case Smith or some of the later applicants were the real inventors and entitled to the patent, at least so far as its broad claims are concerned, unless the idea be held merely mechanical improvement and not the exercise of inventive genius. But it must be held as between the Peller application and use of the principles involved, and the Smith or other interfering petitions, that everything patentable in the idea was disclosed by the Peller buckle. The principle involved was that shown by the deflection of the webbing in such a way as to insure holding between the teeth of the clasp and the upper edge of the lower frame, together with opportunity to have the webbing pass through the buckle and to return in such a position as to cover the buckle and keep it out of contact with the wearer. It would seem, therefore, that the result of the proceeding

in the Patent Office was correct inasmuch as Peller's invention was the first one which showed this combination of construction and ideas, and every element necessary in the combination was disclosed by his application. And in the opinion of the court such an improvement involved invention and an advance upon anything shown by earlier patents or the prior art.

The defendant has called attention to a number of patents, of which the Harris patent, No. 368,529, August 16, 1887, Finney, No. 408,834, August 13, 1889, La Chappelle, No. 485,104, October 25, 1892, Abrams, No. 673,611, May 7, 1901, and Smith, No. 762,662, June 14, 1904, alone need be considered, and of which the defendant's expert picks La Chappelle's patent as being the closest in its teaching and discovery to the present form of rustless buckle. But none of these patents show all the features for which invention is claimed, and upon which the Peller patent was granted. The La Chappelle patent is not of the type which is now called "rustless," although but little metal is exposed at the back of the buckle. The clamping is done by means of pressure exerted between two plates, rather than by adjusting the webbing in such a position as to cause it to engage itself with the teeth of the clamp. The other buckles are either of the old form, in which pressure is against the face of a metallic plate, or large single-web buckles of another type entirely, and there is no evidence in the case showing the use of anything in the trade which would anticipate or disclose, so as to be the property of the public, the invention upon which Peller made his application, except in so far as to have conceived the idea would have been invention on the part of any one, if such an improvement had been devised at any time before Peller noticed the change which he later embodied in his application.

So far as Aston's own manufactures are concerned, and his attempt to enter the interference proceeding, it need only be said that whatever device he had was clearly anticipated by the Smith application, and in the view taken by the court, by the Peller buckle as well. The defendant's buckles are clearly infringements of claims 1, 2, 4, 5, and 6 of the Peller patent.

A decree may be entered upholding the validity of the complainant's patent under assignment from Peller, and holding the defendant as an infringer of the claims specified, with an accounting, and the costs of this action.

HARTFORD et al. v. WESTEN MFG. CO. et al.

(Circuit Court, D. New Jersey. September 4, 1909.)

1. PATENTS (§ 295*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A motion for a preliminary injunction to restrain infringement of a patent is addressed to the sound discretion of the court, and, to justify the granting of such an injunction, complainant's case must exhibit a right free from doubt or reasonable dispute by showing either, first, a prior adjudication sustaining the patent after a bona fide and vigorous contest, or, second, a continuous public acquiescence of such character as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be the equivalent of an adjudication, or, third, by clear and satisfactory evidence that the patent is valid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 474, 488; Dec. Dig. § 295.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

2. PATENTS (§ 328*)—INFRINGEMENT—RETARDING MEANS FOR SPRING VEHICLES.

A motion for preliminary injunction to restrain infringement of the Truffault reissue patent, No. 12,437 (original No. 695,508), for a frictional retarding means for spring vehicles, denied.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for infringement of letters patent, reissue number 12,437, original number 695,508, for a frictional retarding means for spring vehicles, granted to Jules Michel Marie Truffault March 18, 1902, assigned to Edward V. and George H. Hartford, two of the complainants.

On motion for preliminary injunction. Denied.

Dunn & Turk, for the motion.

Conrad A. Dieterich (Robert H. McCarter, of counsel), opposed.

RELLSTAB, District Judge. This is a motion for a preliminary injunction. To justify the issuing of a preliminary injunction, the case shown by the complainants must exhibit a right free from doubt or reasonable dispute. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583; *Hall Signal Co. v. Gen. Ry. Signal Co.*, 153 Fed. 907, 82 C. C. A. 653.

The letters patent, while prima facie evidence of validity, is not sufficient to warrant the granting of such an injunction, unless accompanied by other facts showing, first, a prior adjudication sustaining the patent after a bona fide and vigorous contest; or, second, a continuous public acquiescence of such character as to be the equivalent of an adjudication; or, third, that on the hearing it be shown by clear and satisfactory evidence that the patent is valid. *Palmer Pneumatic Co. v. Newton Rubber Works* (C. C.) 73 Fed. 218; *Bowers Dredging Co. v. N. Y. Dredging Co.* (C. C.) 77 Fed. 980.

Such an application is always addressed to the sound discretion of the court.

The bill is in the usual form to restrain the infringement of patents, and to recover damages incurred by such infringement. It alleges that other infringers, after notice and a more or less vigorous contest, acquiesced in complainants' rights under such patent, and that such patent was expressly adjudicated as valid in complainants' suit against Edward R. Hollander et al. by the United States Circuit Court of Appeals, Second Circuit. *Hartford et al. v. Hollander et al.*, 163 Fed. 948, 90 C. C. A. 308.

The moving affidavits fully sustain the several allegations of fact contained in the bill. The affidavits in opposition deny infringement and validity of complainants' patent, and set up a number of anticipatory patents.

Without attempting to determine the rights of the matter on these ex parte affidavits, a task always better performed on final hearing when the court has the benefit of searching cross-examination and more

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rigid investigation of disputed claims, it is sufficient for present purposes to say that enough doubt has been raised as to the validity of the complainants' patent to prevent the granting of a preliminary injunction, unless the adjudication cited removes the question of validity from present consideration. The case last mentioned does adjudicate such patent valid. Such an adjudication is not *res adjudicata* in another suit, even between the same parties, unless it appears by the record or extrinsically that the precise question was raised and determined in the former suit. *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Truman v. Carvill Mfg. Co.* (C. C.) 87 Fed. 474.

However, a final adjudication sustaining a patent which is the result of an honest, earnest, and efficient litigation, free from any suspicion or collusion or arrangement between the parties, or negligent abandonment of the defense, is conclusive on an application for a preliminary injunction in a subsequent suit. But all other adjudications are at most only persuasive, and it is open to the court in a subsequent suit to re-examine the case *de novo*. *Societe Anonyme Du Filtre Chamberland Systeme Pasteur et al. v. Allen* (C. C.) 84 Fed. 812.

Complainants' patent was first adjudicated invalid. *Hartford et al. v. Hollander et al.* (C. C.) 158 Fed. 103. The Circuit Court stated there were a number of reasons for reaching such conclusion. It gave but one, however, viz., that the patentee had in his reissue broadened the scope of his invention. In the trial court there was a strenuous contest, but in the Court of Appeals (S. C. 163 Fed. 948, 90 C. C. A. 308) the complainant as appellant appeared unopposed, the defendants having no further interest in the proceedings, having become bankrupt in the meantime.

The appellate court, after argument, reversed the finding below, and determined that the patent was valid, in doing so, however, expressly stating that it would consider only the reason given by the Circuit Court in holding the patent invalid and that it was not precluded from examining anew other questions and reaching a different conclusion should another case be fully presented; the language of the court on this subject being as follows:

"Upon this appeal the appellant only has appeared. Being, therefore, without the benefits accruing from the presentation of both sides of the case, we deem it advisable to consider only the particular grounds upon which the Circuit Court acted, and shall not consider ourselves precluded from examining anew other questions and reaching a different conclusion should another case be fully presented. Infringement of the first patent in suit by the defendants' device is obvious, and the patent, in the absence of anything urged to the contrary, appears to be valid unless the reasons stated by the Circuit Court establish invalidity."

The adjudication here is expressly limited to the one question, whether the reissued patent was invalid because it broadened the scope of the original patent.

In the present litigation other and, so far as adjudication is concerned, entirely new questions relating to the prior art are raised, which attack the validity of such patent. In view of this, such adjudication cannot be regarded as even persuasive on such other questions, and the motion for the preliminary injunction is denied.

In re BARTLETT.

(District Court, M. D. Pennsylvania. September 22, 1909.)

No. 923, in Bankruptcy.

1. BANKRUPTCY (§ 163*)—SECURED DEBT—PLEDGES—ENFORCEMENT.

Where a bank to which a bankrupt was indebted, at a time when the bank had no reason to believe the bankrupt was insolvent, advanced to him \$2,077.24 to compromise with his creditors on the strength of a bill of sale of the bankrupt's stock, the pledge was enforceable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 163.*]

2. BANKRUPTCY (§ 166*)—PLEDGES—PREFERENCES—REASONABLE CAUSE TO BELIEVE THAT DEBTOR WAS INSOLVENT.

Where a bankrupt, by executing a bill of sale of his stock to defendant bank, secured an extension of his loans from the bank and money to clear up his current accounts, the bank taking precautions to ascertain by an independent expert examination of the bankrupt's business that he was not then insolvent, the lien so procured was enforceable in bankruptcy to the extent of the note secured, but not for claims assigned to the bank in the course of the compromise made by the bankrupt with his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 254; Dec. Dig. § 166.*]

In the matter of F. W. G. Bartlett, bankrupt. On exceptions to the report of referee sur claim of First National Bank of Sayre to the proceeds of certain personal property. Exceptions overruled.

L. T. Hoyt and H. F. Maynard, for exceptions.

J. C. Ingham and E. M. Dunham, for claimant.

ARCHBALD, District Judge. In 1906 F. W. G. Bartlett, the present bankrupt, was engaged in the jewelry business at Sayre, Pa., and was indebted on merchandise account something over \$6,000, in addition to which he owed the First National Bank of Sayre \$4,300 for borrowed money, his wife \$1,000 and interest, his uncle, F. W. Bartlett, \$124.05, and Frederick Job \$196.95. Being embarrassed by his debts, he decided to try and effect a compromise with his creditors, which he finally succeeded in doing in August of that year, obtaining \$2,077.24 from the bank named for that purpose, which increased his indebtedness to it to \$6,377.24. To secure this, he gave the bank a note with confession of judgment for that amount, and also executed a bill of sale of his stock in trade, fixtures, and book accounts to R. F. Page, the cashier; it being agreed that the proceeds of sales and collections over and above the expenses of conducting the business and replenishing the stock should be applied to extinguishing the obligation, the bankrupt being given six months to redeem in. The bill of sale was executed August 28, 1906, and Page took immediate possession under it. He was recognized by the landlord as tenant of the building and paid rent. The insurance on the stock was transferred to his name, and additional policies taken out by him. A new set of books was opened and the business carried on in his name, the sign being changed, and the trade notified of his ownership, and a statement of his financial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

condition being required of him. Agents came to him to have him buy new goods, and none were bought except by his direction. The proceeds of sales also were turned over to him and deposited in bank and checked out by him. The bankrupt lived in rooms in the rear of the store, and was to remain as clerk and devote his time and attention to making sale of the stock, but was allowed to get whatever he could out of his workbench, which was not included in the bill of sale, and was supposed to be good for \$100 a month to him. After a few months' experience of this arrangement, however, the bank was not satisfied with it. Some \$840 was paid on their note, but the stock, according to their observation, was depleted very much more than that, the bankrupt getting the money, and not turning it over to them. They therefore entered up judgment December 13, 1906, issued execution, and caused the stock to be levied on. The bankrupt thereupon, on December 15, filed a voluntary petition in this court, and was duly adjudicated, the execution being stayed, a receiver appointed, and the store put in his charge. Subsequently, as trustee, he disposed of the property covered by the bill of sale, realizing \$2,900 out of it. The bank, through Page, laid claim to the property, and resisted the sale which was made subject to their rights, an understanding being had with the trustee that they should be remitted to the proceeds without prejudice. The trustee having filed his account, the referee awarded the fund to the bank, and it is to this action that exception is now taken.

There can be no question as to the right of the bank to be repaid out of the fund the \$2,077.24 advanced to the bankrupt to compromise with his creditors. The additional loan so accorded him was made on the strength of the bill of sale, and, as the bank had the right to dictate the terms on which it would part with its money, the security agreed to at the time must be respected in bankruptcy the same as elsewhere. *Hiscock v. Varick Bank*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; *In re Busby* (D. C.) 124 Fed. 469, 10 Am. Bankr. Rep. 650. Not that the bill of sale gave absolute title to the bank, or to Page as their representative; the property being merely held as collateral security. To complete the pledge, of course, it was necessary that possession should be taken, and without this it was not enforceable. *Fourth National Bank v. Millbourne Mills* (C. C. A.) 172 Fed. 177. But that formality was complied with, Page assuming charge, and his authority over the property being expressly recognized. It is true that the bankrupt remained in the store, but in a subordinate position, at his bench, as to which no one could be mistaken. Having done everything therefore to assert its rights, the bank is entitled to have the pledge enforced in its favor. It is of no consequence that the property was levied on at the instance of the bank as belonging to the bankrupt. It was his, subject to the pledge, and the execution was merely another means of divesting his interest. The referee was clearly right, therefore, in directing payment to the bank out of the fund of this much of its indebtedness.

But the rest of the claim is not so easily disposed of. As to the existing indebtedness of \$4,300 at the time the bill of sale was given, there was an apparent preference, which having been secured within

four months of bankruptcy was subject to avoidance. It was only voidable, however, in case the bankrupt was insolvent, and there was reasonable cause to believe that a preference was intended, both of which are disputed. The bankrupt, of course, was embarrassed; his condition being such that he had to go to his trade creditors with a compromise. But embarrassment is not always insolvency, although it suggests it, and the bank was therefore put on inquiry. The bank knew, also, that it was being secured in full, where other creditors were getting but a fraction. And while it supposed that all the indebtedness outside of its own, except that of Frederick Job, was taken care of by the compromise, it ran the chance of there being others, and, as it now turns out, the bankrupt also owed his wife and uncle.

There are other considerations, however, by which the bank is blameless. It may be conceded that, except for the compromise, the bankrupt was insolvent, his indebtedness being close to \$12,000, and his assets, at top figures, several hundred dollars less than that. But, if he was, the bank had no idea of it. And they took pains to inform themselves. Hendelman, an experienced jeweler, made an inventory for them and reported the stock and fixtures on a loan basis, 25 per cent. below cost, as worth \$7,425.76, with good accounts of a \$1,000; beside which there was the Massachusetts real estate worth \$400 or \$500; making a total of about \$9,000. Against this, with the reduction secured by the compromise, which must be considered in the reckoning, there was but \$6,500 of indebtedness that they knew of, including their own, which left a fair margin. The bankrupt, also, three months before that had made a statement showing that he was worth a good deal more than this, which, to a certain extent, they had the right to rely on. And the very offer of a compromise suggested an excess of assets, without which there was no inducement for it. With everything taken care of in this way, except their own and the small debt of Job, and more than enough property, as supposed, to meet it, how can it be said that in taking the security which they did they had reasonable cause to believe that they were getting an intended preference over other creditors? The fact is that the transaction was nothing more than one of ordinary business character, the bankrupt by a pledge of his stock securing an extension of his loans at bank, and at the same time getting money to clear up his current accounts, and go on, which bankruptcy does not assume to interfere with. The pledge, as so made, being good, therefore, not only for the indebtedness created at the time, but for the past indebtedness also, the proceeds of the sale, so far as it would go, must be applied to its repayment. The bank, of course, can only claim on the note, and not for the debts which were assigned to it in the course of the compromise, and the proof of debt, if it is to stand at all, not having been filed within the year, is to be corrected accordingly. The bank is also entitled only to the proceeds of the property covered by the bill of sale, and not to the balance shown by the account of the trustee, assuming that there is a difference. But subject to these restrictions, having the right, by virtue of the pledge, to the repayment of the debt which it was given to secure, the money was properly awarded to the bank, and the exceptions to the action of the referee must therefore be overruled.

In re DOBBS.

(District Court, N. D. Georgia. July 18, 1909.)

BANKRUPTCY (§ 399*)—EXEMPTIONS—FINANCIAL CONDITIONS—CHANGE—CONCEALMENT OF ASSETS.

Where a bankrupt made a statement to a commercial agency on July 23, 1907, that his assets aggregated \$5,750 and his total indebtedness \$1,700, and his schedules filed June 11, 1908, showed his assets to be \$2,000 and his total indebtedness \$2,616.27, he having given no satisfactory explanation for the change and having kept no satisfactory books of account, his application for exemptions should be denied under a state law providing that a debtor shall forfeit his right to exemptions if he is guilty of fraud in concealing from his creditors any part of the property which he possesses at the time he seeks the exemption, etc.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

In Bankruptcy. Application for exemption.

Moore & Pomeroy, for creditors.

E. H. Clay and Geo. L. Bell & Son, for bankrupt.

NEWMAN, District Judge. I am compelled to differ with the referee as to the conclusion reached in this case. He approved the action of the trustee in setting apart an exemption to the bankrupt of an equity in a house and lot in Marietta, valued at \$1,150, and \$450 in cash.

The record, to my mind, brings this case clearly within the rule stated by this court in: *In re Waxelbaum* (D. C.) 101 Fed. 228; *In re Williamson* (D. C.) 114 Fed. 190; *In re Stephens* (D. C.) 114 Fed. 192; and *In re Boorstin* (D. C.) 114 Fed. 696.

It appears from the record that the bankrupt made a statement to the R. G. Dunn Company on July 23, 1907, in which statement he represented that his assets aggregated \$5,750, and his total indebtedness \$1,700. The schedules in bankruptcy, filed June 11, 1908, show his assets to be \$2,000 and his total indebtedness \$2,616.27. I have gone over the evidence very carefully, and the bankrupt fails to make any satisfactory explanation of this at all. He appears to have kept no satisfactory books of account from which the facts as to what he had done with his property and how there had been such a remarkable change in his business could be ascertained.

In the *Waxelbaum* Case it was said by this court:

"The fact alone disclosed by the referee that, 11 months before the petition in bankruptcy was filed, the bankrupt had a large amount of stock and a very small amount of indebtedness, and that at the time the petition was filed he had a very large amount of indebtedness and a comparatively small amount of stock, without any more satisfactory explanation than is shown in the record in this case, would be sufficient to defeat the exemption."

Perhaps the discrepancy in this case is not so clear as it was in the *Waxelbaum* Case; but it certainly is insufficient for the bankrupt, when he comes into court and asks for an exemption of \$1,600 as against his creditors, to give no more satisfactory explanation of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

how his financial condition underwent so great a change than is shown by the evidence here.

The action of the referee is disapproved, and the exemption denied.

UNITED STATES v. BARTLETT et al.

(District Court, E. D. New York. August 4, 1909.)

1. EMINENT DOMAIN (§ 237*)—CONDEMNATION OF LAND BY UNITED STATES—AWARD OF DAMAGES.

Awards of damages by commissioners for lands condemned by the United States for fortification purposes confirmed.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 237.*]

2. EMINENT DOMAIN (§ 233*)—CONDEMNATION PROCEEDINGS—DAMAGES.

The fact that a petition by the United States for condemnation of land states that it is to be used for "erecting fortifications and other purposes incidental thereto and connected therewith" does not preclude commissioners, in awarding damages, from considering the land in connection with adjoining land already owned by the government.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 233.*]

On Exceptions to Report of Commissioners.

William J. Youngs, U. S. Atty., and Selah B. Strong, Asst. U. S. Atty.

Lloyd M. Howell, for defendants.

CHATFIELD, District Judge. It would seem that the report should be confirmed. No erroneous theory of law or bias is shown, and the commissioners, while using considerable latitude in hearing testimony, did not show by the record any idea of unfair use of the evidence which was presented. The land taken is not extensive enough to permit of the erection of fortifications which would greatly damage adjoining property, if the land now owned by the government were actually covered by forts. Any use of the land already owned could not be considered as within the scope of this proceeding, and the damage suggested by the erection of guns would be principally the result of using the present reservation, which the government has the right to do. The evidence as to grading, etc., is only corroborative of the situation indicated above, and should not be judged by itself. Hence it was not error to receive it for proper consideration.

The questions of value and of actual conditions and possibility of use of the upland and beach raise issues of fact, which the commissioners, after viewing the land, had full authority to determine, and cannot be disturbed. It is doubtful if the cottagers have any title to use the beach in question, except by permission or lease from the owners, and the values shown by previous purchases did not cover any conveyance of such beach rights. No satisfactory evidence is offered that purchasers would not buy if they could not use the 96 feet of more or less sandy beach taken by the government, and testimony that all of the adjoining property would be substantially worthless, or that three-quarters of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the value would be taken away by the ownership by the government of the land in question, is too speculative to be satisfactory.

The petition and decree state the object for which the land is condemned as "erecting fortifications and other purposes incidental thereto and connected therewith"; but the argument that this precludes the commissioners from considering the land to be taken in connection with that already owned, and the contention that the result must be viewed as if the present condemnation were separately for a tract to be used for mounting heavy guns, is unfounded, in view of the actual situation. The exact method of computation and the ratio of allowance is not indicated by the report; but the commissioners viewed the land, heard all the evidence, and apparently decided the issue of value thereon. Their determination, under the circumstances, is final, so far as this court is concerned, and the report will be confirmed.

DUKE v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. July 20, 1909.)

1. COURTS (§ 353*)—FEDERAL COURTS—STATE PRACTICE—NEW TRIAL.

On motions for new trial, federal courts act independent of any state statute or practice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. § 353.*]

Following state practice, see notes to *O'Connell v. Reed*, 5 C. C. A. 605; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 393.]

2. NEW TRIAL (§ 6*)—DISCRETION.

A motion for a new trial is addressed to the legal or judicial discretion of the trial court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

3. NEW TRIAL (§ 27*)—FEDERAL COURTS—DISCRETION.

The court will not grant a new trial unless it is reasonably clear that prejudicial error has crept into the record when it appears that the verdict is for the right party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 40; Dec. Dig. § 27.*]

4. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVENESS OF VERDICT.

An objection that the verdict is excessive is available only on a motion for a new trial in the trial court, and cannot be considered on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

5. DAMAGES (§ 228*)—NEW TRIAL (§ 162*)—CONDITIONS OF DENIAL—EXCESSIVE DAMAGES—REMITTITUR.

A federal court cannot arbitrarily order a remittitur from an excessive verdict, and can only give plaintiff an election to file a remittitur as a condition to the court denying a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228; * New Trial, Cent. Dig. § 324; Dec. Dig. § 162.*]

6. DEATH (§ 99*)—EXCESSIVE DAMAGES.

Deceased at the time of his death was 29 years old, with a life expectancy, if he had been in normal health, of 36 years. He was married

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in 1900 at the age of 20, and during the succeeding nine years, while apparently industrious, had spent several thousand dollars of his wife's estate and all he had made himself, leaving at his death only \$250. Before marriage he taught school, and after marriage did hauling, stacked lumber in a sawmill, worked on a farm a year, and then began braking on defendant's railroad, having contributed to his family, consisting of wife and five children, an average of about \$34 a month. During his marriage he had suffered from a bronchial cough, for which he had been confined in a hospital, where it was discovered that one of his lungs was dead, and a physician testified that this condition would greatly shorten his life. *Held*, that a verdict for \$17,545 was excessive, and should be reduced to \$6,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

7. DEATH (§ 86*)—EMPLOYER'S LIABILITY ACT—DAMAGES—LOSS TO CHILDREN.

In an action for the death of a railroad brakeman under the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65), providing that the recovery shall inure to the benefit of deceased's family, an instruction permitting a recovery for the loss sustained by decedent's children, consisting of their loss of care, attention, instruction, and training, from their father's death, was not erroneous.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 112–114, 119; Dec. Dig. § 86.*]

8. DEATH (§ 95*)—AMOUNT OF RECOVERY.

In an action for wrongful death, the amount of recovery depends on the age, character, earning capacity, habits, and morals of the deceased, and of his care, attention, and solicitude for his children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111–115, 120; Dec. Dig. § 95.*]

9. TRIAL (§ 125*)—ARGUMENT OF ATTORNEY—MISCONDUCT—DUTY OF COURT TO CORRECT.

Where, in an action for wrongful death, it appeared that decedent left a wife and two children of tender years, it was improper for plaintiff's counsel in argument to draw a picture of an imaginary wayward son or daughter at the critical period when prone to go astray unless controlled by a father's care, and from this draw the inference that no amount of money could compensate for such things, and make it the basis of a verdict, and the court of its own motion should have stopped counsel, and admonished the jury to disregard such argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303–307; Dec. Dig. § 125.*]

Action by Mrs. Clyde Duke, administratrix, etc., against the St. Louis & San Francisco Railroad Company to recover damages for the death of her husband. Plaintiff had judgment for \$17,545, and defendant moved for a new trial. Motion granted unless plaintiff file a remittitur of her recovery above \$6,000.

O. L. Miles, for plaintiff.

B. R. Davidson, for defendant.

ROGERS, District Judge. This is a motion for a new trial. I shall notice only two grounds of the motion, to the effect that the verdict was not warranted by the evidence, was excessive, and appeared to have been given under prejudice and passion. It is necessary to refer to the practice in the federal courts in relation to motions for new trial before addressing myself to that question.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In *Fishburn v. Chicago, Milwaukee & St. Paul Ry.*, 137 U. S. 61, 62, 11 Sup. Ct. 8, 34 L. Ed. 585, Chief Justice Fuller said:

"In regard to motions for new trial and bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which trial is had." *Mo. Pac. Ry. Co. v. Chicago & Alton Ry. Co.*, 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309.

This seems to be as well settled as any principle of law can be. *Indianapolis Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *In re Chateaugay Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; *Vanstone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961. See cases cited in paragraph 1339, p. 2283, volume 2, *Digest United States Supreme Court Reports by L. C. P. Co.* In *Indianapolis R. Co. v. Horst*, 93 U. S. 301, 23 L. Ed. 898, Mr. Justice Swayne, in discussing an assignment of error that "the motion for a new trial should have been granted in the court below," said:

"In the courts of the United States such motions are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this court, and not a mere matter of proceeding or practice in the Circuit or District Courts. *Henderson v. Moore*, 5 Cranch, 11, 3 L. Ed. 22; *Doswell v. De La Lanza*, 20 How. 29, 15 L. Ed. 824; *Schuchardt v. Allen*, 1 Wall. 371, 17 L. Ed. 642. It is therefore not within the act of Congress of June 1, 1872, and cannot be affected by any state law upon the subject. Judgment affirmed."

Of course, the discretion referred to is a legal, a judicial, and not an arbitrary, discretion. See cases cited on page 2284 of the Digest last cited. See, also, *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321, decided by the Sixth Circuit Court of Appeals, opinion by Taft, Judge.

This motion for a new trial is therefore addressed to the sound discretion of the court. Naturally all courts are reluctant to grant motions for new trial, and for divers reasons will not grant them unless it is reasonably clear that prejudicial error has crept into the record, and they are always reluctant to do so when the court is convinced that the verdict is in favor of the right party. I felt at the conclusion of this trial that the plaintiff was entitled to recover. I am clear now on the record as then made that she was entitled to a verdict. Every effort was made by the court to shut out incompetent evidence, and I do not believe any vital error was committed against the defendant in that regard. The sole question, therefore, to discuss is whether the verdict was excessive. The serious importance of this question to the defendant appears when it is known that, if error has been committed by the jury, it can be corrected in no other way than by the trial court on a motion for new trial. In *Railroad Co. v. Winter, Administrator*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71, the Supreme Court of the United States said:

"Whether the verdict was excessive it is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371: 'It may be that, if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that

is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact or the weight to be given to the evidence which was properly admitted." *Southern Pac. Co. v. Cavin*, 144 Fed. 348, 75 C. C. A. 350.

Nor can the trial court arbitrarily order a remittitur for reasons which will clearly appear by reading *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110. If a remittitur is entered, it must be at the election of the plaintiff. It may, however, be at the suggestion of the court that, if not done, a new trial will be granted. Some courts hold that in personal injury cases where the damages are excessive the new trial should always be granted.

We now come to consider the verdict. The sum assessed by the jury in this case was \$17,545. This sum, if invested at 10 per cent., which is what money was shown to be worth in the neighborhood where plaintiff resides, would yield \$1,754.50 per annum. If invested at 8 per cent., it would yield \$1,403.60. If invested at 6 per cent., it would yield \$1,052.70. If invested at 4 per cent., it would yield \$701.80, and, in either event, at the end of the full life expectancy of the deceased—i. e., 36 years—the principal remain untouched. Let us examine the proof. The deceased was 29 years of age. His life expectancy was about 36 years. He was married in 1900, at about the age of 20, and killed in a derailment while a brakeman on one of defendant's trains on the 28th of March, 1909. In the nine years of his married life (which embraced all of his adult years), while apparently industrious, he had spent several thousand dollars of his wife's estate, and all he had made himself, and his estate at his death amounted to about \$250. Before his marriage he had taught a country school, and had nothing when he married. After his marriage he had driven a team used in hauling (presumably his own). For a time he had stacked lumber at a sawmill, had farmed one year, and then began braking on a railroad. What his earnings were prior to going into the service of the defendant company, 33 months before his death, are not shown. During the 33 months of his service as brakeman in defendant's service his total gross earnings were \$2,139.92; the average monthly gross earnings \$64.84. After deducting certain sums held by the defendant company to pay for meals, hospital expenses, dues, etc., upon his order, the actual amount he drew from the company in cash was \$1,740.42, or a monthly average of \$52.74. This estimate does not cover the earnings during the month he was killed, which amounted to \$76.26, covering 26 days' service in that month. Out of the \$1,740.42 actually drawn should be deducted at least for his actual personal expenses, such as clothing, food when not on the road, doctor's bills, medicines, and other incidental expenses. If one-third of the \$1,740 be treated as going to his personal expenses, then he could not have appropriated in excess of \$1,111.28 to his family during the 33 months next prior to his death, or an average of about \$34 a month, or \$408 per annum. Three per cent. on the verdict would yield an annuity of \$526.35, and leave at the end of the life expectancy the entire amount of the verdict untouched. But it is said that, in addition to such sums as the evi-

dence shows plaintiff appropriated to the support of his family, his children are entitled to recover for the loss of care, attention, instruction, and training resulting from the father's death, and the jury were so instructed. That seems to be the settled law in some of the states, including Arkansas. But I am driven to confess, upon a re-examination of this case, that I am unable to find any federal case which recognizes the doctrine to that extent, and it may be that the instruction is erroneous. I have, however, found two cases in the federal courts bearing upon the subject. In *Spiro v. Felton* (C. C.) 73 Fed. 91, Clark, District Judge, held under a statute of Tennessee for an injury causing death, the recovery under the Tennessee statute being for the benefit of the widow and next of kin of the deceased, evidence of the number and ages of the children of the deceased is competent; and in *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624, under an act of Congress passed February 17, 1885 (chapter 126, 23 Stat. 307), under an act similar to the Lord Campbell act, it was held that:

"It is not error to charge a jury that in estimating damages they may take into consideration the age of the deceased, his health and his strength, his capacity to earn money as disclosed by the evidence, his family and who they are and what they consist of, and from all the facts and all the circumstances make up their minds how much the family would probably lose by his death."

And in that case the court say:

"The injury shown to a family, consisting of a widow and helpless young children, who depended for support entirely upon the labor of her husband and father, whose death was caused by the wrongful act of others, is much greater than would be done to any next of kin able to maintain themselves and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance."

An examination of the statute under which that decision is made will disclose that, though it is couched in different language, the substance is practically the same as the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65) under which the case at bar was brought, and it is expressly provided in that statute that the recovery shall inure to the benefit of the family of the deceased. This case so nearly supports the instruction to which I have referred that I should not feel inclined to disturb a verdict based upon the assumption that the instruction given by the court in this case was error. It is but a single step—it seems to me now a logical step—from the instruction given by the court to the principles recognized in the cases to which I have referred. It may be that upon an exhaustive examination I may find that the federal court does not go as far as the instruction went, and in that event, of course, this court will follow the federal authorities.

But, to revert to the question of the right of recovery on account of the loss to the children of the care, attention, instruction, and training by reason of their father's death, in the case of the *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85, that very question was before the court. The recovery in that case was \$10,000. In that case McCulloch, J., said this:

"The testimony fairly establishes the fact that the deceased contributed to the support of his family as much as \$350 per annum in addition to his earn-

ings in supervision of his farm, and that the present value of his annuity in that sum for his expectancy would be \$4,690. He owned a small farm of 80 acres of land, and was out of debt. It is also shown by undisputed testimony that he was a very industrious man, of good moral character, and was especially solicitous as to the mental and moral training of his children; that he was a kind and indulgent father, provided well for his family, and gave much attention to the proper instruction and education of his children. He had five children, the youngest of them being only two years of age at the time of the accident. This is a well-recognized element of damages in suits of this kind for the benefit of minor children, and it is held to be for the jury to say from all the facts and circumstances found what will be a fair compensation to the children for the pecuniary loss of the care and attention of the father in the way of training and instruction. *Railway Co. v. Sweet*, 60 Ark. 559, 31 S. W. 571; *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472."

The judgment in this case was affirmed, and on motion for a rehearing the matter came up for consideration again, and section 6217, Kirby's Dig. (cited by plaintiff's counsel), in relation to motions for new trial, was held unconstitutional, and, after a careful reconsideration of the evidence, Judge McCulloch said:

"We said in the former opinion that the evidence warranted a verdict for \$4,690 damages to cover the probable contributions of the deceased to the support of his family. This is certainly the utmost limit to which the jury should have gone upon this element of damages. If we indulge in the presumption that the jury confined the verdict to the limits warranted by the evidence as to this element, it leaves the sum of \$5,310, which must have been assessed to cover damages for the loss of the care, attention, and moral training of the father to his children."

Encountering and discussing at some length the question of fixing any proper sum as compensatory for the loss of the care, attention, and moral training of the father to his children, and recognizing that the sum is indeterminate and can be ascertained by no fixed rule, or measurement, but must be left to the sound discretion of the jury, the court nevertheless concludes that there must be some limit to the amount allowed on this account, and it is the plain duty of the appellate court to see that such limits are not exceeded, and, after its full consideration, required the plaintiff to enter a remittitur of \$2,000, leaving the judgment to stand for \$8,000.

It cannot be fairly said in the light of the testimony in this case that the deceased measures up to a higher standard than that laid down by the court in the *Mathis* Case. *Mathis* had acquired a home. He was out of debt; he was industrious and of good moral character; he was especially solicitous as to the mental and moral training of his children; he was a kind, indulgent father; he provided well for his family, and gave attention to the proper instruction and education of his children, of whom there were five, the youngest being two years of age. In the case at bar the deceased had acquired no home; he was industrious, sober, and of good moral character; he seemed to be interested in the education of one of his children, the other being too small. There is nothing to show that he was not kind and indulgent; but, after all has been said, the inevitable conclusion follows from the facts already stated that he was unsuccessful in his business affairs. Instead of having accumulated, he had, to a large extent, dissipated the inheritance of his wife.

In *Railway Co. v. Maddry*, 57 Ark. 307, 21 S. W. 472, it appears
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that Maddry was 52 years of age, and drew a pension of \$72 a month, which it was reasonable to suppose he would continue to draw during the full period of his life. He had been a postmaster, a school director, a promoter of schools, and there was evidence tending to show that he was industrious in his habits and entitled to the respect of those who knew him, and that he was an affectionate and dutiful father, who tried to rear and educate his children properly. The verdict in that case was \$7,500, and the case was affirmed, but Judge Hemingway, who delivered the opinion of the court said, in reference to the amount of the verdict:

"This is certainly a border case, and we are convinced that the jury went very near the limit upon its power. It may be that this case illustrates the evil to be apprehended in administering the law; but, if this is true, it is inherent in the law, and can be remedied only by the power that made the law. We have given to the consideration of this case much time and the most careful deliberation, seriously apprehending that it exacted too much of the defendant, but our conclusion is that there is no error for which we can reverse the judgment."

In the Mathis Case referred to the Supreme Court abandoned the position that it could not remedy an excessive verdict. No one can read these two cases without recognizing the fact that the verdict must bear a just and proper relation to the testimony. The amount to be recovered is made to depend upon the age, the character, the earning capacity, the habits and morals of the deceased, and of his care, and attention and solicitude for his children; so that the jury in passing upon questions of this kind cannot proceed arbitrarily, but their verdict must have a proper relation to the facts developed in the trial. Even where recovery is sought for bodily suffering and mental pain, Judge Sanborn held in *Southern Pacific R. Co. v. Hetzer*, 135 Fed. 274, 68 C. C. A. 28 (1 L. R. A. [N. S.] 288), that:

"In actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury."

The opinion distinctly denies any recovery for damages growing out of mortification or distress of mind from the contemplation of the crippled condition and its effect upon the esteem of his fellows, and adds that:

"Mental pain which is inseparable from the physical suffering caused by the injury is too remote, indefinite, and intangible to constitute an element of the damage in such a case, and evidence of it is inadmissible." *Chicago, R. I. & P. R. Co. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552; *McDermott v. Severe*, 202 U. S. 601, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.

And in the matter of the recovery for future pain and suffering only such damages can be recovered as are reasonably certain to result from the injury, and not such as are merely probable or likely. *Chicago, M. & St. P. R. Co. v. Newsome*, 154 Fed. 665, 83 C. C. A. 422. Such damages could be recovered in no case unless the proof in the case justified the finding of the existence of the facts from which such damages may be reasonably inferred. But it was argued, first to the jury, and afterward to the court on this motion, that the jury had a

right to consider what it was said is generally known, that many young men accumulate nothing in early life; that they stumble and fall and get up and try again, showing courage and determination to do, and in after life succeed and accumulate. This is undoubtedly true of a certain percentage of men generally, and it is untrue of a certain percentage of men generally. If the jury in the exercise of their experience might consider this fact without evidence, then the matter becomes one of pure speculation, and the speculation must inevitably be as to which one of the two classes the deceased belonged. If they should judge his future by his past, they would be compelled to say that it gave but little promise of his ever appropriating a great deal more to his family than he was appropriating at the time of his death. If they should judge his future without reference to his past, and determine that in the future he would succeed, they must do that without any testimony at all, and would at once find themselves in the realm of conjecture and speculation. Such matters are wholly speculative and entirely too remote.

But there is another element in this case which is not found in the Mathis Case or in the Maddry Case. It is that element which relates to the physical condition of the deceased, and directly affects the question of his life expectancy. Counsel for the plaintiff seemed to treat this aspect of the case lightly. It impressed the court very differently. From the proof it appears that he had been troubled with a bronchial cough during his married life; that for some months before his death it had become worse; that in December, before his death in March, he had felt called to consult a physician with reference to his condition. It appeared that he was suffering with a dry, hacking cough, from night sweats, from a slow fever in the evening; and that after frequent visits to this physician he was advised to go to the hospital provided by the employes of the defendant railway company for their own use at St. Louis. There he underwent a careful and a critical examination by the physician in charge of that hospital, and it was found that one side of his chest was retracted; that his lung was dead; that no air seemed to penetrate it, and that one lung was performing all the service; that he came from a family three brothers of which had died early from malarial hæmaturia; that his wind was short; that he was at times dizzy from vertigo. This testimony was entirely undisputed. If it were not true, it cannot be that his widow was not advised of it. His immediate friends must have had more or less knowledge of it. But the plaintiff offered no evidence to combat it; and, when this condition of things was submitted to Dr. King, a reputable physician, as an expert, and inquiry made as to his physical condition, he said that he would consider it very much impaired, and that it would shorten his life very much, that the lung would never be restored, and that the disease would likely be progressive, and likely to culminate in tuberculosis, and that the fever from which he suffered was malarial or tubercular, and that he would regard his condition as grave. The case, as considered up to this time, is upon the theory that he was a sound man, and that there is no substantial reason why he might not live out his life expectancy; but the conditions just

stated cannot be overlooked. They are of the most serious character, and, if the information was in the possession of his widow or those familiar with his previous history, and no explanation was offered, it must be assumed that, if it had been offered, it would not have been favorable to the deceased. Counsel insisted that this character of testimony should have been produced by the defendant; but the court thinks the rule and the reason of the rule is the other way. The defendant was not in possession of the private history of the deceased, except as disclosed by himself or of his physical condition prior to his death further than it was developed by the testimony already referred to. But, as stated, the widow must have been, for they were living together, and had been for nine years, and whatever his physical condition was she must have known much of it. So his family physician and friends must have, to some greater or less extent, been familiar with the condition of his health. In *Vicksburg & Meridian R. Co. v. Putnam*, 118 U. S. 556, 7 Sup. Ct. 3 (30 L. Ed. 257), the Supreme Court of the United States said:

"Life and annuity tables are formed upon the basis of the average duration of the lives of a great number of persons. But what the jury had in this case to consider was the probable duration of this plaintiff's life and of the injury to his capacity to earn his livelihood."

So, in the case at bar, one of the questions for the jury to determine was whether or not the deceased would live out the term of his life expectancy. If he would not, then no recovery could be had for any loss that might flow from his death to his widow and children beyond the life period of the deceased. It is said the jury passed upon this question. If they did, they passed upon it with no other evidence than that offered by the defendant of his physical condition. There was no controversy about his condition. It may be that one suffering as plaintiff was shown to have been suffering could continue in the service in which he was engaged, and possibly be better for it at milder seasons of the year, and yet suffer and suffer seriously, as the proof shows he was suffering, during the winter months preceding his death. It was for the jury to consider in the light of this testimony what the probable duration of his life was, and that must be based not upon speculation, but upon the testimony in the case. In *Louisville, E. & St. Louis Railroad Company v. Clarke*, 152 U. S. 242, 14 Sup. Ct. 582 (38 L. Ed. 422) the court said:

"The age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings were all proper elements of inquiry as to the compensation proper to be awarded on account of his death."

In the case at bar Duke's probable expectancy of life was perhaps the most material factor, so far as the amount of recovery was concerned. If his earnings, however large, were only to continue for a few years or perhaps less, they could not be the basis for any considerable damages for the loss of life.

I think I ought to say in this case that I am of the opinion that the jury were misled by the earnestness and zeal and pathetic appeal made to them by plaintiff's counsel in the closing argument. One argument made in the closing of the case I regard as unfair, unwarranted by any

evidence in the case, purely speculative, outside of the record, and well calculated to bring about exactly the result which occurred, an excessive verdict. It was not objected to by defendant's counsel, but the court thinks now he was himself at fault in not on his own motion stopping counsel and admonishing the jury to disregard it. *Union Pac. R. R. Co. v. Field*, 137 Fed. 14, 69 C. C. A. 536. It was, however, unexpected, without precedent in the experience of the court in such cases, and for the moment did not impress the court as it has since and upon reflection and closer examination of the authorities. The conclusion arrived at is that all damages must have some substantial basis in the evidence, which was wholly wanting in the record of this case in the respect mentioned. To draw a picture of an imaginary wayward son or daughter at that critical period when they are prone to go astray, saved by the timely interference of a strong and tender and watchful father, and from this imaginary incident draw the inference that no money could compensate for such things, and make that the basis of a verdict in damages in a case where there could be no such evidence, since the only children of deceased were of very tender years, and what might occur when they had reached the period in life when such a spectacle as was pictured could occur, is obviously going beyond the realm of legitimate discussion upon the evidence adduced, and indulging in speculation as to conditions which may never occur as the basis for the recovery of damages. The law recognizes no such rule. Such damages are too remote, indefinite, uncertain, and visionary. The zeal of counsel led him beyond the realm of legitimate discussion, and the court was derelict in not instantly condemning the argument and admonishing the jury that it should be disregarded. Personal injury cases have become the most fruitful source of litigation. Many of them are meritorious as tending to make common carriers more careful of human life, and as making some provision for the victim families of the unfortunates; but it must be remembered that the case at bar is not one for punitive damages. The court is satisfied on the record that the derailment in this case was the result of the reckless and dangerous speed of the train of the defendant, in violation of its orders, the fault of the engineer and conductor. In such cases only compensatory damages can be recovered, and the court should see that no jury, however honest and faithful and conscientious and good citizens they may be, shall be allowed by their verdict to disregard the rule stated, ignore the evidence, and fix another rule for the measure of damages unrecognized by the law, and under the circumstances shocking to the mind of the court. In *Bolen-Darnell Coal Co. v. Williams*, reported in 164 Fed. 666, 90 C. C. A. 482, Philips, Judge, delivering the unanimous opinion for the Court of Appeals for the Eighth Circuit, composed of Sanborn, Hook, and Philips, Judges, this language was used:

"Under the facts and circumstances disclosed by this record, there being neither wantonness nor reckless negligence on the part of the defendant, we cannot refrain from expressing the view that the amount of the verdict awarded by the jury seems to be excessive; so much as to give color to the impression that there was present in the mind of the jury an element of passion or prejudice. The responsibility of correcting such abuse by the jury,

however, rests upon the trial court, to see to it that justice does not miscarry, by presenting to the plaintiff in such instance the alternative of entering a reasonable remittitur or to submit to a new trial."

I am familiar with the record in that case, having examined it in the last day or two. Williams was injured by an explosion in a coal mine in the state of Oklahoma, and recovered a verdict for \$12,500. The injury sustained by Williams was of the most serious nature, and involved intense pain and suffering, permanent disability to labor, and his face, neck, and ears were badly burned, a portion of one ear being burned off. The flesh was burned from his hands so that when it sloughed off the bones were in sight. The burns so stiffened his hands and drew his fingers that he could not use them at all, could not do manual labor at all, had not worked a day after his injury. On parts of his hands there was no flesh, only a thin skin. The doctors had advised him that no operation would give him relief. He was confined to his room six weeks. His earning capacity was about \$65 per month. His age was 29 years, and his life expectancy about the same as that of Duke. If the Court of Appeals in this class of cases felt called upon to admonish the trial court that this verdict was excessive, what must be said of this case, where all recovery for pain and suffering, past and future, and all temporary and permanent impairment of earning capacity, has been eliminated by instant death? In the Mathis Case the court allowed the widow and five small children as probable contributions the father would have made to their support \$4,690, and I think it allowed all the facts warranted; and they allowed on account of care, attention, etc., \$3,310, thereby reducing a \$10,000 verdict to \$8,000. In that case no question was made as to the physical condition of Mathis or his probable life expectancy. He had accumulated a small farm where his family lived, was supervising its cultivation, and contributing nearly as much in addition thereto as the proof justified the jury in finding the plaintiff's intestate in this case was contributing to the support of his family. Mathis' personal and domestic qualities were not the subject of criticism; indeed, they were shown to be laudable. In the case at bar Duke's physical condition and life expectancy were both seriously involved by uncontradicted and I think credible testimony, and which it was in the peculiar knowledge of plaintiff, if it were not true, to combat, which was not done. His physical condition was serious, and his life expectancy grave. If his life was to terminate from disease in a few years at most, as the evidence tended strongly to indicate, then his earning capacity and his care and attention to his children must inevitably have terminated also. This uncertainty of his life makes it more difficult to determine what should be the maximum of his recovery, and leaves the mind of the court to lean towards setting aside the verdict in toto and to grant a new trial. But in the opinion of the court the verdict was for the right party, and the record free from any vital error affecting that right to recover. Naturally, therefore, the court feels that it ought to give the plaintiff the right to elect as to whether she will enter a remittitur, or take the chances of another verdict. Some of the states fix arbitrarily by statute the recovery in such cases at \$5,000, and in some it is indefinite, depending on the proof, as it is under the

employer's liability act under which this suit was brought. In the latter class of cases it is left to the sound discretion, good judgment, and varied experience of the jury, subject always to the supervision of the court.

Under all circumstances of this case, after the most careful thought and consideration, I have concluded that I would not have set aside a verdict for \$6,000, and, if plaintiff will file a remittitur within two weeks reducing the verdict to the sum mentioned, I will enter judgment therefor; otherwise set aside the verdict, and grant a new trial.

RED C. OIL MFG. CO. v. BOARD OF AGRICULTURE et al.

(Circuit Court, E. D. North Carolina. September 7, 1909.)

1. CONSTITUTIONAL LAW (§ 68*)—VALIDITY OF STATE LAWS—REVIEW BY COURTS.

While the Legislature of a state is primarily vested with power to enact inspection laws, and to say what articles of commerce shall be brought within their provisions, the question whether in a given case the sale or use of the article bears any reasonable relation to the public morals, health, or safety so as to bring its regulation within the police powers of the state is of necessity a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. § 68.*]

2. CONSTITUTIONAL LAW (§ 48*)—LIMITS OF LEGISLATIVE AUTHORITY—PRESUMPTION.

If a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. COMMERCE (§ 50*)—INTERSTATE COMMERCE—INTERFERENCE BY STATE LAWS—INSPECTION OF KEROSENE OIL.

A state statute providing for the inspection and testing of kerosene oil sold for use in the state for illuminating purposes is within the police powers of the state, and is not unconstitutional as an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 48-53; Dec. Dig. § 50.*]

Inspection, quarantine and sanitary regulations interfering with interstate commerce, see note to *Smith v. Lowe*, 59 C. C. A. 191.]

4. COMMERCE (§ 77*)—POWER TO IMPOSE LIMITATION—FEDERAL CONSTITUTION—TAX ON IMPORTS.

Article 1, § 10, Const. U. S., providing that "no state shall, without the consent of Congress lay any impost or duty on any imports or exports, except what may be absolutely necessary for executing its inspection laws," applies only to articles imported from foreign countries, or exported to them, and not to articles of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61-70; Dec. Dig. § 77.*]

5. INSPECTION (§ 1*)—VALIDITY OF STATE LAWS—INSPECTION FEES.

While a state may not tax interstate commerce, it may, in the exercise of its reserved police power, impose such a reasonable charge or tax as is necessary to execute its inspection laws, and the amount of such charge or tax cannot be held excessive by the courts so as to invalidate the law,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

unless so unreasonable and disproportionate to the service rendered as to impeach the good faith of the law.

[Ed. Note.—For other cases, see Inspection, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—RESTRAINING ENFORCEMENT OF STATUTE.

A preliminary injunction to restrain the enforcement of a statute on the ground of its invalidity will not be granted unless it is quite clear that the statute cannot stand, or that there is great danger of irreparable injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307, 309; Dec. Dig. § 137.*]

7. CONSTITUTIONAL LAW (§ 47*)—STATUTES (§ 216*)—DETERMINATION OF VALIDITY—SCOPE OF INQUIRY.

The opinions of individual members of a legislative body expressed in the discussion of a bill as to its construction or probable effect cannot affect the judgment of a court in determining its validity or its construction where its language is free from doubt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43, 45; Dec. Dig. § 47;* Statutes, Cent. Dig. § 292; Dec. Dig. § 216.*]

8. COMMERCE (§ 51*)—CONSTITUTIONAL LAW (§ 62*)—NORTH CAROLINA OIL INSPECTION LAW—VALIDITY.

Act N. C. March 8, 1909 (Laws 1909, p. 911, c. 554), providing for the inspection and testing of illuminating oils sold or offered for sale in the state, imposing a tax of one-half cent per gallon on such oils to defray the expenses of such inspection and testing, and empowering the State Board of Agriculture to make rules and regulations therefor such as "they may deem necessary to provide the people of the state with satisfactory illuminating oil," is within the police powers of the state, and is not unconstitutional as an interference with interstate commerce, nor because the charge made is so excessive as to show it to be a revenue, and not an inspection statute; nor is it in violation of article 2, § 1, of the state Constitution, vesting legislative authority in the Legislature, because it delegates to the Board of Agriculture power to prescribe the details of the inspection and tests and the standard to which the oils must conform.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 48, 49, 52, 53; Dec. Dig. § 51;* Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

In Equity. In this cause, upon filing the bill, a temporary restraining order, enjoining the enforcement of the provisions of the statute in regard to inspection, but not as to the payment of the tax, was granted, with an order returnable on August 2, 1909, to defendants to show cause why an injunction should not be granted to the hearing.

Aycock & Winston, for complainant.

R. H. Battle & Son and T. W. Bickett, Atty. Gen., for defendants.

CONNOR, District Judge. Complainant seeks to enjoin the enforcement of the provisions of an act of the General Assembly of North Carolina entitled "An act to provide for the inspection of illuminating oils and other fluids," ratified March 8, 1909. Laws 1909, p. 911, c. 554. The act provides:

"Section 1. That all kerosene, or other illuminating oils, sold or offered for sale in this state, shall be subject to inspection and test to determine the safety and value for illuminating purposes."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

All manufacturers, wholesalers and jobbers before selling or offering for sale, in this state, any kerosene, or other oil, for illuminating purposes, are required to file with the Commissioner of Agriculture a statement, showing that they desire to do business in the state, and to furnish the name or brand of the oil, or oils, which they desire to sell, with the names and address of the manufacturer, and that such oil will comply with the requirements of the law.

Sec. 2. Power is conferred upon the Commissioner of Agriculture to collect samples of any illuminating oil offered for sale in this state and have the same analyzed. The inspection of oil, as authorized by the act, is to be made under the direction of the Board of Agriculture, which is authorized—

"to make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety, purity or absence from objectionable substances and luminosity when not in conflict with this act and which they may deem necessary to provide the people of the state with satisfactory illuminating oil."

The Board of Agriculture is required to appoint oil inspectors, not exceeding, in number, one from each congressional district, whose compensation shall not exceed \$1,000 a year and expenses. They are given power to examine all barrels, tanks, or other vessels containing kerosene or other illuminating oils to see that they are properly tagged, and shall, as directed, collect and test samples of oil offered for sale in different sections of the state, and, when instructed, collect and send samples to the Department of Agriculture for examination.

Section 3:

"For the purpose of defraying the expenses connected with the inspection, testing and analyzing oils in this state there shall be paid to the Commissioner a charge of one half cent per gallon which payment shall be made before delivery to agents, dealers or consumers in this state."

Provision is made for attaching to each barrel, tank, tank car, and other containers a tag or a stamp to be furnished by the Commissioner of Agriculture showing that the tax has been paid. When oil is shipped in tank cars or other large containers, the manufacturer or jobber shall give notice to the Commissioner of Agriculture of every shipment, with the name and address of the person, company or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

Section 4:

"All moneys received under the provisions of this act shall be paid into the state treasury and kept as a distinct fund to be styled 'The Oil Inspection Fund.' All checks or orders in payment for tags or stamps shall be made payable to the State Treasurer. The Commissioner of Agriculture is authorized to draw out of said fund, upon his warrant, such sums as may be necessary to pay all expenses incurred in connection with this act including salary to oil chemist, or chemists, cost of inspection, blanks," etc.

Section 5:

"The State Treasurer shall, on the first day of June and December of each year turn into the general fund of the state all moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses."

Section 6: The Commissioner of Agriculture is required to include in his report to the General Assembly an account of the operations and expenses under the act.

Section 7 provides that, whenever complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this state, the Commissioner shall cause a sample of said oil or oils complained of to be procured, and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden, and report of the result or results shall be sent to the party making the complaint and to the manufacturer of such oil.

The remaining sections prescribe penalties for violation of the provisions of the law. The act went into effect July 1, 1909. On the 9th day of March, 1909, the General Assembly passed an act entitled:

"An act to suspend the collection of taxes under section 58 of the revenue act because of the higher taxes imposed by the oil inspection act which was ratified on the 8th day of March, 1909." Laws 1909, p. 742, c. 441.

This act contained the following preamble:

"Whereas, since the passage and ratification of the act to raise revenue at the present Session of the General Assembly, a law has been passed providing for the inspection of illuminating oils and for the imposition of an inspection tax of one half cent per gallon thereon; and whereas the said tax is much greater than the tax imposed under section 58 of the revenue act; and whereas it is not the purpose of the General Assembly that the said taxes shall be cumulative: Now therefore: It is enacted, That the tax imposed under section 58 of the revenue act be suspended and not collected from any person, dealer or corporation paying the tax imposed under the inspection law."

This act contains a proviso that, if the inspection act should be held invalid, section 58 should remain in full force and effect. It is alleged that, under a similar provision in the revenue law in force prior to 1909, the tax levied upon oil companies, confined to such as sold more than \$25,000 in value of oil, yielded about \$10,000 annually. The complainant did not sell a sufficient quantity of oil in this state to subject it to the provision of this act.

Pursuant to the provisions of the act, the Board of Agriculture prescribed a form of "A Statement" to be filed by every person, company, or corporation desiring to sell, or offer for sale, illuminating oil in this state, setting forth the name or brand of oil, flash test, by whom manufactured, a stipulation that the oil or oils sold shall comply with the requirements of the act and regulations of the Board of Agriculture. The board adopted the following rules:

"There shall be placed upon each tank car, vessel, barrel or other container of illuminating oil, offered for sale in this state, the name under which it is sold, the name of the manufacturer or wholesale dealer, flash test of said oil, date when filled; and when a barrel or other container is filled from a tank car, or other large container, the number of said tank car, or other large container; also tax stamp as required by section 3, c. 554, Laws of 1909.

"The flash test of illuminating oils shall not be less than one hundred and five (105) Fahrenheit, as tested by the Elliott method, according to directions prepared by the state chemist."

Shipments by car loads of oil in barrels or vessels or other small containers shall be reported to the commissioner, as required for ship-

ment in tank cars or other large containers by section 4 of the act. The oil chemist is required to analyze such samples as are deemed necessary to ascertain purity and luminosity and report to the Board of Agriculture. The board elected 10 oil inspectors for a term of one year. Each inspector is required to examine all tanks, cars, barrels, vessels, cans, or other containers found in his district to see that they are properly tagged, and to collect samples as directed, and send same to the department for analysis by the oil chemist. The compensation of each inspector is fixed at \$3 per day and actual expenses while at work. "All kerosene, or other oils usually used for illuminating purposes offered for sale or sold in this state for other use, shall have plainly marked on the container in letters at least two inches long, or plainly printed on a tag attached thereto: 'Not for illuminating purposes—Dangerous.' Such oil is not subject to inspection." Using or selling it for illuminating purposes is declared to be a violation of section 8 of the act. "The Commissioner, with the approval of the oil committee, may suspend or change any of the regulations, until the ensuing meeting of the board."

The complainant alleges: That it is a corporation duly created and organized under the General Laws of the state of Maryland, authorized to purchase, sell, and otherwise dispose of petroleum and the by-products thereof in the state of Maryland and elsewhere in the United States. That, pursuant to its corporate powers, it is and has been for several years engaged in buying and selling petroleum oil and the products and by-products thereof in the state of North Carolina and other states. That for the purpose of conducting its trade and business in said state it is engaged in shipping over the railroads and other transportation lines extending from the state of Maryland and other states into North Carolina large quantities of illuminating oil and other products and by-products of petroleum. That it has been for several years engaged in the manufacture of kerosene oil for illuminating purposes in the state of Maryland, and shipping and selling the same in North Carolina, and intends to continue to manufacture and ship oil and other products of petroleum into the state of North Carolina to meet the demand of its present and increasing trade. That it has invested in its business and plant—building, machinery, and material—a large capital, exceeding \$100,000. Complainant further alleges: That the Commissioner of Agriculture, pursuant to the power vested in him by the said act of the General Assembly and the rules and regulations made by the defendant Board of Agriculture, threatens to enforce the provisions of said act, unless it complies therewith by paying the tax imposed and otherwise obeying and complying with said rules, etc. That he threatens to institute prosecutions against complainant, its agents, and servants for the recovery of the penalties and to declare the forfeitures prescribed in said act for a failure to comply therewith. That, unless restrained by the court, the Commissioner will proceed to enforce said act and the rules and regulations, thereby subjecting complainant to a multiplicity of suits, seriously interfering with its business and otherwise subjecting it to irreparable injury. Complainant alleges that the said act in many respects, all of which are fully set forth, violates the provisions of the Constitution

of the United States and the fourteenth amendment thereto, in that: Kerosene oil, as now manufactured and sold, is not a proper subject of inspection, that it is not in its use dangerous to life or property, and that it is impossible by any practical test, otherwise than by use, to ascertain its illuminating power. That, not being a proper subject of inspection under the police power vested in the state, the attempt to subject it to such inspection and to impose an inspection tax is an interference with interstate commerce, and is oppressive and injurious to complainant. That the act itself, and especially the rules and regulations adopted by the Board of Agriculture, are unreasonable, unjust, and deprive the complainant of its rights, privileges, and immunities secured to it by the Constitution of the United States and the amendments thereto. That the standard of safety fixed by the board is unreasonably high, and the method of testing the oil is unscientific and impracticable. That the rules and regulations prescribed for administering the law unjustly discriminate against complainant and other independent dealers, and give to the Standard Oil Company unfair and unjust advantages in the sale of oil in this state. That the tax of one-half cent per gallon is largely in excess of the cost of inspection, and that, as appears from the language of the act, the history of its enactment, and extrinsic evidence introduced by complainant, it is shown that it was not intended and is not in fact an inspection law, but was intended by the Legislature to be, and is, a measure for raising revenue, violating article 1, § 8, and article 1, § 10, of the Constitution of the United States. That the statute violates the Constitution of North Carolina (article 2, § 1), in that it confers upon the Board of Agriculture legislative power. The defendants deny each and every one of the allegations, upon the truth of which the prayer for relief is based.

The disposition of the first contention involves an inquiry respecting the character, extent of, and limitations upon the police power, as it is related to, or affected by, the power conferred upon Congress to regulate interstate commerce. It was held in the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394, "that the fourteenth amendment did not interfere with the exercise of the police power by the states." Guthrie's *Fourteenth Amendment*, 77. It is conceded that all of the kerosene oil sold and used in this state is manufactured, or is the product of crude petroleum brought in from other states. It is conceded that, unless the inspection of illuminating oils can be sustained as a valid exercise of the police power, it violates article 1, § 8, of the federal Constitution. It therefore becomes necessary to dispose of that question at the threshold of the discussion. No question of discrimination is presented. While it is not easy to define and fix the limits upon the police power, it is sufficient for the purpose of this discussion to say that:

"It includes the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity originally and always belonging to the states not surrendered by them to the general government, nor directly restrained by the Constitution of the United States." *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

Mr. Justice Day in *McLean v. Denver & Rio Grande R. R.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78, after referring to the constitutional provision conferring upon Congress the exclusive power to regulate interstate commerce, says:

"While this is true, it is equally well settled that a state or territory for the same reasons in the exercise of the police power may make rules and regulations, not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. * * * A state or territory has the right to legislate for the safety and welfare of its people, and this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the Legislature is in conflict with an act of Congress or is an attempt to regulate interstate commerce."

It is not suggested that Congress has legislated upon the subject. In *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, it is held that:

"Whenever inspection laws act on a subject, before it becomes an article of commerce, they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection, commonly called the police power. No doubt can be entertained of this when the inspection is manifestly intended and calculated in good faith to protect the public health, the public morals, or the public safety. And it has now been determined that this is so if the object of the inspection is the prevention of imposition on the public generally."

Mr. Guthrie as the result of a careful examination of the decided cases thus states the limitations on the police power:

"In considering the validity of an enactment of a state Legislature under the police power, the inquiry is whether the regulation or classification has been designed to subserve some reasonable public purpose, or is a mere device or excuse for an unjust discrimination or for the oppression or spoliation of a particular class. Any regulation of the internal affairs of the state fairly subserving a valid police purpose and reasonably exercised for the benefit of the community at large will be upheld, but, if it be arbitrary and have no substantial relation to the health, morals, peace, or welfare of the community, it will be nullified. No precise limits, however, should be placed upon the police power of the state, for no one can foresee what regulations the welfare of the community may require." Fourteenth Amendment 74, 75; *Hawker v. New York*, 170 U. S. 192, 18 Sup. Ct. 575, 42 L. Ed. 1002.

In *Patapsco Guano Co. v. Board of Agriculture*, *supra*, the court sustained an act providing for the inspection of commercial fertilizers sold or shipped into the state. Mr. Chief Justice Fuller said:

"Inspection laws are not in themselves regulations of commerce, and, while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily in the latter aspect such laws are applicable to articles imported into as well as articles produced within a state."

In *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, discussing an act requiring the inspection of cattle brought into the state, Mr. Justice Moody said:

"The statute before us is an inspection law and nothing else. It excludes only cattle found to be diseased, and, in the absence of controlling legislation by Congress, it is clearly within the authority of the state, even though it may have an incidental and indirect effect upon commerce between the states."

Mr. Justice Day in *McLean v. Denver & Rio Grande R. R.*, supra, discussing the same question in regard to a law providing for the inspection of hides, says:

"It is true that it affects interstate commerce, but we do not think such was its primary purpose, and, while it may have an effect upon this class of property, the main purpose evidently was to protect the people against fraud and wrong."

In *Oil Co. v. Craine*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, it appeared that the oil inspection law of Tennessee imposed an inspection tax upon oil brought into the state and stored for shipment to other states. The oil company, insisting that such oil was the subject of interstate commerce, sought to enjoin the collection of the tax. While the questions presented in this case were not discussed or decided in the opinion, many of the reasons here assigned for attacking it were pressed by counsel in the brief filed in that case. The act was sustained. There is no suggestion in the opinion that it was not valid as a police regulation. The power of the state to enforce inspection laws in the exercise of the police power is discussed in *Plumley v. Mass.*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, and *Schollenberger v. Penna.*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, wherein restrictive legislation in regard to the introduction and sale of oleomargarine was involved. In *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453, the Oklahoma oil inspection law was attacked. Mr. Justice White said:

"We think the court below was clearly right in deciding that, as the subject was within the police power of the state, it was not within the province of the judiciary to disregard the statute and treat it as void upon the theory that the Legislature had acted unwisely in fixing the standard which the statute prescribed."

Complainant insists that if it be conceded that, under conditions formerly existing, kerosene oil, by reason of the explosive fluids, naphtha and gasoline, left in it, when offered for sale, at the present time such conditions do not exist, that they are so completely eliminated from the oil that there is no danger of explosion. In support of this contention it alleges in the bill and reads affidavits made by persons having scientific knowledge, training, and experience to show that formerly the value of naphtha and gasoline was very small, not so great as the kerosene oil; that now, and for some time past, their value has increased very much and is much greater than the oil; that refiners now take all of the naphtha out of the crude petroleum by a process which is explained in the affidavits; that, by reason of this condition, the danger to life and property from explosion of illuminating oil or vapors generated in its use "has been reduced to a minimum, and there is at this time no danger whatever from the use of kerosene oil." Defendants say that, while "it is true that a part of the explosive product and by-products of crude petroleum are of greater commercial value than kerosene or other illuminating oil, they aver that there is enough explosive substance left in the oil to make it dangerous to life and property, and this is shown by the fact that the more progressive and intelligent states in the Union have upon their statute books oil inspection laws similar to the law of North Carolina." Defendants

read in support of their contention the affidavits of the state oil chemist and of Dr. Withers, the professor of Chemistry at the State Agricultural and Mechanical College, who say that they have made a study of the subject, and have had training and experience in analyzing and testing illuminating oils. They give it as their opinion and that of other eminent chemists, whose writings they quote, that the illuminating oil sold in the markets of this state is sometimes dangerous. Prof. Withers says:

"Affiant has tested samples furnished by the state oil chemist from oils on sale in this state, and has found some which showed a flash point of less than 90 degrees F. by the Elliott closed cup and less than 100 degrees F. by the Tagliabue cup and the Foster cup. He is of the opinion that the use of such oil in lamps for illuminating purposes is dangerous and should not be permitted."

He is "also of the opinion that the State Board of Agriculture should require the state oil chemist to make tests which will show the light giving qualities of the illuminating oils on sale in this state. These tests may be made by the use of a photometer. There are other tests which may be made which will indicate the light giving power." Prof. Syme says that he has visited the states of Georgia, Tennessee, and Ohio, the Bureau of Combustibles of New York City, and Bureau of Chemistry of the United States Department of Agriculture at Washington, and has investigated the systems of oil inspection and standards in use in those places; that in the light of the information he has acquired by the study of illuminating oils he has recommended to the Board of Agriculture the adoption of a flash test of not less than 100 degree Fahrenheit made with the New York state board of health tester, commonly called the "Elliott cup," or the Standard Flash, for insuring the safety in the use of oils. He also gives it as his opinion that the standard adopted by the board is as low as it should be in this climate. It appears from the affidavits and exhibits that in 35 states of the Union, including the state of Maryland, oil inspection laws are in force; that in almost, if not quite, all the countries of Europe and in Canada, New Zealand, Australia, and Japan similar laws are in force. The standards and methods of testing the oils vary. The Elliott cup is used in only five states in the Union. Assuming that, under ordinary conditions, kerosene oil is a proper subject for the operation of the inspection laws, not conflicting with the right of Congress to regulate interstate commerce, has complainant shown that, by reason of the condition alleged to exist, the naptha and gasoline in crude petroleum are so thoroughly and perfectly eliminated by distillation, refinement, or other process as to render the oil harmless and remove it from the domain of such legislation by the state in the exercise of the police power? It is well settled that, while the power to enact such laws and to say what articles of commerce shall be brought within their provisions is primarily vested in the Legislature, the ultimate decision of the question whether in a given case the sale or use of the article bears any reasonable relation to the public morals, health, or safety is vested in the courts. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under a solemn duty—to look at the substance of things

whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and give effect to the Constitution." *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. 297, 31 L. Ed. 205, and *Minn. v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. Whether in passing a statute in the exercise of the police power the Legislature has exceeded its constitutional limitations and deprived the citizen of his constitutional right is of necessity a judicial question. If it were not so, constitutional limitations would be of no validity; the legislative will, not the Constitution, would be "the supreme law of the land." This is elementary and has long since passed beyond the domain of debate. It is equally elementary and equally essential to the practical working of a government of defined, distributed powers that:

"In determining whether the Legislature in a particular enactment has exceeded the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well-settled rule of constitutional exposition that, if a statute may or may not be according to circumstances within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed." *Harlan, J., in Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188.

The latest expression of the Supreme Court is from Mr. Justice Moody in *Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. The city of Knoxville fixed rates to be charged by the water company. Claiming that they were confiscatory, the company applied to the Circuit Court for an injunction restraining their enforcement. The learned justice said:

"There can at this day be no doubt that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that the power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and, when that invalidity rests upon disputed questions of fact, the invalidating facts must be proven to the satisfaction of the court. * * * Nothing less than this is demanded by the respect due from the judicial to the legislative authority."

Mr. Justice Peckham in *Wilcox v. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, in which the validity of rates was brought into question, said:

"The case must be a clear one before the court ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical results of such rates."

Mr. Justice Harlan in *Plumley v. Mass.*, *supra*, said:

"The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, the health, and the morals of the people, unless such legislation plainly and palpably violates some right granted or secured to the national Constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

In considering this aspect of the bill the allegations in regard to the "Rules and Regulations" adopted by the Board of Agriculture—the standard of safety—the instrument and method adopted for testing the oils and their effect upon complainant's constitutional rights are treated as part of the act. Complaint is made of the standard. It is said that it is unreasonably high; that it will be very difficult for independent companies to procure the oil necessary to meet the regulations and requirements of the board; that they may result in driving them out of the state, thus giving to the Standard Oil Company a monopoly in the sale of oil in the state; that, in order to furnish oil to the consumers in North Carolina under the rules and regulations prescribed, the oil will cost them a much higher price, probably as much as five cents a gallon more than is now charged, which will entail an expense of \$500,000 upon the people. It is sufficient to say that no one or all of these matters can affect the decision of the question whether the statute, together with the rules and regulations, as applied to the conditions existing in this state, is within the legislative police power. If, as it alleges, the standard of safety fixed is unreasonably high, or the method of testing the oil unsatisfactory and not such as are in general use or the regulations in other respects unjust or oppressive, it should seek relief by applying to the Board of Agriculture to modify them. The court cannot declare a law invalid because in its opinion it does not accord with sound policy or justice. The appeal for redress must be made to the lawmaking power. "The courts have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body." *St. Louis & Iron Mt. Ry. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. It is not claimed that the rules and regulations are prohibitory. If their enforcement will add very largely to the cost of the oil to be paid by the consumer, this does not affect any constitutional right of complainant. While there is much diversity of opinion in respect to the danger of explosion from the use of kerosene oil and of the power to ascertain its illuminating capacity, it is evident that the question has not so far passed beyond the domain of debate that the Legislature may not subject it to reasonable inspection before permitting its sale in the state. The court cannot say that such a law has no reasonable relation to the public safety or welfare. In its domicile of origin and of residence complainant's product is subjected to an inspection law fixing standards and tests, differing, it is true, from those established in this state. A careful analysis of the act and rules and regulations established for its administration shows that it conforms to the standard fixed by the courts for the validity of such legislation. "The particular exercise of the police power must tend, in a degree that is perceptible, to secure some object of the proper exercise of the police power, and the court must be able to see that the means adopted have a reasonable relation to the end desired." *Health Dept., etc., v. Trustees, etc.*, 145 N. Y. 39, 39 N. E. 835, 27 L. R. A. 710, 45 Am. St. Rep. 579. This being so, the act does not upon its face conflict with the right of Congress to regulate interstate commerce or

deprive the complainant of any constitutional right or privilege, or take its property without due process of law.

The complainant further says that the act violates the Constitution because it imposes an excise or impost tax upon oil shipped into the state. Article 1, § 10, provides:

"That no state shall, without the consent of Congress, lay any impost or duty, on any imports or exports, except what may be absolutely necessary for executing its inspection laws."

The terms "imports" and "exports," as used in this section, have been held to refer to such articles as are brought into or sent out of the states from or to foreign countries. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Woodruff v. Parham*, 75 U. S. 123, 19 L. Ed. 382. In *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544, it is said:

"The terms 'imports' and 'exports' apply only to articles imported from foreign countries, or exported to them. The inhibition imposed is the laying of duties on imports from foreign countries and not on such as come from one state to another."

While no express prohibition is found in the Constitution against a state laying such duty or tax upon an article brought into its borders from a sister state, of necessity it is found in the power conferred upon Congress to regulate interstate commerce, because, as said by Judge Marshall, "the power to tax is the power to destroy." While, therefore, the state may not tax interstate commerce, it may, in the exercise of its reserved police power, impose such a reasonable charge or tax as is necessary to execute its inspection laws. It is said by Mr. Justice Bradley in *Neilson v. Garza*, 2 Woods, 287, Fed. Cas. No. 10,091:

"The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations and among the states, and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such duty is void, if it exceeds what is absolutely necessary for executing such inspection laws."

This case is cited, and the language quoted with approval, in *Papasco Guano Co. v. Board of Agriculture*, supra. Thus the limitation upon the amount of a tax imposed by an inspection law upon an article which is the subject of interstate commerce is the same as that fixed by the Constitution in article 1, § 10, upon "imports." If an excessive inspection tax is imposed upon an "import" within the meaning of that section, it is provided that:

"The net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

No such provision being found in section 8, the inhibition can be enforced only by declaring the statute imposing the tax invalid. In the *Neilson Case*, Judge Bradley inquires how the alleged excess is to be determined. After suggesting the difficulties involved in submitting the question to a jury, he concludes:

"Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed ex-

cessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with free importation of goods."

In the Patapsco Guano Case, *supra*, it appears that the Legislature passed an act imposing a "license tax of \$500" upon dealers in commercial fertilizers, on each separate brand sold, and expressly appropriated large sums, from the proceeds of the tax, to specific objects, the support of an industrial association, the expense of an oyster survey, and the establishment of an agricultural college. The act was declared invalid. *Fertilizer Co. v. Board of Agriculture* (C. C.) 43 Fed. 609, 11 L. R. A. 179, Seymour, J., delivering the opinion. He said that, while the court might judicially take notice of the fact that the amount of the tax was largely in excess of the cost of inspection, it was relieved of "all embarrassment in this respect by the fact that the act declares by necessary implication that the tax is not needed for inspection expenses." In consequence of this decision, the Legislature repealed the invalidating provisions of the act, and enacted a statute practically the same as section 3955 of the Revisal of 1905 (section 2190, Code 1883), providing that:

"For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing material in this state, there shall be paid to the Commissioner of Agriculture a charge of twenty-five (now twenty) cents per ton on such fertilizers."

The proceeds of this tax are directed to be paid into the state treasury by the Commissioner of Agriculture, and kept on a separate account by the Treasurer as a fund for the exclusive use and benefit of the Department of Agriculture. Revisal 1905, § 3937 (Code 1883, § 2208). This act was sustained in an opinion by Seymour, J., in *Patapsco Guano Co. v. Board of Agriculture* (C. C.) 52 Fed. 690. Upon appeal the judgment was affirmed, Fuller, C. J., saying that the alleged excessiveness of the tax was only material if "it demonstrates a purpose other than that which the law declared." In discussing the same objection to an inspection law in *McLean v. Denver & Rio Grande R. R.*, *supra*, it is said:

"It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection which goes into the treasury of the sanitary board. * * * The law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the service rendered as to attack the good faith of the law."

The sole ground, therefore, upon which the amount of the inspection tax becomes material, or can be considered by the court, is to ascertain whether the Legislature has acted in good faith—has enacted a statute for the purpose of securing inspection of illuminating oil sold to the people, or whether, under the guise of doing so, it has violated the Constitution and imposed a tax for the purpose of increasing the revenues of the state. In no other aspect is the amount of the tax as related to the cost of inspection "a judicial question." Before the court should find in the language or in the provisions of a statute a purpose on the part of the Legislature to violate the Constitution and to nullify the statute otherwise clearly within its power to enact, such un-

constitutional purpose should appear beyond any reasonable doubt. The court will never presume that the Legislature intended to violate the Constitution. In the language of Mr. Justice Moody: "Nothing less than this is demanded by the respect due from the judicial to the legislative authority." It will be well to inquire in what manner the Supreme Court has dealt with the question in similar cases. In the *Patapsco Guano Case*, *supra*, Chief Justice Fuller said:

"If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge. But, treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared as a judicial question, we are satisfied that, comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be affected as to justify the imputation of bad faith and change the character of the act."

In *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240, it appeared that the borough had imposed a license tax to meet the expense of inspection and supervision upon the poles and wires of the telegraph, telephone, and electric light companies. In an action to enforce the payment of the tax the company contended, as here, that the tax was so largely in excess of the cost of inspection and supervision as to show that such was not its real purpose, but that it was intended and had the effect of bringing revenue into the treasury. Upon appeal Mr. Chief Justice Fuller said:

"It is conceded that the borough had the right, in the exercise of its police power, to impose a reasonable license fee upon telegraph poles within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable."

In the discussion a number of decisions of the Supreme Court of Pennsylvania are cited—one in which it was conceded that the tax was five times more than the cost of inspection. The Chief Justice concludes:

"Concurring in these views, in general, we think it would be going much too far for us to decide that the test set up (the annual cost of inspection) by the plaintiff in error must be necessarily applied and the ordinance held void because of failure to meet it." *St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Id.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810.

The same principle or test was applied in *McLean v. Denver & Rio Grande Ry. Co.*, *supra*; the court saying:

"The facts shown do not bring the case within that class which holds that, under the guise of inspection, other and different purposes are to be subserved, thus rendering the legislation invalid."

In *Telephone Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342, it appeared that a license fee was imposed upon poles and wires to cover cost of inspection and supervision. In an action brought to recover the fee Mr. Justice Peckham said:

"The borough has, in fact, done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any ex-

penses arising from inspection or supervision on its behalf. The fee itself is 20 times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough, and efficient inspection and supervision that might have been made of such poles and wires and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public."

The opinion concludes:

"Judging the intention of the borough by its action, it did not intend to expend anything for the inspection of the poles and wires, and did intend to raise revenue under the ordinance."

This is not the expression of an opinion—it is the averment of a fact.

The distinction between this and the other cases cited is too obvious to require comment. Applying the principle or test upon which all of the decisions go to the facts developed in the record, what is the conclusion? There is nothing on the face of the law to show that the tax will yield an amount largely in excess of the cost of inspection, but the bill alleges it will be more than double the amount necessary for the inspection proposed under the statute and regulations, and that defendants estimate that they will be able to turn into the state treasury annually, after paying all of the expenses, at least \$20,000. This is denied by the defendants. The only evidence offered to sustain the averment is the affidavit of the president of complainant in which he says:

"The present act, if enforced, and if as much oil is sold under said act as has heretofore been sold in this state, will produce an income of \$52,000 per year, and that the inspection provided for under the rules and regulations of the Department of Agriculture will not necessitate the use of half that sum."

At best this is but the opinion of the president. He does not say what quantity of oil was shipped into the state during the past year, nor does he undertake to, as probably he could not by anticipation, say what the cost of inspection will be. There are many items of expense as enumerated by the court in the Patapsco Guano Case, the character and amount of which cannot be anticipated with any reasonable degree of certainty. It is due the Department of Agriculture to assume that a fair trial will be given, the result reported to the General Assembly, and, as said by the Chief Justice, if the charge is found excessive, it will be "moderated." While the power to enjoin the enforcement of statutes manifestly violative of the Constitution and destructive of the rights of the citizen is clear, it should be exercised with great caution and with due regard to the respect which is due from the judicial to the legislative authority, and to the necessity for arresting the enforcement of the law to prevent irreparable injury. The observations of the court and the course pursued in the case of *Knoxville v. Water Co.*, supra, express clearly the best considered view of the Supreme Court upon this subject. It is an elementary doctrine of equity jurisprudence that an injunction will not be granted, unless the facts upon which the extraordinary relief is demanded are clearly set forth and sustained. Mere opinion or apprehension of injury are not sufficient. "A preliminary injunction proceeding on the ground of the invalidity of a statute will not be granted unless it is quite clear that the statute cannot stand or that there is great danger of irreparable injury."

Ryan v. Williams (C. C.) 100 Fed. 177. Any other rule of practice would invite frequent applications to the courts to enjoin the enforcement of statutes before they had gone into operation, based upon more or less well-grounded apprehensions of irreparable injury, resulting in serious disturbance of the relations between the different departments of the government, and entailing other evils which a due regard to elementary principles would prevent. It appears from an examination of the various oil inspection laws in force in the United States that the charges for inspection vary from one-half to one and one-half cents per gallon, and that in states wherein population and other conditions are similar to those in this state the charge is about the same as that fixed by the act. The fact that the statute directs that semiannually the balance to the credit of the oil inspection fund is to be turned into the general fund does not show that there will be any surplus. It does tend to show that the Legislature anticipated that there might be, but experience has demonstrated that an anticipated revenue surplus too frequently exists only in the legislative mind. It is insisted that the passage of the act of March 9, 1909, suspending the tax imposed upon dealers in oil under section 58 of the revenue law (Laws 1909, p. 674, c. 438), shows that the Legislature intended and expected the act to produce revenue. The recitals and preamble to that act throw but little light upon this question. It is manifest that the cost of inspection will greatly exceed the amount raised by section 58, estimated at \$10,000. It is equally manifest that the Legislature expected the inspection tax to cover the cost of inspection; hence the recital is entirely consistent with the declaration that the oil inspection law would yield a much larger sum than section 58 of the revenue law. It might well be that the Legislature did not deem it wise to impose a cumulative tax upon illuminating oil, especially in view of the elementary truth that the consumer pays the tax, and that in consideration of the benefit secured to the people by an inspection of oil used by them the state was willing to surrender a revenue collected under section 58. Whatever may have been in the legislative mind, the passage of the act of March 9th is far from conclusive evidence of a purpose to violate the Constitution or act in bad faith in the passage of the oil inspection law, and it has no relevancy to the argument for any other purpose.

The complainant insists that its contention in this respect is sustained (1) by the report made by the minority of the committee recommending the passage of the bill, saying that "many of the states not only protect the people in the matter of lights, but receive considerable revenue from the inspection," naming two states; (2) that two members of the house in advocating the passage of the bill stated that it would yield considerable revenue, one of them estimating \$30,000; that one member who opposed the bill urged the same opinion as his reason for thinking that it was unconstitutional. This is stated in the affidavit of the president of complainant, and taken as true. He also says that he is informed and believes that "like positions were taken in the other branch of the General Assembly." In *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469, Taney, C. J., said:

"The judgment of the court cannot in any degree be influenced by the construction placed by individual members of Congress in the debate which took

place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language used, comparing it when any ambiguity exists with the law upon the same subject, and looking, if necessary, to the public history of the time at which it was passed."

In *U. S. v. Freight Ass'n*, 166 U. S. 290, 318, 17 Sup. Ct. 540, 550, 41 L. Ed. 1007, the reason of the rule is clearly stated, and its wisdom strongly illustrated:

"It is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of the individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

It would but invite a court into a most uncertain and unsatisfactory domain of conjecture to abandon the language of a statute, the meaning of which is free from doubt, to indulge in speculation as to the motives of the members of a legislative body in voting for or against it. To do so would endanger the integrity of the statute law of the state. A careful consideration of the record, in the light of well-settled principles of constitutional exposition and well-considered authorities, fails to show that the court should find that the law was not passed in good faith for the purpose explicitly declared both in its title and in its provisions. As shown, this is the test upon which its validity depends.

The last assault made upon the act, and strongly urged in the argument, is that it is incomplete, indefinite, and dependent for its validity and enforcement upon the exercise of legislative power conferred upon the Board of Agriculture. It is true that the act fixes no other standard than that the oil shall be satisfactory in respect to safety and illuminating power, nor does it prescribe any method of testing it for the purpose of ascertaining whether it conforms to the standard in these respects. Power is conferred upon the Board of Agriculture "to make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety and purity." It is said that, until this legislative power is exercised, the act is incapable of enforcement, that it is a mere legislative declaration of a purpose to subject oil to inspection giving the manufacturer no notice of the standard to which its oil must conform, nor the consumer of what he has a right to demand. This power, it is urged, is vested exclusively in the Legislature, and cannot be delegated. Article 2, § 1, of the State Constitution, provides that "the legislative authority shall be vested in two distinct branches both dependent on the people," and section 8, art. 1, declares that the legislative, executive, and supreme judicial powers ought to be kept forever separate and distinct. There is nothing in the federal Constitution which prohibits the Legislature of a state from delegating legislative power. In *Dreyer v. Illinois*, 187 U. S. 71, 84, 23 Sup. Ct. 28, 32, 47 L. Ed. 79, it is said:

"Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination, one way or another, cannot be an element in the inquiry whether due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters of life or liberty." *Prentiss v. A. C. L. R. R. Co.*, 211 U. S. 210, 225, 29 Sup. Ct. 67, 69, 53 L. Ed. 150.

It is insisted that the court having jurisdiction of the cause by reason of the diverse citizenship of the parties must pass upon this question. The courts of this state have uniformly adhered and given full force and effect to this essentially fundamental principle which separates the function of the three co-ordinate departments of the government. They have also recognized the practical difficulty of carrying into effect the well-settled policy of the state to secure police regulation and protection in regard to many subjects except by the use of commissions and other quasi legislative and administrative boards. They have with practical uniformity sustained statutes, the provisions of which verge very closely upon the line of constitutional inhibition in respect to the delegation of legislative power. While, as shown by many strongly reasoned and well-sustained cases cited by counsel to the contrary, decisions of the courts of other states are in accord with ours. It is concededly difficult to reconcile many of the decided cases. It is true, as shown by the briefs, that in all of the other states the oil inspection laws fix the standard of safety. It is also true that the fertilizer and cotton seed meal inspection laws in this state fix the standards of purity and fitness for use. In the light of these statutes the attack made upon the act under consideration in this respect is not without force. Many reasons occur to the mind why the Legislature deemed it best to leave the fixing of standards and methods of testing oil to an intelligent Board of Agriculture with the aid of chemists and other persons having knowledge and experience in such matters. The sole question, however, for the court is whether the act violates the Constitution in this respect. The delegation of power to fix reasonable rates to be charged by common carriers of passengers and freights is found in both federal and state statutes and sustained by the courts with full recognition that it is a legislative power. The same is true in regard to rates charged by telegraph, telephone, water companies, electric light companies, and all other public utilities. It is said that this legislation is sustained because of the necessity of the case—that it is not practicable for the Legislature to fix rates. The answer to this is found in the fact that in our own and many other states the Legislature has fixed such rates and the right to do so sustained by the court. It is said that a standard is fixed by the statutes creating these commissions that the rates are to be "reasonable," so here the oil is to be "satisfactory" in respect to safety and luminosity. Some of the cases cited may be distinguished, and some, although very much in point, it might be shown are not in harmony with the current of authority. The principle upon which this act may be sustained is stated and its applicability illustrated in *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Congress enacted a statute prohibiting

the importation of any tea "which is inferior in purity, quality, and fitness for consumption to the standards provided by section 3 of this act." This section provided that the Secretary of the Treasury upon the recommendation of a board appointed by him should "fix and establish uniform standards of purity, quality, and fitness for consumption of all teas," etc. The act was attacked because it delegated to the Secretary of the Treasury and the board appointed by him legislative power to fix the standard of teas imported into the country, etc. It is stated in the exhaustive briefs filed that the case was the last of a series of cases brought to test the constitutionality of the act. Mr. Justice White thus states the contention:

"That the act confers authority to establish standards and that such power is legislative, and cannot constitutionally be delegated by Congress to administrative officers."

He disposes of it by saying:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported and therefore in effect vests that official with legislative power is without merit. We are of the opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably so, because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the more executive duty to effectuate the legislative policy declared in the statute. * * * Congress legislated upon the subject as far as was reasonably practicable, and, from the necessities of the case, was compelled to leave to an executive official the duty of bringing about the result pointed out by the statute. * * * The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment to be honestly exercised, and, if that were important, there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting upon him."

An act of Congress conferring upon the American Railway Association the power to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, and was sustained upon the authority of the *Buttfield Case*. It would be difficult to distinguish these cases in principle from this. In *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, a pure food law conferring upon the State Board of Health the power to "prepare rules regulating standards," etc., was sustained. See, also, *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361; *Lockes' App.*, 72 Pa. 491, 13 Am. Rep. 716. To deny to the Legislature the power to fix the "primary standard" in respect to many of the multitude of subjects coming within the police power, and vesting in commissions and administrative boards or officers the power to work out the details, would seriously embarrass the state governments in many of their most important functions. As said by the editor of *American & English Encyclopedia* (volume 6, p. 1022):

"A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies, to boards and commissions, to local authorities, and especially to the voters."

There is a manifest advantage in the course pursued by the Legislature in this enactment. The standards fixed in other states vary, and the oil chemists do not agree as to the methods of inspection. Reasonable changes suggested by experience and larger information may be made by the board. In the Buttfield Case, *supra*, commenting upon the complaint that the rules and regulations made by the Secretary of the Treasury are harsh or unreasonable, it is said that a hearing should have been sought rather than an application to annul the statute. It does not appear in this record that complainant has requested any hearing or submitted any suggestions in regard to the standard fixed by the board, or the method of testing oil. This course would probably afford relief from any harsh, unjust, or oppressive rule, if such has been made, by the Board of Agriculture. It may be that the attempt to confer upon the Commissioner and the oil committee power to change the rules is invalid. There is no suggestion that this is threatened.

Upon a careful consideration of the several grounds upon which the complainant's prayer for injunctive relief is based, in the light of the enlightening arguments and briefs of counsel, no valid cause is seen for enjoining the defendants from proceeding with the enforcement of the act in accordance with its provisions and the rules and regulations adopted for its administration. As no other relief is asked, the bill will be dismissed at complainant's cost. It is so ordered.

UNITED STATES et al. v. W. T. MASON LUMBER CO.

(Circuit Court, W. D. North Carolina. September 10, 1909.)

1. INJUNCTION (§ 57*)—JURISDICTION—SUIT TO RESTRAIN THE CUTTING OF TIMBER.

Equity has jurisdiction of a suit to enjoin the cutting or removal of timber from land where the right to remove the same depends on the construction of a contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 112; Dec. Dig. § 57.*]

2. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—DURATION OF CONTRACT—EQUITIES OF PARTIES.

Defendant's assignor contracted with a tribe of Indians, subject to the approval of the Secretary of the Interior, for the purchase, for the sum of \$15,000, of the timber of certain dimensions standing on a tract of land, the purchaser being given the right to construct sawmills, roadways, etc. The contract provided that it should be in force for 15 years from date, and that "all trees not cut and removed from said land at the expiration of this contract shall revert to and become the property of the parties of the first part." By reason of a suit brought by the United States in behalf of the Indians and of the failure of the Secretary to sooner approve the contract, defendant was delayed for nearly five years in commencing work thereunder, and at the expiration of 15 years from its date defendant had a large quantity of timber cut which it had not removed from the land. It had paid the full consideration of \$15,000 in accordance with the terms of the contract. *Held*, that conceding that by a strict construction of the contract the timber so cut, but not taken from the land, would revert, the United States was not entitled in equity, under the circum-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stances, to enforce such provision, but that defendant had the right to remove said timber within a reasonable time.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Dec. Dig. § 3; * Contracts, Cent. Dig. § 890.]

In Equity. On final hearing.

A. E. Holton, U. S. Atty., and A. L. Coble, Asst. U. S. Atty., for complainants.

Merrimon & Merrimon, for defendant.

NEWMAN, District Judge. This is a suit in equity, brought by the plaintiffs against the defendants to enjoin the latter from cutting and removing timber from a certain large tract of land, being a part of the Cathcart tract and within the Qualla boundary, the timber on which was the subject of an agreement between the Eastern Band of Cherokee Indians and David L. Boyd, on the 20th of September, 1893. By transfer from Boyd, and intermediate conveyances, all the rights Boyd acquired under the contract are in the W. T. Mason Lumber Company, the defendants here. The agreement is as follows:

“State of North Carolina, Swain County.

“This agreement made and entered into this the 28th of September, 1893, by and between the Eastern Band of Cherokee Indians in council assembled at Cherokee, N. C., a corporation and body politic under the laws of North Carolina, represented by a council vested with full powers to act for the said band in all matters pertaining to the affairs of the band whether in their corporate or tribal capacity, and especially authorized to enter into this contract, party of the first part, and David L. Boyd, contractor, of the town of Newport, in the state of Tennessee, party of the second part, witnesseth: That whereas the Eastern Band of Cherokee Indians in council assembled at Cherokee, in Swain county, North Carolina, passed resolutions authorizing the sale of the timber in the Cathcart tract of the Qualla boundary of land, a copy of which resolution marked ‘Exhibit A,’ is hereto attached and made a part of this contract, and whereas the said David L. Boyd, party of the second part, has made an offer of fifteen thousand dollars for the timber on the said tract now owned by the said Eastern Band of Cherokee Indians upon the terms, conditions and resolutions hereinafter set forth; and whereas at a council duly called and held at Cherokee, county of Swain, N. C., on the 28th day of September, 1893, a resolution was passed accepting the said offer by the council and authorizing and empowering Stillwell Sanwooka, James Blythe and Andy Standingdeer, a committee to execute the contract with the party of the second part for the sale of said timber, a copy of which resolution marked ‘Exhibit B’ is hereto attached and made a part of this contract.

“Now, therefore, the Eastern Band of Cherokee Indians in council assembled, party of the first part by virtue of an authority vested in them as heretofore stated and for and in consideration of the sum of fifteen thousand dollars to be paid by the party of the second part as hereinafter set forth, have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey unto the said party of the second part, his heirs and assigns, subject to the conditions and resolutions herein contained the timber trees and fallen trees not cut into logs of the dimensions hereinafter set forth on so much of what is known as the Cathcart tract within the tract of land known as the Qualla boundary as shown on the map of the Qualla boundary made by M. S. Temple, and embraced in the deed by William Johnston and wife to the Eastern Band of North Carolina Cherokee Indians on the 9th day of October, 1876, and the timber within a tract containing 1,230 acres, situated within said Cathcart tract, it being No. 53, conveyed in the deed made by William Johnston and others to the Commissioner of Indian Affairs, trustee of the Eastern Band of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Cherokee Indians, in North Carolina on the 14th day of August, 1880, the said Cathcart tract of land situated and lying on the waters of Loco creek, in Jackson county, and Ocona-Lufta river, in Swain county, being grant No. 224, patented by the state of North Carolina to William Cathcart on the 20th day of July, 1796, and bounded as follows: Beginning at a locust stake and Chestnut oak in John Gray Blount's line at or near the path that leads out of the head of Johnathan's creek, and near a spring; thence running on John Gray Blount's line N. 45 W. 3,000 poles, crossing the main fork of Ocona-Lufta river to a stake in Blount's line, thence S. 45 W. 1,800 poles to a stake near a spruce pine; thence S. 45 E. 3,000 poles to a stake; thence N. 45 E. 1,800 (poles) to the beginning, containing 33,300 acres, which said grant or patent is registered in Book 3, page 163 of the office of the register of deeds, in Buncombe county, N. C., on the 9th day of August, 1796, it being the intention of the parties of the first part to sell the timber on so much of the land as is embraced within the said Cathcart tract as is now owned by the Eastern Band of Cherokee Indians, the tracts within said Cathcart tract owned by individual Indians aggregating about eight hundred acres, being excepted therefrom of the following dimensions taken at this date and species, namely: All poplar 22 inches in diameter and upwards; all chestnut, pine, and spruce 20 inches in diameter and upwards, walnut, cherry, birch, and oak 18 inches in diameter and upwards, hickory and box elder 12 inches in diameter and upwards, all other species of timber trees 18 inches in diameter and upwards, excepting locust which is not included in this contract; and the parties of the first part hereby give, grant, and assure to the party of the second part right of way thereto to fell, cut and remove said timber, and in addition to the above-mentioned timber trees to have the right to cut the necessary timber below the sizes herein named which may be required for the construction of railroads and tramways by the nearest possible road within the limits of the boundaries of the lands of the Eastern Band of Cherokee Indians, to be used in the removing of said timber trees and the use of such ground as may be necessary to erect sawmills, railroads, tramways, etc., the same to be constructed with as little damage to the improvements of said Indians as can be done without unnecessary expense to the parties of the second part, provided, however, that the said party of the second part shall pay to the Indian occupants of the said lands such damages to crops, houses, gardens, private roads and improvements to the Indians as they may sustain in the construction of said roads and tramways and in the removal of said timber.

"But, if the said Indian occupant and the party of the second part shall fail to agree as to the amount of damages sustained, the matter shall be referred to two disinterested parties, members of the council, one of whom shall be selected by said Indian or Indians, the other by the party of the second part, and in case of disagreement by the two they shall select a third man and the decision of the majority shall be final.

"And it is further agreed by and between the parties hereto that this contract shall be in force and effect for the period or fifteen years from date; and that all trees not cut and removed from said land at the expiration of this contract shall revert to and become the property of the parties of the first part. It is further agreed between the parties to this contract that the party of the first part, shall retain a lien on the timber trees herein conveyed for the purchase price at any time unpaid on the same but this lien shall not interfere with the manufacture or sale of sawed lumber in the ordinary course of business.

"Nothing in this contract is intended to prevent any Indian of the said bands from making boards from said timber to cover his buildings on the said Cathcart tract nor from removing any timber trees fallen and cut into logs at the date of this contract, or using any suitable timber within the said survey needed by them for the building of fences or the improvement of their farming lands. Nothing in this contract shall permit the party of the second part to cut any shade tree or any walnut, hickory or chestnut tree being or situate on lands in actual cultivation at the date of this contract of any Indian residing within the Cathcart survey. It is further agreed by the parties to this contract that the party of the second part shall pay the said sum of fifteen thousand dollars, as follows, viz.: Five thousand dollars upon the confirmation of this

contract by the Secretary of the Interior of the United States and five thousand dollars one year from this date, and five thousand dollars two years from this date, all of said payments evidenced by the promissory notes of David L. Boyd and the two last notes to bear interest at 6 per cent. per annum. In the event the Secretary of the Interior shall refuse to confirm this contract or action thereon should in any wise be delayed longer than October 27th, 1893, then and in that event the party of the second part agrees to cut, log and saw said timber and to pay the first notes so soon as one-third on Loco is cut, logged and sawed, and the second of said notes when another third of the Loco timber is cut, logged and sawed, but in no case shall the timber be removed until the payments are made as above set forth. All payments to be made to the bank or persons designated by parties of the first part authorized to receive the same.

"If at any time any controversy should arise between the parties to this agreement it is stipulated and agreed that all matters in dispute shall be referred to two good and disinterested citizens of the state of North Carolina as arbitrators vested with power to pass upon all such matters in controversy, and in case of disagreement to call in a third man, the award of the majority to be final.

"The parties of the first part covenant that they will forever warrant and defend the title to the timber trees above conveyed to the party of the second part, and his heirs and assigns, against the lawful claims of all persons whatsoever.

"In witness whereof, the parties of the first and second parts have hereunto set their hands and seals the day and year above written.

"Eastern Band of Cherokee Indians, [Seal.]

"By Stillwell Sanwooka, [Seal.]

"James Blythe, [Seal.]

"Andy Standingdeer. [Seal.]

"Witnesses:

D. L. Boyd. [Seal.]

"J. M. Moody.

"Thos. F. Davidson."

The above instrument was properly acknowledged before Thos. A. Jones, judge of the criminal court of Buncombe county, N. C.

It appears from the record in this case that, soon after the execution of this contract, certain parties who had acquired rights from Boyd under the agreement proceeded to make arrangements to cut timber from the lands in question, without having obtained the approval of the contract by the Secretary of the Interior. It seems to have been the understanding between the parties when the contract was made that this approval would be obtained without difficulty. In the year 1895 a bill was filed in this court by the United States of America, Samson Owl, and others, Cherokee Indians, against Boyd and others, seeking to enjoin them from exercising any of their rights under the contract in question.

The principal question raised in that case, as will be seen by the decisions of the Circuit Court in the case of United States et al. v. Boyd et al., 68 Fed. 577, decided by Judges Simonton and Dick, and the case in the Circuit Court of Appeals (United States v. Boyd, 83 Fed. 547, 27 C. C. A. 592), was whether or not the Circuit Court had jurisdiction of the case; that question depending upon the relation which the United States bears to the Eastern Band of Cherokee Indians. A full discussion of the subject will be found in those cases, the result of which was that it was held that the United States did have supervision of the affairs of this band of Indians, and that it was its right and duty to look after their interests; and, that being the case, the

United States could properly bring the bill, and, as a consequence, the court had jurisdiction of the case. It was further held by the Circuit Court of Appeals that, in the absence of the approval of the contract by the Secretary of the Interior, the same was invalid, and that the defendants in that case were attempting to remove timber unlawfully. The case in the Circuit Court of Appeals, as will be seen, was not decided until November 5, 1897; and on the 18th day of May, 1898, the approval of the Secretary of the Interior was obtained to the contract, and its predecessors in right under the agreement, and the defendant company, have since, and until September 28, 1908, been cutting and removing timber, when it ceased operations on the lands.

The present bill was filed on November 16, 1908, at Greensboro, N. C., and in July, 1909, was transferred to this court. It is alleged in the bill:

"That the said defendant is now cutting and removing the said timber from the said land notwithstanding the right so to do ceased under the terms of said contract on the 28th day of September, 1908, and notwithstanding due notice has been given them to cease their operations, and that since the 28th day of September, 1908, the said defendant, its agents and employés, as the plaintiffs are informed and believe, have continued cutting and removing timber within the boundary of the said Cathcart tract, and is still cutting and removing timber therefrom in large quantities, and have so cut and removed as the plaintiffs are informed and believe some 4,000,000 or 5,000,000 feet of lumber since the expiration of said contract of the value of \$10,000 or more, as plaintiff is informed and believes, to great injury and damage to the Eastern Band of Cherokee Indians and its property; that the said defendant threatens to continue and is continuing its waste and destruction upon the timber situate upon said land, and is thereby committing and threatening to commit great permanent and irreparable injury to said lands and the destruction of the timber thereon which is the principal substance and value of the land, which if allowed to be removed will be practically valueless, and that the plaintiffs will suffer irreparable injury for which they have no adequate remedy at law."

Upon the filing of this bill Judge Boyd made a temporary restraining order, and directed the defendants themselves to show cause on the first Monday in December why an injunction should not be granted as prayed. The case coming on to be heard on the 27th day of December, 1908, an agreement appears to have been made, resulting in an order of the court as follows:

"Circuit Court of the United States, Western District of North Carolina,
"Fourth Circuit.

"United States of America, Eastern Band of Cherokee Indians, Stillwell Sanwooka, James Blythe, and Andy Standingdeer v. The W. T. Mason Lumber Company.

"Order.

"This cause coming on to be heard upon the notice heretofore issued therein and served upon the defendant, The W. T. Mason Lumber Company, to appear at Charlotte, N. C. on the first Monday in December, 1908, to show cause why it should not be restrained and perpetually enjoined from cutting and removing the timber from the said lands described in the bill, it appears to the court that the defendant has agreed with the plaintiffs as follows:

"First, that the defendant would not engage in cutting any standing timber on said land until the further order of this court; and that the plaintiffs agree with the defendant that the defendant shall have the privilege of making sale of all timber cut and now remaining on said land and not sawed into lumber at such price as shall be approved by this court, and this privilege shall continue

until the further order of this court, and in the event that a sale shall be made and approved by the court, the proceeds arising shall be under the control of the court until the further order of the court.

"It is therefore now ordered that the terms agreed upon between the parties be and hereby are approved and adopted as the order of this court.

"As it now appears to the court there is no reason why the defendant should not be permitted to remove and dispose of the sawed lumber which was sawed prior to September 28th, 1908, and it is therefore ordered by the court that the defendant be and hereby is, permitted to sell and dispose of such lumber unless for good cause shown it shall hereafter be restrained by this court.

"The foregoing agreement and orders as expressly understood and agreed between the parties are made without prejudice to the defendant's rights to object to the jurisdiction of the court upon any ground it may wish to assign by demurrer, plea or answer to the bill of complaint herein.

"This the 7th day of December, A. D., 1908.

"[Signed] Jas. E. Boyd, U. S. Judge."

The defendant answered the bill on December 18, 1908, proofs were taken, and the case is now before the court on final hearing on bill, answer, and evidence.

1. The first question raised in the case is whether or not the court has jurisdiction. In effect, it is the same question that was raised in the case referred to in the Circuit Court and decided by Judges Simonton and Dick, and in the Circuit Court of Appeals. I think this court is clearly controlled by those decisions on the question of jurisdiction. The opinions of Judges Simonton and Dick and the opinion of Judge Goff in the Circuit Court of Appeals very ably and fully discuss the questions involved, and it would be useless and a mere waste of time to attempt to add anything to them.

2. The next question is as to whether the defendant was doing or attempting to do anything by itself or its agents and employes which would justify a court of equity in granting an injunction in the case; that is, whether there was anything to enjoin. Of course, on the face of the bill presented to Judge Boyd a clear case was made, and the right to a restraining order was apparent in the absence of a proper showing by the defendant of facts to the contrary. It appears from the evidence in this case that, while the defendant company did not intend to do any more cutting of timber after September 28, 1908 (indeed they claim to have stopped cutting a day or two before that time), they did intend to remove the timber already cut, amounting to some 4,000,000 or 5,000,000 feet.

Mr. E. H. Hall, secretary and treasurer of the defendant company, testified on cross-examination as follows:

"Q. You intended to move all of this timber that you cut down as fast as you could, did you not, this timber you cut down during the latter part of the year, just before the 26th of September? A. Yes; I think so.

"Q. Just as fast as you could? A. Yes.

"Q. It would be dangerous to remain long? A. Yes; to all of it if it remained long enough.

"Q. You intended to continue your work there didn't you? A. We had notice that this deed or contract expired on the 27th, and, of course, it all depended upon the termination of that. We contended that it did not, and, of course, these logs would be worthless in there, if not moved.

"Q. You expected to continue that part of it? A. Yes.

"Q. You got notice from the Indian agency or some one? A. We got the notice from Mr. Harris over there, saying that our time expired on the 27th, I believe.

"Q. And after you received that notice? A. We took him at his word, and did not do anything; that is, did not cut any more timber.

"Q. You continued to haul logs? A. Yes.

"Q. And make roads? A. Yes.

"Q. But you did not cut any logs after the 28th of September? A. No, sir; I don't think so.

"Q. You never sawed any after the 28th? A. I think they sawed some trees into logs. I don't think they logged any. I am not sure.

"Q. What quantity of timber did you think you had down there? A. I cannot tell.

"Q. Four or five million feet? A. Yes; I think there is that much. I am not an expert.

"Q. Did you ever have that much down before at one time? A. I don't think so."

The contention of the government was, and is, that the contract expired on December 28, 1908, and that all trees not both cut and removed from the land by that time should revert to and become the property of the Cherokee Indians; that is, all trees not removed from the land, although felled and lying on the ground, should revert to the Cherokee Indians. Based on this contention and the case thereby made, it is clear that a cause of action exists cognizable in a court of equity and in this court, the jurisdiction here existing by reason of the United States being a party, as heretofore stated.

3. The next question is as to the relative rights of the parties under this contract, in view of all the facts connected therewith and of the present situation. The contract provided, in referring to payments, for "\$5,000 upon the confirmation of this contract by the Secretary of the Interior of the United States," and, further on in the contract, this expression occurs: "In the event the Secretary of the Interior shall refuse to confirm this contract," etc. From this it will be clearly seen that the approval of the Secretary of the Interior to the contract was considered necessary to make the contract effective and valid. From what has been stated before, it will also be seen that by the action of the government in filing its former bill, and by the action of the Secretary of the Interior in declining to approve the contract until May 18, 1898, the purchaser of this timber was delayed something more than four years and seven months in getting to work to cut and remove the timber which he purchased and had paid for in full. There is no doubt but that it was the contemplation of the parties to the contract that the purchaser should have 15 years in which to cut and remove the timber. By the action of the Secretary of the Interior in declining to approve this contract, resulting also in the previous litigation referred to, they lost, as stated, more than four years and seven months of this time. Should the government now be heard to say against the assignee in right of the purchaser of this timber that the 15 years should commence from the time the contract was entered into, when, by its action, the purchasers were prevented for such a considerable part of the period from carrying on the work under the contract? The contention of the government is that the contract commenced, as stated therein, from its date, and that the purchaser of this timber and his assignees knew that the approval of the Secretary of the Interior was not obtained until 1898; and yet, with a full knowledge of this fact, and believing themselves to be able to cut and remove all the timber of the sizes pur-

chased during the period remaining, they continued with the contract, and that, more than 10 years remaining, they had ample time in which to get the full benefit of the contract, and to realize fully all the rights to which they were entitled under it.

I am doubtful about this, and careful reflection has not removed the doubt which I had on hearing the case. While I am not able to agree entirely with the contention of the defendant in this matter as to this feature of the case, of one thing I am perfectly clear, and that is that the company should have the right to remove the timber already cut on the land. We are in a court of equity—a court of conscience—and in my opinion it would be wholly inequitable to refuse the defendant this right in view of all that has occurred in the case. The company, knowing that it would be claimed that the contract expired on the 28th of September 1908, exercised great diligence in cutting timber for a month or two before and up to that time. They cut timber which they had purchased and paid for long before, and, in view of the interruptions which they had had, and the long delay in getting to work, they should certainly be allowed to remove the timber which they had cut within that period. It is true that the language is "all trees not cut and removed from said land at the expiration of said contract shall revert to and become the property of the party of the first part." The contention of the government is that, because this timber had not been removed, as well as cut, it reverted to the Cherokee Indians. The language is: "All trees not cut and removed. * * *" Taking this in connection with the right granted by the contract to erect sawmills, railroads, tramways, etc., I do not know that the contract should be construed so as to mean that all the timber cut before the expiration of the contract, and still on the land of the Indians, should revert to them. If it be strictly construed in that way, even timber now on the tramways or at the mills, would revert to the Indians. It was probably originally contemplated by the parties that the trees would be removed to the sawmills, and sawed up, the whole work going on together. Towards the expiration of the contract, on account of the great distances, this being impossible, it seems within the fair meaning of this contract, properly construing it, that the company should have the right to take these trees to the mills, saw them up, and get the benefit of them. The contention of the defendant's counsel is that, when trees are severed from the stump, they are removed within the meaning of this contract. Whether this be true or not, I am inclined to think, taking the whole language of the contract together, that it was never contemplated that fallen trees should revert, even if after they are felled they are "trees" within the meaning of the contract, which is doubtful. Be this as it may, however, I am perfectly clear, in view of the delay which the purchasers of this timber have suffered by reason of the action taken on behalf of the Indians, that it would be wholly inequitable to refuse to allow them to remove the timber cut within the period limited by the contract.

In several recent decisions the Supreme Court of North Carolina has held that instruments like this convey an absolute title in the timber embraced in the contract, defeasible as to timber not removed within

the time limited. In *Mining Company v. Cotton Mills*, 143 N. C. 307, 55 S. E. 700, Chief Justice Clark says:

"It is true, as contended by the plaintiff, that 'a deed purporting to convey all the wood and timber therein described vests in the grantee a present state of absolute ownership in said timber defeasible as to all timber not removed within the time required by the terms of the deed.' *Lumber Company v. Corey*, 140 N. C. 462, 53 S. E. 300; *Hawkins v. Lumber Company*, 139 N. C. 160, 51 S. E. 852; *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24."

In *Lumber Company v. Corey*, the first headnote is as follows:

"A contract to cut all timber of an indicated measurement on certain land, for a fixed period, passes a present estate in the timber defeasible as to all timber not cut within the limit of the time fixed."

A defeasance should not be extended beyond its necessary import and meaning. In this case it is, in effect, a forfeiture of timber bought and paid for, and forfeitures are not favored by the law; so I think on the whole there can be no doubt of the right of the defendant company to remove the fallen timber. They should be allowed a reasonable time to do this. As to what a reasonable time would be, I will hear counsel on some day of the present term, when it will be convenient for counsel for the government and defendant. When this time shall have been fixed, a decree may be taken in accordance with what has been said.

CARTER v. FORTNEY et al.

(Circuit Court, N. D. West Virginia. September 9, 1909.)

INJUNCTION (§ 152*) — PRELIMINARY INJUNCTION — RESTRAINING UNLAWFUL ACTS OF STRIKING WORKMEN.

A preliminary injunction granted on conflicting affidavits restraining striking miners formerly in the employ of a coal company from interfering with the property of the company or assaulting, threatening, or intimidating its employes pending final hearing on a bill for a permanent injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 337; Dec. Dig. § 152.*

Restraining boycotts, strikes, and other combinations by employes interfering with commerce or business, see note to *Shine v. Fox Bros. Mfg. Co.*, 86 C. C. A. 313.]

In Equity. On motion for preliminary injunction.

P. J. Crogan and F. E. Parrick, for plaintiff.

Charles E. Hogg, for defendants.

DAYTON, District Judge. After the overruling of the demurrer in this cause (for opinion, see 170 Fed. 463), by order entered July 20, 1909, submitting motion for a preliminary injunction, the defendants, save and except George Kerchival, Claude Mankins, and John S. Douglass, have filed, to be read as their joint affidavit upon this hearing, their joint answer, sworn to by nine of their number, to the plaintiff's bill, in which they distinctly and explicitly deny all allegations of conspiracy, all charges and all and any acts, words, or declarations

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of threats, menaces, intimidation, insulting language, jeers, hootings, and assaults and violence charged against them therein. The defendant George Kerchival has filed his separate answer, to be read as his affidavit upon the hearing of this motion, to the same effect. In addition, these defendants have filed, in resistance of this motion, the separate affidavits of the defendants Charles Watkins and James Tuhill, Sr., in which they explicitly allege that all the allegations in the bill imputing intimidation, coercion, or interference on their several parts are untrue.

The defendant Charles Watkins alleges himself to be a law-abiding citizen, married, with one child, and that he is a property owner in the town of Tunnelton, where he has lived substantially all of his life; that he is a churchgoer and member of the town council of Tunnelton; that there has been no such disturbance as charged in the bill within the corporate limits of said town so far as he knows that could not be controlled by the local authorities, but that, on the contrary, good order has prevailed in said town, except so far as disturbed by drunken men brought in by the coal company from other places to take the place of the striking miners; and that these men have indulged in shooting on the streets, have assaulted the police officers, and indulged in other acts of lawlessness against good order and the peace.

The defendant James Tuhill, Sr., in his affidavit substantiates these statements, and alleges that for 13 years he has been a citizen of the town of Tunnelton, and that the superintendent of the coal company has admitted that he has never seen affiant do anything to interfere with the men who are employed by the coal company, and that he only knew what he has been told by others.

In addition to this, the defendants have filed the affidavit of Hubert Pentony, who states that he is a resident of the town of Tunnelton, and has been a resident of said town for 11 or 12 years; that he was town sergeant from April 1, 1908, to March 31, 1909, and knows all the defendants in this suit; that he has heard the bill read, and from his own knowledge states that the charges of fraud, violence, intimidation, and coercion charged in the bill are untrue; that he has had full opportunity to see the defendants and striking miners from the time the strike began until the present, and that he has observed no act or attempt by force, fraud, intimidation, or other unlawful means to induce the employes of the said coal company to quit work or prevent others from going to work for it. He states that many persons have been brought into the town to work at said mines to take the place of the striking miners, and that those persons have indulged in promiscuous and aimless shooting, and that the managers and agents of the coal company have done nothing to arrest them or taken any steps to have them punished; that there has been no violence, fraud, intimidation, or coercion of any sort used toward persons coming in on the passenger trains of the railroad; that the former mayor of the town, now an attorney for the coal company, refused to put on additional police force at the expense of the company on the ground that it was not necessary, and the affiant says that it was not necessary, and that he, as town sergeant, could take care of the situation himself, as there was no such violence or evidence of danger to property or persons as required

any assistance to enable him to maintain order as the police officer of the town of Tunnelton.

The affidavit of Joseph A. Miller states that he has been a resident, except for six years, of Preston county all his life; that he is married, and is and has been holding the office of justice of the peace within the county of Preston since January 1, 1909; that he knows all the defendants and T. R. Barber, the superintendent of the coal company; that the coal company brought into the town of Tunnelton persons from different sections of the country to take the places of the striking miners; that these men so brought into said town did promiscuous and aimless shooting in the streets; that he personally saw and talked with Barber touching this shooting as a public officer; that Barber would make no complaint against any one so shooting; that he has been at his home at Tunnelton almost continuously since the 1st day of January, 1909; that he never saw any misconduct on the part of the defendants indicating an effort to intimidate, coerce, or do violence to the employés of the coal company; that he has heard the charges read which are contained in said bill, and that there is no particle of truth in any of the statements so made against the defendants in said bill, except that he heard some of the boys about the town of Tunnelton bleating like sheep, but he does not know at whom they were bleating, nor can he say that they are any of the parties who are defendants to this bill. He further states upon his own accord and explicitly that most of the defendants named in the bill are among the most law-abiding and peaceable citizens in his part of the state of West Virginia; that they are industrious, reliable, and skillful miners, and a number of them own their own homes.

The affidavit of W. E. Smith states that he has been a resident of Tunnelton for seven years past; that he is a coal miner, knows all the defendants; that he has heard the bill in this cause read, and that there is no foundation in fact for its allegations of fraud, coercion, intimidation, conspiracy, or other unlawful acts; that George Kerchival, one of the defendants, while at one time in the employ of the coal company, is mayor of the town of Tunnelton, is an upright, law-abiding citizen, and diligent in the discharge of his duties; that no necessity exists for guards to protect the company's property, and that law and order are maintained by town authorities.

The affidavit of J. N. Thorn states that he is a restaurant keeper, resident in Tunnelton for four years past, knows all the defendants, and knows them to be peaceable and law-abiding citizens; that he has heard the bill read, and that, so far as his own knowledge extends, the charges of violence, coercion, and intimidation therein contained are not founded in truth; that since the awarding of the injunction he has not observed anything on the part of the defendants indicating an intention or purpose of interfering with the operation of the company's mining plant or to coerce or intimidate its employés; that he is and has been since January 1, 1909, a constable for Preston county, has never been called upon nor has it been necessary to arrest any of the defendants since then, but that outside "strike breakers" have created more trouble than has been known in Tunnelton for the same length of time since he has been resident thereof; that he has for three nights deemed it

imprudent to go to bed because of the lawlessness of these outside parties for whom he has now in his possession warrants of arrest for 11 several persons.

The affidavit of the defendant George Kerchival states that he is a resident of Tunnelton for eight years past, has been mayor thereof, since February, 1909, knows all the defendants, knows them to be peaceable, law-abiding citizens, has heard the bill read, and that its allegations of fraud, violence, intimidation, and conspiracy are not true, and he knows them not to be true; that since the awarding of the injunction he has observed nothing on the part of the defendants indicating any intention or purpose of interfering with the company's plant or of intimidating any of its employes. He then reiterates the charges substantially set forth in the preceding affidavits against the "strike breakers," and specifically charges that one of them was attempted to be shielded from arrest by him and his officers by the superintendent of the company.

The affidavit of O. G. Ashley states that he is a resident for 23 years of Tunnelton, prior to January 1, 1909, was constable of Preston county, knows all the defendants, has heard the bill read, that all the charges thereof against the defendants of fraud, intimidation, conspiracy, coercion, threats, and other unlawful acts have no foundation in truth or fact, and reiterates the charges against the strike breakers.

And the affidavit of E. M. Durr says that he is a resident of Tunnelton for 30 years, was formerly a railroad brakeman, now a miner; knows the defendants; that they have been peaceable and law-abiding; that they have not by threats, combination, coercion, intimidation, fraud, or violence interfered with the company's property or employes; that he has heard the bill read, and its charges to this effect are not founded in truth. He repeats the charges against the "strike breakers."

On the other hand, the plaintiffs have filed, heretofore in this cause with a view to asking rules for contempt and on said 20th day of July, 1909, in support of this motion:

The joint affidavit of Mrs. Mary Martin, Mrs. Lona Mayfield, M. L. Mayfield, George Zetty, George Laughry, Nathan Laughry, Robert Zetty, Ernest Davis, George Combs, and Harry Hall to specific acts after the restraining order became effective, first, on the part of defendant Claude Mankin, who said to Mrs. Martin and Mrs. Mayfield, wives of working miners, "You G—— d—— scabs get out of the door," and to Mrs. Mayfield, "Take in the children," that they (Mankin and others) were fighters and would kill the children, who were "d——n scabs"; second, on the part of defendants Mankin and John S. Douglass, who each assaulted George Zetty because he was an employe of the company; third, on the part of said Mankin and Douglass, who assaulted, struck, and run out of a restaurant George and Nathan Laughry, company employes, calling them "scabs," and declaring their intention to kill all "scabs"; fourth, on the part of the defendants Mankin and "Bum" Layton, who at 10 o'clock at night stopped Robert Zetty and Ernest Davis, assaulted and searched one and overtook the other running away, threw him down and choked him; on the part of said defendants Mankin and Douglass, who attacked George Combs

and Harry Hall, employés of the company, and called Combs "a G—— d—— black-hearted scab."

The affidavit of Edward Edwards, which sets forth that defendant Douglass, the defendant Mankin aiding and abetting, struck him in a restaurant, and called him a "G—— d—— scab," on March 13, 1909, after the restraining order became effective.

The affidavit of B. F. McNemar, a watchman for the company, which says that defendant Joe Selvey after the restraining order became effective called those working for the company "yellow dogs."

The affidavit of J. H. Glendenning, who says that the defendant Selvey, after the restraining order, stopped him in the county road, and denounced him and the others working for the company as "scabs and blacklegs."

The affidavit of A. F. Cutlip, who says defendant Selvey, after the restraining order, denounced him and the others working for the company as "two-legged dogs."

The affidavit of C. Clayton Jones, who states that the defendant Victor Huffman, after the restraining order, called the daughter of Charles H. Jones, an employé, "a d——n scab" and a "water sheep," frightening her until she went crying into the house.

The affidavit of Charles H. Jones, who says that the defendant Huffman called him "a d——n scab," and attempted to hit him with a stone when he was passing from his work, this after the restraining order.

The joint affidavit of A. F. Cutlip and J. W. Schroder, employés, who says that the defendant Wilbur Mease denounced them as "G—— d—— scabs," and said the company did not work anything but "scabs and yellow dogs," followed them to a restaurant, and said: "Look at the G—— d—— yellow dogs."

The affidavit of Mrs. Earl Wiles, in which she states she heard the defendant Harvey Halbritter say that "some one ought to put a stick of dynamite to the dam of the company and blow it out," and that "he would not be a bit too good to do it"; and on another occasion that "some one ought to put a stick of dynamite under Shumaker's office," Shumaker being the company's bookkeeper.

The affidavit of W. E. Imler, who states he was electrician for the company, and while returning from church was struck by a stone thrown by some one whom he could not discover or identify, but who called him a "scab."

The affidavit of Lloyd Zetty, who states that the defendants prior to the restraining order were accustomed to congregate in numbers upon the streets and sidewalks of the town, and of insulting, threatening, and annoying the company's employés, and of threatening to destroy the property and mine of the company, and do injury and violence to its employés; that about November 5, 1908, while the defendants Osburn Fortney, Wm. F. Fowler, Walter Duvall, Wilbur Mease, and Clarence Milter were together in a crowd on the street, Fortney and Fowler threatened that they "would kill every s—— of a b—— that was working up there."

The affidavit of Charles Price, who says he is the son of U. G. Price long in the employ of the company, and in January, 1909, while standing on a store platform near the mine, he was struck by one of the

stones thrown by parties down the street, whom he believes to have been some of the defendants; that the defendants were accustomed to gather great crowds upon the streets, and by insults, threats, and violence seek to make men quit work for the company, and that they frequently made threats of injury against the company's property.

The affidavit of Charles H. Jones, who says that he was a miner for the company, resident of the town for several years, and while returning from his work on January 21, 1909, he was met by defendant Charles Watkins, who took hold of him and called him "a G—— d—— black s—— of a b—— and a d——n dirty liar," and said to him "G—— d—— you, I have a notion to kill you right here," and that his only provocation or purpose of this assault was to intimidate him as an employé of the company. He states that assaults were made upon Wm. Zetty, A. J. Johnson, Stewart Bonnafield, W. E. Imler, John Brown, John A. Riley, Frank Kiley, and Charles Price, employes.

The affidavit of John A. Riley, a resident for several years of Tunnelton and a company employé, who says that in August, 1908, an attack was made upon him by the defendant Eli Drake on the railroad track, who beat, wounded, and injured him solely because he was working for the company; that while making such assault Drake called him a "scab" and other terms of vilification.

The affidavit of A. J. Johnson, a resident of Tunnelton for several years, who says that on September 16, 1908, the defendant John M. Herndon made an assault upon him when he was in a weakened condition physically by reason of a recent sufferance of typhoid fever and seriously beat and wounded him, this in front of the Baltimore & Ohio passenger depot, without provocation or reason except his rage on account of affiant's working at the company's mine; that while making this assault Herndon called him "scab" and other vile names.

The affidavit of John Brown, a resident of Tunnelton for several years, who says that in August, 1908, while riding along the street on a bicycle, he was assaulted by the defendant "Bum" Layton, struck by a stone, wounded and injured by him, without cause, except that he was working at the mine.

The affidavit of M. V. Shaffer, a resident of Tunnelton for several years, who says that in August, 1908, in the nighttime, three masked men came to the power house where he was working, sought admission, but, being prevented by the night watchman, fired off a pistol near the door, and gave the night watchman a letter for affiant threatening him and other company employes that, if they did not cease working immediately, they would be killed, and that, if they permitted the fact to be known that such letter had been delivered to them or such visit had been made to them at the power house, they would be killed immediately.

The affidavit of Frank Kiley, an employé, who says that on November 3, 1908, that while walking along the sidewalk, without provocation, he was struck by the defendant Harry Wilds and knocked off the sidewalk into a ditch or sewer; that while he worked for the company in the summer of 1908 prior to the restraining order herein he was daily insulted, threatened, and abused upon the streets by the defendants and their sympathizers in order to intimidate and prevent his work-

ing; that the defendant James Tuhill, Sr., threatened and told him "don't you go to work any more, or you will get your head knocked off"; that defendants daily congregated on the streets, insulted the company's employes, calling them "yellow dogs," "scabs," "black-legs," and other vile epithets not fit to be written; threatened said employes with beatings and injury; that they would have "their heads knocked off," "their heads broken," and would be killed if they did not quit work; that they frequently threatened that they would destroy the property of the company, would blow up the dam, blow up the office, and destroy the company houses in which its employes lived.

The affidavit of T. R. Barber, superintendent of the company, which sets forth that the company by reason of the strike closed down its mine from March, 1908, to August, 1908, when it started operations again, but was so harassed by the combination and conspiracy of the defendants to prevent workmen from working by their daily assembling at or near the mine and upon the highways leading to it and jeering, hooting, insulting the workmen, calling them "yellow dogs," "scabs," "blacklegs," "black sheep," and other vile epithets not fit to be written, that the company again suspended operations until the last week in December, 1908, when it again undertook to operate its mine; that many of its men went back to work, but many, including the defendants, declined to do so and began again to threaten, insult, and intimidate those who did go to work by daily assembling upon the highways at or near the mine and calling the men the names set forth and threatening to kill them; that he himself was often threatened with violence, and this conduct was likewise indulged toward his wife and family; that employes were attacked and assaulted while going to and from work, and he sets forth specifically assaults made by defendant Charles Messenger upon D. C. Williams, who was thrown or pushed from the sidewalk into a deep ditch and called a "G—— d——n little blackleg son of a bitch" by Eli Drake upon John A. Riley, who was beaten, abused, and greatly injured, by John M. Herndon upon Albert Johnson, who was beaten and injured, upon Phillip Rhodes at night by unknown men in force and numbers and who fired leaden bullets into and through his dwelling house, the wife and children of Rhodes being in the house, by Henry Wiles upon Frank Kiley, who was pushed from the sidewalk; that besides these many other assaults were made or attempted upon various other employes, the person making which could not be identified, but the employes were constantly met, insulted, threatened with death, if they did not cease work; that such assaults were made upon Geo. W. Zetty, W. P. Bridge, D. C. Arbogast, Charles Buzzard, W. E. Imbrey, and others; that the officials of the town would or could not protect said employes; the company obtained the services of two deputy sheriffs of the county who were unable to preserve order; that threats were made of destroying the company's property; that it was greatly hampered in its operations in complying with its contracts, and, without the restraining order herein, he believes it would have been impossible for it to continue its operations at all; that since such order most of defendants have ceased their unlawful conduct, but certain ones named have in contempt of it violated it in certain particulars set forth.

A large number of the foregoing affidavits in addition to the specific acts set forth therein assert that defendants with many others by them incited constantly and continuously congregated in crowds upon the streets and sidewalks where employes of the company had to go to and from work to their homes and threatened them with serious injury if they did not quit work, reviled them as "scabs," "blacklegs," "yellow dogs," and other vile names; frequently pushed, struck and assaulted them; that they daily congregated about the depot of the railroad at such times as trains were scheduled to stop, and whenever any one would alight whom they had reason to believe intended entering the service would crowd around such person or persons, and by entreaties, persuasions, abuse, threats, and vilifications strive to prevent them from entering such service, and to compel them to leave; that they would display large banners with written warning thereon to persons not to enter the service of the company; that, on account of these conditions, deputy sheriffs of the county were sent there who were unable to maintain order, and the Baltimore & Ohio Railroad Co. was compelled to and did send and stationed there a special policeman in and at the depot. These general statements of disorderly conduct are substantiated in addition by the separate affidavits of Thomas Fisher, a merchant; of Everett Walker, a physician; of J. W. Miller, a merchant; of M. C. Gibson, a merchant; of W. E. Noel, a hotel keeper; and of C. A. Fleegle, a railroad agent—all of whom state they have no connection of any kind with the company.

The condition of things revealed by these affidavits is startling. Ten of the defendants by reason of their verification of answers, together with the mayor of the town, a member of its council, its sergeant, the resident justice of the peace, the resident constable, and four others, have emphatically and in unqualified terms under oath stated the allegations made in plaintiff's bill of lawless conduct on the part of defendants to be absolutely false and untrue, that defendants are peaceable, law-abiding citizens with the very best character, and the town government of Tunnelton in effect has been both competent and efficient. On the other hand, 31 persons have set forth under oath a condition of affairs which, if true, shows these defendants or most of them to be in principle utterly regardless of the law and the rights of their fellow-men, as prone to lawless deeds almost as the sparks are to fly upward, and also shows the officers of the town and those of the county resident at Tunnelton to have been absolutely false to their official duty and their administration of justice and maintenance of law and order to have been the baldest farce. It is impossible to reconcile the statements of these conflicting affidavits. It cannot be done. There is clear perjury somewhere, and it should be sifted out and prosecuted.

It seems to me that there is nothing for me to do but to award this preliminary injunction, require the parties to take the evidence, and determine finally the case upon its merits.

ASHEVILLE LUMBER CO. v. HYDE.

(Circuit Court, M. D. Pennsylvania. September 13, 1909.)

No. 227, June Term, 1907.

1. CORPORATIONS (§ 545*)—OFFICERS—WRONGFUL USE OF CORPORATE FUNDS—OBTAINING PREFERENCE AS CREDITOR.

An officer of an insolvent corporation, who has claims against it or is bound on its obligations, must share ratably with other creditors, and cannot secure to himself any advantage or preference over them by using his power as an officer to pay his claims, or those on which he is liable, when it is evident that other creditors cannot be paid in full and that the corporation cannot continue its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*]

2. CORPORATIONS (§ 545*)—OFFICERS—LIABILITY TO CREDITORS FOR MISAPPLICATION OF FUNDS.

Defendant, who was treasurer and general manager of a corporation, after it had become hopelessly insolvent, used all of its available funds to pay certain notes on which he and other directors were indorsers, and in payment of his back salary and temporary advances which he had made in cash shortly before to meet demands on the company. *Held*, in an action to recover, for the benefit of general creditors of the company, the sums so paid out, that defendant was liable for the sums he had so unlawfully applied on claims which were not entitled to preference, and that it was no defense that other directors, who were also indorsers, were released by such payment, but that he was entitled to his salary and the sum taken in repayment of cash advances made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*]

3. CORPORATIONS (§ 548*)—LIABILITY OF OFFICERS TO CREDITORS—SUIT TO ENFORCE.

The fact that a creditor of a corporation, while it was insolvent and a short time before it ceased doing business, received payments on his debt which gave him a preference over some of the other creditors, does not deprive him of the right to maintain a suit in behalf of himself and all other creditors against an officer of the corporation to recover sums illegally used by such officer in paying other debts on which he was personally liable.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 548.*]

In Equity. On final hearing.

Grant Herring, for plaintiffs.

Harry S. Knight, for defendant.

ARCHBALD, District Judge. This is a bill brought by certain creditors of the Bloomsburg Lumber & Manufacturing Company, on behalf of themselves and others, to charge the defendant with money of the company paid out by him as treasurer, in fraud, as it is said, of their rights. The Bloomsburg Lumber & Manufacturing Company was incorporated under the laws of Pennsylvania, somewhere about January 1, 1904, to conduct a lumber and planing mill business, with a capital of \$41,000, of which \$16,000 was paid in, in cash; the balance being represented by real estate put in at \$25,000. The money paid

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in was exhausted in the purchase of machinery and material, and within four or five months, in consequence, the company was compelled to borrow \$10,000 for working capital, which was secured at different banks on notes indorsed by the defendant and two other directors. The defendant was treasurer of the company from the start, and on May 1, 1906, was made general manager, and given full charge. The business was a losing one from the beginning, running \$4,000 behind the first year, and \$6,000 the second; and on January 15, 1906, when an account seems to have been taken, the indebtedness amounted to \$33,000, which was increased by July to \$43,000, at which time the banks, not being satisfied with the outlook, gave notice that the loans which they were carrying must be paid. On August 20, the accustomed pay day, the company was not able to meet its July pay roll, and some 10 days later a bill was filed against it in the common pleas of the county upon which the defendant was appointed receiver. Meantime the defendant, as treasurer, had been collecting in and realizing upon the available assets of the company, getting together in this way some \$10,000, which he used, to take care of the notes at bank, on which he and the other directors were indorsers, and also to pay himself for salary and advancements, all of which he did on his own responsibility and without consultation with the other directors. The payments so made were as follows:

August 18.	10 months' salary.....	\$1,000
"	20. First National Bank of Catawissa.....	1,000
"	24. First National Bank of Bloomsburg.....	4,000
"	26. First National Bank of Berwick.....	2,500
"	28. Money advanced by defendant personally.....	515
"	30. Farmers' National Bank of Catawissa.....	1,000
Total.....		\$10,015

This drained the treasury of every dollar, and the day after the last payment the bill for the appointment of a receiver was filed. It is to recover for the benefit of creditors generally the money so paid out that the present suit was instituted. The contention is that, the company being hopelessly insolvent, the defendant had no right to take advantage of his position, as general manager and treasurer, to prefer himself and pay off the indebtedness due to him individually and the obligations for which he and the other directors were liable, and that, having done so, it was a breach of trust and a constructive fraud, for which he is answerable to creditors.

The doctrine which is thus invoked, while not of universal acceptance, is the better, if not the prevailing, rule. 7 Am. & Eng. Encyc. Law (2d Ed.) 743, 744; 10 Cyc. 1255; Morawetz, Corp. § 787; Thomp. Corp. §§ 6503, 6504. It is that of the Pennsylvania and the federal courts, and is therefore controlling here. It was expressly held in Hopkins' Appeal, 90 Pa. 69, that where the officers of an insolvent corporation, to whom it was indebted, took notes and got judgment by default in their own favor, on which execution was issued and the property of the company sold, it was a fraud in law, which gave them no preference over other creditors in the distribution of the proceeds, which should therefore go equally to all. And in Kerstetter's Appeal,

149 Pa. 148, 24 Atl. 163, a similar decision was made; the rule, as laid down in *Morawetz on Corporations*, § 787, that the directors of an insolvent corporation who have claims against it must share ratably with other creditors, and cannot secure to themselves any advantage or preference over them, by using their power as directors, being expressly approved. "If on the discovery of the insolvency of the corporation," it is said, "its officers were at liberty to appropriate its entire assets in satisfaction of their demands against it, outside parties dealing with it would be utterly devoid of protection. The law does not intend or allow such an appropriation, by persons intrusted with the management of the corporation." And *Mechanics' Building Association's Estate*, 202 Pa. 589, 52 Atl. 58, and *Pangburn v. American Vault Co.*, 205 Pa. 83, 54 Atl. 504, are to the same effect. "The established rule," as it is said, in the former, "is that a director of a corporation may advance money to it, and may take from it a mortgage or other security, like any ordinary creditor, * * * but that when the corporation has become insolvent he cannot thus secure himself for past advances."

There is nothing to call this in question in *Mueller v. Fire Clay Company*, 183 Pa. 450, 38 Atl. 1009; it being found in that case that, at the date of the judgment confessed to secure the notes on which the directors were indorsers, the company was solvent, and that the judgment was not given to prefer the directors, but in order to satisfy the demands of the banks, and as a condition to the extension of existing loans, which was essential to the continuance of the company's business, and not with the idea of stopping it. The rule that the directors of an insolvent corporation may not take advantage of their position to the detriment of other creditors, as declared in previous cases, was at the same time in terms approved; such action, as it is said, being constructively fraudulent, and the burden being on the officers preferred to show that it was fair and conscionable. And the case of *Cowan v. Plate Glass Co.*, 184 Pa. 1, 38 Atl. 1075, is no different.

The same rule prevails in the federal courts, of which one or two examples will be sufficient. Thus, in *Koehler v. Iron Company*, 2 Black (U. S.) 715, 17 L. Ed. 339, it was held that a mortgage executed by the officers of a corporation in failing circumstances to secure an existing indebtedness due to themselves, in abuse of their authority, was not enforceable. "Directors cannot thus deal with the important interests intrusted to their management," as it is said. "They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation." So where, in *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40, the directors of an insolvent railroad, who had indorsed its notes, which were secured by its bonds, procured a foreclosure of the trust mortgage and a sale of the road, with its equipment, which they assisted the purchaser to acquire for an inconsiderable sum, the transaction was held to be tainted with such fraud as made the purchaser liable to creditors of the company for the value of the property obtained. "The conduct of the directors of this railroad corporation," says the court, "was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interest-

ed, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a clear breach of trust. To be relieved from their indorsements, they were willing to sacrifice the whole property of the road. Bound to execute the respective duties intrusted to their management with absolute fidelity to both creditors and stockholders, they nevertheless acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed."

This, no doubt, was an extreme case, but the same principle was involved. It has also been asserted in numerous cases in the lower federal courts, of which a few only need be named. *Lippincott v. Shaw Carriage Company* (C. C.) 25 Fed. 577; *Sprague Brimmer Manufacturing Co. v. Murphy Furnishing Goods Co.* (C. C.) 26 Fed. 572; *White Manufacturing Co. v. Pettes Co.* (C. C.) 30 Fed. 865; *Adams v. Kehlor Milling Co.* (C. C.) 35 Fed. 433; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* (C. C.) 45 Fed. 7; *Farmers' Loan & Trust Co. v. San Diego Car Co.* (C. C.) 45 Fed. 519; *Sutton Manufacturing Co. v. Hutchinson*, 63 Fed. 496, 11 C. C. A. 320; *Northwestern Mutual Life Insurance Co. v. Cotton Exchange Real Estate Co.* (C. C.) 70 Fed. 155.

The case of *Twin Lick Oil Co. v. Marbury*, 91 U. S. 588, 23 L. Ed. 328, is in no respect opposed; the transaction there being nothing more than a loan of money in good faith to the corporation by one of its directors, secured by a deed of trust of its property, made at the time as a condition to the loan, which there is nothing in law or equity to prevent. The court at the same time takes pains to declare:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, * * * which has received the clearest recognition in this court"

—which suggests no intended departure from other cases. In *Sanford Fork & Tool Co. v. Howe Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713, also, the circumstances took the case out of the ordinary rule. The corporation there, although insolvent in the sense that it did not have sufficient property to pay its debts, was still a going concern and intended to continue its business, and the mortgage security given to its creditors was not to protect past indebtedness alone, but to procure an extension of the maturing paper of the company and obtain further advances of credit, all of which is very different from what we have here.

That a case is presented, in the present instance, within the rule so laid down, would seem to be clear. Of the insolvency of the corporation, at the time of the payments complained of, there can be no doubt. The indebtedness, including that which was preferred, amounted, as already stated, to \$43,000, to meet which but \$10,000 could be got together after turning every penny. The real estate was all that was left, and this was incumbered with a mortgage of \$6,000, as it had been from the beginning, subject to which it was subsequently sold by the defendant, as receiver, for \$5,250. So involved was the company that it could not pay its workmen their July wages, some \$2,500, or at least

it did not; the money being used by the defendant to pay off the notes at bank instead. If there is any virtue, therefore, in the doctrine that officers of a bankrupt corporation cannot select and pay off the indebtedness for which they are individually liable to the detriment of other creditors, a case in which to apply it is fully made out.

It is said that the notes were called, and that the defendant had no option but to pay them, which rebuts the idea of fraud. But the banks were not the only creditors who were asking for their money. Nor is it as though payment was made to stave off failure and enable the company to keep on. With failure in sight and all parties demanding payment, the defendant simply saw fit to prefer those that would suit his own interest best. This was an abuse of his position, and not the equality of treatment which the law requires.

It is further said that the defendant was opposed to the receivership; his idea being that, if the principal stockholders would make good the amount that had been taken from the working capital, the company could still go on and succeed. But this does not do away with the effect of what had been done. It concedes the extremity that the company was in, which is not lessened by the fact that the defendant thought there was possibly a saving chance.

It is urged that, the notes having been paid, the other indorsers are discharged, and that it would not be fair to throw the whole burden on the defendant, as the bill seeks to do; but, if the defendant has got into any such dilemma, he has only himself to blame. The plaintiffs are not to be denied the relief which they are entitled to, because of this result.

It is also said that large payments were made to both the plaintiffs just before the company failed, and that, having themselves been preferred over other creditors, they are not in a position to complain. But this is not a proceeding in bankruptcy, where considerations of that kind might apply. There was nothing to prohibit them as creditors, subject only to being so called to account, from getting all that they could on their debts, and the responsibility of the defendant is not lessened thereby. It is to be observed, also, that suit is brought in the interest of all creditors, and not of the plaintiffs alone.

But, while the defendant should be made to restore that which was paid to the banks on the notes where he was indorser, a distinction is to be made, in my judgment, as to his salary and the cash advances which he had made. Salary, like wages, stands for daily bread; and to the extent of six months, at least, the amount due him was a preferred lien on the real and personal property of the company, which the defendant could have enforced. *Scully's Appeal*, 115 Pa. 141, 7 Atl. 588. Even without that, the salary being payable monthly, as it accrued, and having simply been deferred for the company's relief, it is going too far and making too large a demand on human nature to hold that he could not pay himself what was so his due when the end was in sight.

And this indulgence should be accorded, also, to the \$515 of money advanced. This had been paid out for the company from time to time in small amounts to take care of pressing demands, as a temporary accommodation, until there should be funds to repay it, an arrangement

which the defendant simply enforced when the time came. It was not like the payment of long-standing loans, which were being carried on indorsements at bank. The distinction may be a narrow one; but the defendant is held to a heavy responsibility as it is.

The bill is sustained, and a decree directed to be entered in favor of plaintiffs to the extent indicated, with costs.

ROGERS v. FIDELITY SAVINGS BANK & LOAN CO. et al.

(District Court, W. D. Arkansas, Ft. Smith Division. September 22, 1909.)

1. BANKRUPTCY (§ 159*)—PREFERENCES.

Whether a transaction is a preference must be determined by its effect to prefer the creditor receiving the benefit thereof, and not by its form.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 159.*]

2. BANKRUPTCY (§ 164*)—PREFERENCES—PAYMENT.

A bankrupt in October, 1904, opened a store at B., and began doing business with defendant bank. His first deposit was made October 11, 1904, and he continued making deposits until December 24th following, when his overdrafts at the bank aggregated \$2,059. On December 24th the bank refused to pay any more of his checks until deposits had been made to cover them, and several checks were protested for nonpayment. On December 31st the bankrupt sold out his business at B., the purchaser agreeing, as a part of the consideration, to pay the debt to the bank, which he subsequently did; an adjudication in bankruptcy being made February 16, 1905. *Held*, that the transaction operated to prefer the bank, and was therefore a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

3. LIMITATION OF ACTIONS (§ 5*)—STATE STATUTE—APPLICATION.

Kirby's Dig. Ark. § 5083, providing that if an action shall be commenced, and plaintiff suffer a nonsuit, he may commence a new action within a year after such nonsuit was suffered, etc., was not intended to and did not purport to shorten the general statute of limitations, but was a saving clause to prevent a bar that had already run when the nonsuit was suffered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 13-15; Dec. Dig. § 5.*]

Action by J. W. Rogers, as trustee in bankruptcy of A. C. Reifel, against the Fidelity Savings Bank & Loan Company and another to recover an alleged preference. Judgment for plaintiff as against the Fidelity Savings Bank & Loan Company alone.

In this case the jury was waived, and the case submitted to the court, sitting as a jury. The court finds the following facts: A. C. Reifel prior and during the year 1904 was a merchant doing business at the town of Rogers, in Benton county, Ark. Early in October, 1904, he also opened a store at Bentonville, in the same county. On January 5, 1905, his creditors filed an involuntary petition in bankruptcy against him in this court, and he was on the 16th of February, 1905, adjudged a bankrupt, and plaintiff, J. W. Rogers, was elected trustee in bankruptcy of his estate, and duly qualified as such, and is now, and has been ever since February 5, 1905, such trustee; that the defendant bank is a corporation organized under the laws of Arkansas, and has been since October, 1904, and is now doing a banking business at Bentonville, Ark.;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

that the bankrupt early in October, 1904, opened a store at Bentonville, and continued the business at Rogers, the two stores being conducted separately, the store at Rogers doing business at Felker's Bank, at Rogers, and, as soon as he opened the store at Bentonville, he opened an account for that store with the defendant bank. His first deposit at defendant's bank was October 11, 1904, and he continued making deposits from sales of the Bentonville stock until December 24, 1904, a little over a month and a half, when his overdrafts at the defendant's bank aggregated \$2,059, which was used in payment of goods which went into the Bentonville store. From October 11, 1904, to October 19, 1904, the bankrupt's deposits exceeded his drafts, and the first overdraft occurred October 19, 1904, and, after that, his overdrafts exceeded his deposits until December 24, 1904. About the middle of December, 1904, defendant Burks, who was the president and a member of the board of directors of defendant bank during all the time herein referred to, had a conversation with the cashier of the Felker Bank at Rogers, in which the cashier of the Felker Bank informed him that the bank at Rogers had transferred its claims against Reifel to a Mrs. Jackman, at Rogers, and that Burks had better not let Reifel get in debt to him too deep. A week or ten days later, on December 24th, the defendant bank refused to pay a check of Reifel's for \$15 until a deposit was made to cover it. About December 24th Reifel drew on defendant's bank a draft for \$600, and defendant's bank refused to pay it, and returned it. On December 31, 1904, J. S. Nelson & Son, a shoe company, sent for collection through the First National Bank, of Bentonville, a check drawn by Reifel for \$300. This check the defendant bank refused to pay, and it was protested. Defendant bank extended no credit to Reifel after December 24, 1904. On December 31, 1904, the very day the said check of Nelson & Son, shoe company, for \$300 was protested, Reifel sold out his Bentonville store to George P. Jackson, and the same day the following writings were executed:

"Whereas, A. O. Reifel, at even date herewith and for a valuable and sufficient consideration sold and delivered to Geo. P. Jackson, a general stock of merchandise, fixtures and furniture owned by the said Reifel, and, being and situate in the brick business block in Bentonville, Arkansas, known as the Haney block, at and for the invoice price of seventy cents on the dollar of the original cost thereof, and

"Whereas, by the terms of the said sale and the agreement of the said Jackson and Reifel, out of the proceeds of said sale, the said Jackson was to apply and pay to W. A. Burks for said Reifel the sum of two thousand and fifty-nine (\$2,059.00) dollars, and the remainder and balance of such proceeds when ascertained, to be paid by said Jackson to W. R. Felker, and,

"Whereas, in consideration of the payment to W. A. Burks by said Jackson, the sum of \$2,059.00.

"Now, therefore, This evidences that the said W. A. Burks do by these presents, promise and agree with the said Geo. P. Jackson, his heirs and administrators to warrant and defend the title to said stock of merchandise to the extent of the value of said sum of said \$2,059.00 and further to hold, keep and indemnify the said Jackson and administrators against all claims that may be legally asserted against said stock of merchandise to the extent and amount of said sum of said \$2,059.00 so received by me for the faithful and apt performance of the foregoing obligation and indemnity, we bind ourselves, our heirs and legal representatives.

"Witness our hands this the 31st day of December, 1904. Executed in duplicate.

W. A. Burks,
"_____."

"This evidences that Geo. P. Jackson hereby fixes and recognizes his liability to W. A. Burks in the sum of \$2,059.00 for the purposes and consideration set forth in the obligation on the reverse side hereof, and to be due and payable within 60 days from date hereof without interest, and in such installments as the said Jackson may elect, provided, however, he may hold and retain said sum of \$2,059.00 or so much thereof as may be necessary to fully indemnify him as provided in the obligation on the reverse side hereof, unless the said Burks shall elect to execute the obligation on the reverse side

hereof with satisfactory security to said Jackson, and thereupon said sum of \$2,059.00 shall be paid over to the said Burks at any time after the expiration of 60 days from this date.

"Given under our hands this the 31st day of Dec., 1904.

"W. A. Burks.
"G. P. Jackson."

Copied from reverse side of original agreement:

"Received \$559.00 payment on the within agreement this 21st day of Jany. 1905.

"Recd. \$500.00 this Jan. 31st, 1905.

"Recd. \$500.00 this Feb. 21st, 1905."

The Bentonville store at the time the sale to Jackson occurred and the foregoing instruments were executed had about \$6,000 of merchandise, and had very little indebtedness except to the defendant bank. In making the sale to Jackson it was understood between Reifel and Jackson (and of this the defendant was advised) that the sale was not for cash, but that Jackson should assume (with defendant bank's consent) the overdraft of \$2,059, and to release Reifel from the same, and carry out the agreement contained in the writings hereinbefore set forth. As it was not convenient to get the bank directors together in order to carry out the defendant bank's part of the agreement, defendant Burks, its president, did it in his own name, but acted for the bank, without the knowledge of the other members of the board of directors. The sale to Jackson was made, or agreed, at 70 cents on the dollar. The stock was part new, and part had been on hand for some time. When Jackson executed the obligation to pay the bank \$2,059, Burks credited Reifel's account with the bank with that sum, and Jackson's note for that amount was in due time fully paid by Jackson as per agreement, and no one else paid anything on that account. Prior to the proceeding in bankruptcy Reifel had a wide reputation as a successful business man and merchant. The proceeds of the sale of the Bentonville stock was paid to the defendant bank and to the Felker Bank at Rogers. Defendant Burks did not know just how much Reifel owed at Rogers and Bentonville when he sold to Jackson. At the time Reifel sold to Jackson he was insolvent, but the defendant did not know it until after Jackson had paid the debt to the bank. The bankrupt's estate paid about 27½ cents on the dollar, and is still in process of administration, not having been closed.

2. The court further finds that J. W. Rogers, as trustee as aforesaid, commenced a suit in the circuit court of Benton county, Ark., on the 9th of March, 1905, against the defendant for this same debt, and on the 3d of April, 1907, the same was dismissed without prejudice, and more than a year elapsed thereafter before this suit was commenced.

W. A. Dickson, for plaintiff.

J. A. Rice, for defendants.

ROGERS, District Judge (after stating the facts as above). On this finding of facts the court declares the law in favor of the plaintiff, as against the defendant bank; and that the cause of action is not barred by the statute of limitations. This court finds that Reifel was insolvent when he sold to Jackson. In the light of the facts, no other conclusion could be reached than to hold that Reifel at the time of the sale knew that he was insolvent. If he knew it, providing, as he did, for the full payment of the defendant bank, he knew he could not provide for the full payment of his other creditors. Therefore, the payment of the defendant bank was intended by him as a preference. It was not necessary that the defendant bank or Burks should have known that the payment was intended by Reifel as a preference, or even should have believed it was so intended. It was sufficient if Burks acted for the bank in caring for its claim against Reifel, and

came into possession of facts as to the condition of Reifel's business sufficient to produce in the mind of an ordinarily prudent man reasonable cause to believe that Reifel was insolvent, and that the provision for the payment of his debt was intended as a preference. It would be profitless to discuss this evidence. I am unable, after the most careful consideration of all the evidence, to get the consent of my mind that the facts and the transaction in the possession of the defendant Burks at the time the sale was made from Reifel to Jackson were not ample to put any ordinarily prudent man upon inquiry as to the solvency of Reifel and of his intention in making the sale to Jackson; and the proper inquiry could not have failed to have resulted in the disclosure of Reifel's condition and purpose. The transaction in this case must be determined by its effect, and not by its form. The effect was to prefer the bank. The following cases can be read with profit on these points: *Roberts v. Johnson*, 151 Fed. 567, 81 C. C. A. 47, 18 Am. Bankr. R. 132; *In re Coffey*, 19 Am. Bankr. R. 149; *In re Hines* (D. C.) 144 Fed. 543, 16 Am. Bankr. R. 495; *Suffel v. McCartney Nat. Bank*, 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004, 16 Am. Bankr. R. 259; *In re Andrews*, 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. R. 387; *Parker v. Black* (D. C.) 143 Fed. 560, 16 Am. Bankr. R. 202; *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. R. 449; *In re Virginia Hardwood Mfg. Co.* (D. C.) 139 Fed. 209, 15 Am. Bankr. R. 135 (decided by this court, and cases there cited); *In re Pfaffinger* (D. C.) 154 Fed. 523, 18 Am. Bankr. R. 807, which case contains a very clear discussion, and cites many cases in point.

As to the statute of limitations, section 5083, Kirby's Dig. Ark., was not intended and does not purport to shorten the general statute of limitations. It was intended as a saving clause to prevent a bar where it had already run when the nonsuit was suffered. *Karnes v. American Fire Ins. Co.*, 144 Mo. 413, 46 S. W. 166; *Long v. Long*, 141 Mo. 352, 44 S. W. 341; *Coffin v. Cottle*, 16 Pick. (Mass.) 383. This suit is therefore not barred either under the bankrupt law or the statute of limitations of the state. It is not necessary to decide what statute applies to this character of case.

The finding of the court is that the plaintiff recover from the defendant bank \$2,059 and 6 per cent. interest from the 9th of March, 1905, the date the original suit was brought, amounting in the aggregate to \$2,619.39, with costs; and the court finds the issues in favor of the defendant Burks.

OREGON TRUNK LINE, Inc., v. DESCHUTES R. CO.

(Circuit Court, D. Oregon. August 24, 1909.)

No. 3,531.

1. PUBLIC LANDS (§ 92*)—GRANT OF RIGHT OF WAY TO RAILROADS—VESTING OF TITLE.

Under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting right of way through the public lands to any railroad company duly organized which shall have filed with the Secretary of the In-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terior a copy of its articles of incorporation and proofs of its due organization, and providing that any company desiring to secure the benefits of the act shall within 12 months after the location of any section of its line, if the land is surveyed, file with the register of the local land office a profile of its road, "and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way," the approval of the map showing such profile is equivalent to a patent, and vests in the corporation title to the definite right of way shown thereon. Such title, however, dates from the time of such approval, and does not relate back to the date of the filing of the articles of incorporation or to the time of survey, and, as between two companies each seeking to secure the same right of way in whole or in part, the one whose map is first approved obtains the title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 276; Dec. Dig. § 92.*]

2. PUBLIC LANDS (§ 92*)—GRANT OF RIGHT OF WAY TO RAILROADS—RIGHT TO ATTACK.

A railroad company cannot attack the title of another company to a right of way over the public lands, confirmed to it by the Secretary of the Interior under the statute, unless it shows that at the time of the grant it had itself an interest in such right of way, and was lawfully entitled to it instead of the grantee.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 92.*]

In Equity. On cross-motions for preliminary injunctions.

Charles H. Carey and James B. Kerr, for complainant.

W. W. Cotton and Zera Snow, for cross-complainant.

BEAN, District Judge. This is a contest between two railroad companies for the possession of and the right to build a railroad on a strip of land 200 feet wide and about 20 miles long through the public lands of the United States on the east side of the upper Deschutes river, in this state, and each company is asking for a preliminary restraining order against the other. Both claim the right to occupy the land in question under Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), "granting to railroads the right of way through the public lands of the United States." The first section of this act provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

By the second section it is declared that:

"Any railroad company whose right of way or whose track or roadbed upon such right of way, passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass or defile for the purposes of its road, in common with the road first located or the crossing of other railroads at grade."

The third section is not pertinent to any question involved in this case; and the fourth provides:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any such uncompleted section of said road."

By the fifth section certain lands not material here are excepted from the operation of the act. According to the decisions of the Supreme Court of the United States, a railroad company, copies of whose articles of incorporation and due proofs of organization have been filed in the proper office, and approved by the Secretary of the Interior, becomes a grantee, entitled to take under the law referred to, but no title passes to it to any definite part of the public domain until its road is actually constructed or a map or profile thereof filed in the local land office, and approved by the Secretary of the Interior, thus fixing the boundaries of the grant and the title dates from that time. *Jamestown & N. R. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; *Minneapolis, St. P. & S. Ste. M. Ry. v. Doughty*, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474. By filing copies of the articles of incorporation and due proofs of organization a corporation becomes qualified to take, but it is the actual construction of the road or the approval by the Secretary of the Interior of a map showing its proposed line which gives it title to any definite area of land. A corporation which desires to secure the benefit of the act must not only file copies of its articles of incorporation and due proofs of organization with the Secretary of the Interior, but it must within a specified time thereafter file with the register of the local land office a map or profile of its route, and, upon the approval thereof by the Secretary of the Interior, the statute says the same shall be noted upon the plats in the land office, and "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." The approval of the map is therefore the act which vests in the corporation title to a definite right of way over the public lands for a road thereafter to be constructed. Such approval is equivalent to a conveyance or patent from the government for the route delineated on the plat, and it cannot subsequently be revoked by the Secretary or his successor in office, nor can it be set aside or vacated by a court except for reasons that would justify such relief in case of a patent. *Noble v. Union River Logging R. R.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.

Now, applying this settled construction of the act of 1875 to the case in hand, the duty of the court is clear. The plaintiff corporation was organized February 19, 1906, under the laws of the state of Nevada, among other things, to build and operate a railroad "from a point on the Columbia river in the state of Oregon at or near its confluence with the Deschutes river, southerly along the course of said Deschutes river to central Oregon; the length of such road as near

as may be to be 250 miles." It filed copies of its articles of incorporation and due proofs of organization with the Secretary of the Interior April 12, 1906, as alleged in the bill of complaint, or May 14, 1906, as stated in the answer, and the same were approved by that officer on June 4th following. On August 16, 1906, it filed in the local land office a map or profile of its proposed road, beginning 40 miles south of the mouth of the Deschutes river, and extending southerly 60 miles, which includes the disputed territory, and this map was duly approved by the Secretary of the Interior on July 21, 1908.

The defendant is an Oregon corporation, organized on February 2, 1906, to build and operate a line of railroad from a point on the line of the Oregon Railroad & Navigation Company at or near the mouth of the Deschutes in a general southerly direction up the valley of the Deschutes to the town of Bend. On February 10, 1906, it filed copies of its articles of incorporation and due proofs of organization with the Secretary of the Interior, and the same were approved by that officer on March 1, 1906. It thereafter made a survey of the first 40 miles of its road south of the mouth of the Deschutes, and filed maps thereof in the proper land office in March and May, 1906, but, owing to objections thereto by the reclamation service, the maps were returned to the defendant. It thereafter made some changes in its survey, and filed new maps of the 40-mile section, which on June 21, 1909, were approved by the Secretary of the Interior contemporaneous with a map filed by the plaintiff covering a part of the same route. No survey, however, was made by the defendant or map filed of its line south of the 40-mile post prior to the approval of the plaintiff's map for that part of its lines. Between August 29, 1908, and October 9th of that year, the defendant surveyed its line south of the 40-mile post for about 60 miles, a part of which, it is alleged, is over and upon the route formerly located by the plaintiff, and delineated upon its approved map, and maps thereof have been filed, but not yet approved by the Secretary of the Interior.

It thus appears that the plaintiff has an approved map of a line over the disputed territory, which, under the ruling of the Supreme Court, vests in it a title to a right of way over the public lands, and the defendant has not. The plaintiff's map was approved and the right of way delineated thereon segregated from the public domain, and the title in effect vested in it before the defendant company commenced to survey its line over the disputed territory. The plaintiff, therefore, has an apparently valid title to the land in dispute, while defendant has no rights therein. The defendant insists, however, (1) that the approval of plaintiff's map by the Secretary of the Interior was invalid and passed no title, because the plaintiff, being a Nevada corporation, organized under a law which prohibits it from building or owning or operating a railroad in the state of its creation cannot do so in Oregon, and therefore had no capacity to take the grant in question; (2) that the survey of the line delineated on the plaintiff's map as shown thereon was made prior to the filing of a copy of its articles of incorporation and due proofs of organization with the Secretary of the Interior, and was not in compliance with the provisions of the act of 1875, and the Secretary had no power or authority to approve the map for that

reason; and (3) that the statement on the face of the map that the survey was made after the organization of the plaintiff company is false and untrue, as the survey was, in fact, made prior to such organization, and therefore the Secretary of the Interior was deceived and misled, and his approval of the map procured by fraud. The defendant, however, is not in a position to raise any of these questions. It had no title or interest in the property at the time the map was approved which was affected thereby. It was a stranger to the proceedings and the title. The Secretary of the Interior had jurisdiction and authority to dispose of the public domain, and his approval of the plaintiff's map was equivalent to the issuance of a patent to the land, and cannot be challenged by one who is not in privity with the government, or who had not acquired a right to be preferred in the acquisition of the land before such approval. "To enable one to attack a patent from the government," says Mr. Justice McKenna, "he must show that he himself is entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him." *Duluth & Iron Range R. R. v. Roy*, 173 U. S. 590, 19 Sup. Ct. 550, 43 L. Ed. 820. See, also, *Deweese v. Reinhard*, 61 Fed. 777, 10 C. C. A. 55; *Hartman v. Warren*, 76 Fed. 157, 22 C. C. A. 30.

It is argued on behalf of the defendant that its title to the right of way over the public lands along the route described in its articles of incorporation was initiated at the time copies thereof and due proofs of organization were filed with the Secretary of the Interior, and approved by him, and, if regularly and diligently followed up, gave it a right to occupy any part of the public domain along the proposed route for railroad purposes as against a company subsequently becoming a qualified grantee under the act of Congress by filing copies of its articles of incorporation and due proofs of organization. But this position is contrary to the doctrine of the Supreme Court in the *Doughty Case*. It was there contended by the railroad company that the approval of its map by the Secretary of the Interior related back to the time of the actual survey of the line on the ground, and that one who settled on the land after such survey and before the approval of the map took subject to such right of way. The court held that the approval of the map did not relate back to the survey, but that the right of the company attached from the date of the approval only, and that the homestead settlement took preference. In that case the survey had been made by the railroad company before the land was settled upon and the map of location was subsequently duly approved, while here no survey was made by the defendant until after the approval of the plaintiff's map, and the title had passed to it, and the defendant's map has not yet been approved, so that the facts in the *Doughty Case* were more favorable to the railroad company than in the present one. I am clear, therefore, that the plaintiff is entitled to the relief prayed for. It is the legal owner as against the defendant of the property in question, and entitled to its possession and enjoyment. The defendant has no right or claim thereto, and no reason has been shown why the court should disregard the plaintiff's title and al-

low the property to be occupied or improved by one having no interest therein.

The defendant has filed a cross-bill, setting up its organization, averring the steps that it has taken in the survey, location, and construction of its road, attacking the validity and legality of the plaintiff corporation, and its right to hold, own, or operate a railroad in this state, or hold or own a right of way therefor, and the validity of the proceedings before the Secretary of the Interior in the matter of the approval of its map, and asking that the plaintiff be enjoined from proceeding with the construction of its road over the disputed section pending this litigation, but I can see no reason, either legal or equitable, why it is entitled to any such relief. It has no title to the property in question, and none of its rights will be invaded by the construction of a railroad over same by the plaintiff. Each of the parties is now actually engaged, apparently in good faith, in building its road from the mouth of the Deschutes to eastern Oregon, and neither should be permitted to obstruct the work of the other. The plaintiff's ownership and right to occupy the disputed territory does not prevent the defendant from proceeding with its road. If the plaintiff's road as delineated on its approved map is through a canyon, pass, or defile, it cannot, on account of any priority it secured by reason of such approval, prevent the defendant from using or occupying the same upon such terms and conditions as may be adjudged just and equitable. *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. It appeared from the affidavit of Mr. Boschke, chief engineer of the defendant company, that for more than 100 miles from its mouth the Deschutes river follows through a rough and rolling plateau, a depth of from 100 to 2,000 feet below the level of the surrounding country; that the banks on either side are uniformly steep and precipitous, and the same character on both sides; and "that for the purpose of railroad construction as considered not only from a construction standpoint, but from a standpoint of the expense of construction, and from the standpoint of expense of maintenance and operation, there is no substantial choice or difference between the banks of said river, but that either bank affords as favorable location as the other for said purposes." There is therefore room for both of these roads, and it would seem that each can be built without conflicting with or encroaching upon the rights of the other.

It is claimed that the route of the plaintiff's railroad as delineated on its approved map and shown by the field notes filed therewith is so indefinite and uncertain that it will be impossible for the defendant to comply with any injunction order that may be issued herein. This matter cannot be determined from the affidavits now on file. If the defendant should be unable to determine the location and boundaries of the premises which it is enjoined from trespassing upon, it may report that fact to the court for further consideration.

Let a temporary injunction issue as prayed for in the bill.

In re LEWIS F. PERRY & WHITNEY CO.
(District Court, D. Massachusetts. March 27, 1909.)

No. 14,121.

BANKRUPTCY (§ 88*)—PETITION—PETITIONING CREDITORS—INTERVENTION—TIME—“AT ANY TIME.”

Bankr. Act July 1, 1898, c. 541, § 59, cl. “f,” 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) provides that creditors, other than original petitioners, may “at any time” enter their appearance and join in the petition. Clause “d” declares that creditors, notified of the pendency of the petition as there provided, must join in it prior to or during the hearing. *Held*, that clause “d” deals only with cases in which the issue is whether the alleged bankrupt’s creditors number less than twelve, and hence a creditor may intervene and join the original petitioners “at any time” prior to the dismissal of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 110; Dec. Dig. § 88.*

For other definitions, see Words and Phrases, vol. 1, pp. 602, 603.]

In the matter of the Lewis F. Perry & Whitney Company, an alleged bankrupt. On motion to dismiss the petition of Francis T. Leahy to join in the original petition. Petition denied.

See, also, 172 Fed. 745, 752.

Jacobs & Jacobs, for petitioning creditors.

Charles E. Heywood, for alleged bankrupt.

Morse & Friedman, for objecting creditors.

Francis T. Leahy, pro se.

DODGE, District Judge. The original petition in this case was filed on September 23, 1908. Answers were filed by the alleged bankrupt and by two of its creditors, denying that there were three bona fide petitioning creditors. Petitions by other alleged creditors to join in the original petition were subsequently filed, and on December 1, 1908, the case was sent to the referee for ascertainment and report of facts upon the issues raised by the pleadings. The referee’s report was filed January 28, 1909, and was to the effect that there were three petitioning creditors capable of maintaining the petition. Upon this report there was a hearing before the court on February 15 and 16, 1909, at which the respondents contended that the referee’s conclusions were not warranted by the evidence before him. On February 25, 1909, before any decision by the court upon the questions in controversy, the present petitioner, Francis T. Leahy, filed the petition now to be considered, alleging himself to be a creditor and joining in the original petition of September 23, 1908. This petition the respondents move to dismiss, on the ground that it is filed too late.

Section 59f of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) provides that:

“Creditors other than original petitioners may at any time enter their appearance and join in the petition.”

The words “at any time” are obviously not to be taken in any absolutely unlimited sense. The petition must at least be pending before the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes

court. If dismissed by final decree, it cannot be reinstated or revived by any application to join in it. *Neustadter v. Chicago Dry Goods Co.* (D. C.) 96 Fed. 830. But that section 59f gives to creditors the right to intervene and join in a petition at any time before it has been dismissed by the court seems to be recognized in all the decisions under the present act in which the question has presented itself. *In re Romanow* (D. C.) 92 Fed. 510; *In re Bedingfield* (D. C.) 96 Fed. 190, 192; *In re Mackey* (D. C.) 110 Fed. 356; *In re Plymouth Cordage Co.*, 135 Fed. 1000, 68 C. C. A. 434; *In re Tribelhorn*, 137 Fed. 3, 69 C. C. A. 601; *In re Luffy* (D. C.) 156 Fed. 873, 875. See, also, *Collier, Bankruptcy* (6th Ed.) 467; *Loveland, Bankruptcy* (3d Ed.) 262; *Remington, Bankruptcy*, § 213. It is true that in clause "d" of section 59 creditors notified of the pendency of the petition as there provided are required to join in it "prior to or during" the hearing; but, if this would exclude a creditor who wished to join after the case had been submitted, and while it had not yet been dismissed, clause "d" deals only with the cases in which the issue is whether or not the alleged bankrupt's creditors number less than 12, and in clause "f," which applies generally, the different provision "at any time" is used. It is true also that clause "f" undertakes to provide that creditors may answer the petition "at any time," that this is in direct conflict with section 18f, limiting the time for filing answers, and that section 18b has been held to govern the question. *In re Mutual Mercantile Agency* (D. C.) 111 Fed. 152. But there is no such conflicting provision in the act relating to the time within which intervention is allowable. If, notwithstanding the words "at any time," the court may hold a creditor barred from intervention by his own neglect to appear within a reasonable time (see *In re Jemison Mercantile Co.*, 112 Fed. 966, 50 C. C. A. 641), the facts in this case as they are now presented do not seem to me sufficient to warrant such a disposition of the application to join.

My conclusion is that no sufficient reason for refusing to permit the petitioner Leahy to intervene appears, and that the motions to dismiss his petition must be denied.

IN RE LEWIS F. PERRY & WHITNEY CO.

(District Court, D. Massachusetts. April 7, 1909.)

No. 14,121.

1. **BANKRUPTCY (§ 76*)—PETITION—RIGHT TO JOIN—"CREDITOR."**

Since a "creditor" within the bankruptcy act includes every one who owns a provable demand or claim, a creditor within such definition is not disqualified as a petitioner because he acquired the claim by assignment after commission of an act of bankruptcy.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 99; Dec. Dig. § 76.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

2. **BANKRUPTCY (§ 76*)—PETITIONING CREDITORS—ASSIGNED CLAIMS.**

Where an assignment of claims against an alleged bankrupt to employés of the petitioning creditors was a deliberate splitting of claims by such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

petitioner, in order to secure an advantage in the bankruptcy proceeding to which neither he nor the assignor was lawfully entitled, and for no other purpose, the assignees were not entitled to join.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 99; Dec. Dig. § 76.*]

3. BANKRUPTCY (§ 76*)—INVOLUNTARY PETITION—PETITIONING CREDITORS.

Where W., a creditor of an alleged bankrupt, did not appear in the proceeding, but the petitioning creditor, under a power from W., attempted to assign her claim to two of his employes in order to make the requisite number to sustain the petition, the fact that W. owned a claim which would have made her a competent petitioner was immaterial on the question of the sufficiency of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 99; Dec. Dig. § 76.*]

4. BANKRUPTCY (§ 91*)—CLAIMS—TRANSFER—EVIDENCE.

Evidence held insufficient to sustain a referee's finding that a claim against a bankrupt had been absolutely transferred to two of the alleged petitioning creditors, and that the original petitioner had authority from the owner of the claim to make such transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138; Dec. Dig. § 91.*]

5. BANKRUPTCY (§ 76*)—ASSIGNMENTS—CONSENT OF CREDITORS—EFFECT.

Where an assignment for creditors constituted the act of bankruptcy relied on, creditors who had assented to the assignment were not entitled to join in an involuntary bankruptcy petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 97; Dec. Dig. § 76.*]

6. PRINCIPAL AND AGENT (§ 137*)—ACTS OF AGENT—AUTHORITY—ESTOPPEL.

Where the clerk of a creditor of an alleged bankrupt gave his employer's assent to an assignment by the bankrupt for the benefit of creditors, and had in many previous instances of the same character given similar assents, the creditor was estopped to deny the clerk's authority, and was bound by his act.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 492; Dec. Dig. § 137.*]

7. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 44*)—ASSENT—FRAUD.

Affidavits seeking to avoid creditors' assents to an assignment for the benefit of creditors on the ground of misrepresentation or concealment were insufficient, where no misrepresented facts existing before the assents were given were specified.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 197; Dec. Dig. § 44.*]

8. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 215*)—ACTS OF ASSIGNEE—IMPUTATION TO ASSIGNOR.

That an assignee for the benefit of creditors made an arrangement with a bank to assume the claim of any creditor is not imputable to the assignor, unless the assignee was acting at the instance or as agent of the assignor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 725; Dec. Dig. § 215.*]

9. BANKRUPTCY (§ 95*)—INVOLUNTARY PETITION—MAJORITY CREDITORS.

That only an inconsiderable minority of creditors desired administration of an insolvent estate in bankruptcy, and the greater proportion in number and amount regarded the bankrupt's common-law assignment as more for their interest, did not justify the court in resolving every doubtful question of fact or law against the petitioning creditors, if there were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

three bona fide creditors applying for administration in bankruptcy whose claims amounted to \$500.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 140; Dec. Dig. § 95.*]

In the matter of the Lewis F. Perry & Whitney Company, an alleged bankrupt. Application for adjudication. Petition dismissed. See, also, 172 Fed. 744, 752.

Jacobs & Jacobs, for petitioning creditors.

Charles E. Heywood, for alleged bankrupt.

Morse & Friedman, for objecting creditors.

Francis T. Leahy, pro se.

DODGE, District Judge. The sole act of bankruptcy relied on in this petition, which was filed September 23, 1908, is a general assignment for the benefit of creditors to Birney C. Parsons, alleged to have been made on September 11, 1908. It is not disputed that such an assignment was made, but on September 10th, as the referee has found, instead of September 11th, according to the petition.

Two of the three original petitioning creditors, viz., Skelly and Beaumont, were not creditors on September 10, 1908. On that date the demands or claims, of which they allege themselves the owners in the petition, belonged either to the firm of Stroheim & Romann, the third petitioning creditor, or to Mrs. Woititz by transfer from them, and were in either case within the control of Stroheim. By the contrivance and under the direction of Stroheim, the demands or claims referred to were transferred to Skelly and Beaumont, respectively, for a nominal consideration, after the debtor's assignment, for the sole purpose of qualifying them as petitioning creditors.

1. It is urged that no one can be a petitioning creditor who did not own his demand or claim at the date of the act of bankruptcy complained of. This would seem to have been held in *Re Callison* (D. C.) 130 Fed. 987, and affirmed on appeal in *Brake v. Callison*, 129 Fed. 201, 63 C. C. A. 359. See, also, *Collier, Bankruptcy* (6th Ed.) 460, 461; *Remington, Bankruptcy*, § 214. If this doctrine is sound, it debars Skelly and Beaumont from any standing to maintain the petition. But in the decisions above referred to, and in the earlier cases under the present act cited in them, the situation dealt with appears to have been that in which the petitioning creditor's demand or claim, though it had become provable when the petition was filed, was not provable by him or by any one else when the act of bankruptcy was committed. Here the demands or claims relied on would have been provable by their owners, so far as their inherent character goes, on and after September 10th. "Creditor," in the present bankruptcy act, includes every one who owns a provable demand or claim. In the authorities relied on in support of the rulings made are assigned which are of considerable force, but in view of the above definition I hesitate to hold that a creditor is disqualified as a petitioner for no other reason than that the claim owned by him was not transferred to him until after the act of bankruptcy. See *Lowell, Bankruptcy*, p. 35, § 50.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. Assuming Mrs. Woititz to have owned the two notes transferred to Skelly and Beaumont on September 22, 1908, when the transfer is said to have been made to them, the transfer then was effected, on the petitioners' evidence, by Stroheim without her knowledge. He claims to have had general authority from her; but, if he had it, he used it in this instance for his own purposes, which were to procure two creditors to execute the petition in place of Mrs. Woititz alone. The transfer was a deliberate "splitting of the claim" by him, in order to secure an advantage in the bankruptcy proceedings to which neither he nor Mrs. Woititz was lawfully entitled. It served no other purpose whatever. After the transfer, he or she, for all purposes of the bankruptcy proceedings, controlled both notes as much as they did before it. Skelly and Beaumont were both of them in his employ, and in everything done by them in these proceedings were simply following his orders without any real interest of their own. I must hold that these facts disqualify both Skelly and Beaumont as petitioning creditors. To recognize them as such would be to permit a scheme to succeed, which is contrary to the policy of the bankruptcy act. *In re Tribelhorn*, 137 Fed. 3, 69 C. C. A. 601; *In re Halsey Electric Generator Co.* (D. C.) 163 Fed. 118.

3. Mrs. Woititz is not a petitioning creditor, and has not appeared in the proceedings in any manner, not even as a witness. For the purposes of the question whether there is a sufficient number of petitioning creditors to support this petition, the fact that she owns a claim such as would have made her a competent petitioner, had she been a petitioner at all, if true, seems to me immaterial. Skelly and Beaumont have never petitioned as her trustees or representatives, but in their own right as independent owners of respective notes.

4. If it be true that the notes referred to were in fact transferred from Stroheim & Romann to Mrs. Woititz in June and August, 1908, they remained in Stroheim's possession and under his control thereafter as before. To show that the discount of them, to which he has testified, was absolute and without reservation, not qualified by any undisclosed understanding or intention, and that the notes continued to be her separate property down to and at the time of their alleged transfer to Skelly and Beaumont, there is only the unsupported evidence of Stroheim. Nor is there anything more to show that he had authority from Mrs. Woititz sufficient to warrant the dealings with these notes on her behalf to which he has testified. He did not testify in person before the referee, who had before him only the same depositions, given by Stroheim in New York, which are before the court. It is not a case, therefore, in which the presumption in favor of the referee's conclusions, arising from the fact that he has seen and heard the witness, arises. So far as the case turns upon the acceptance of his testimony as true, I must decline so to accept it. I am obliged to regard it as the testimony of one attempting to support by his unsupported statements a questionable transaction, planned by him and carried through in such secrecy that he is the only person who knows the essential facts regarding it, and to consider it insufficient for that purpose. In many of its details it is contradicted by admissions of his own, or by the evidence of other witnesses examined by the petitioner, which need

not, however, in the view of the matter I have taken, be referred to in detail.

5. For the reasons above stated, I am obliged to differ with the referee, and to hold that only one of the three original petitioners is capable of bringing such a petition, viz., the firm of Stroheim & Romann. There are three alleged creditors who have applied to join in the original petition since it was filed, viz., Alfred Charles Dodman, on October 27, 1908, Dennison Manufacturing Company, on October 29th, and Perkins & Co., Incorporated, on November 2, 1908. There is no dispute that Dodman has a right to become a party to the petition. As to the right of the other two interveners there is dispute.

6. The Dennison Company's intervention was signed and verified by its treasurer, on the company's behalf. It appears that an assent in writing to the common-law assignment of September 10th on the company's behalf by Lucius Cummings, Jr., its clerk, was given on September 12th. If this was the company's assent, so given as to bind it, the company is estopped to maintain the petition in which it later sought to join, according to the well-settled law in this circuit. It is urged that Cummings, as clerk, was without authority to give the company's assent. It is shown, however, that in many previous instances he had been permitted by the company to give its assent to similar assignments, just as he undertook to do here. From September 12th to September 30th there was no suggestion that the company's assent had not been duly given. On September 30th, in an affidavit later filed here with its petition to intervene, Cummings swore that his assent was induced by misrepresentation and concealment of facts, and that he "hereby withdraws his assent." This was no doubt by way of anticipation of the objection to permitting the company to intervene, that its assent had been given. Further reference is made below to this affidavit; but it is to be noticed here that there was at the time no suggestion by Cummings or any one else that he was not authorized on September 12th to signify the company's assent to the assignment. A later petition by the company, filed December 18th, asks that it be permitted to withdraw its attempted intervention. That the assent of the company was validly given, so far as Cummings' authority is concerned, I do not think can be properly denied under these circumstances. The company is therefore estopped to intervene so far as this question is concerned.

7. Perkins & Co., Incorporated, like the Dennison Company, had assented to the common-law assignment before it undertook to intervene here. Its assent, like that of the Dennison Company, was claimed to have been induced by misrepresentation and concealment of facts. An affidavit to that effect, made by F. A. Perkins, its president, accompanies its petition to intervene, just as Cummings' affidavit to the like effect accompanied the Dennison Company's petition. I think it clear, on the evidence, that neither of these affidavits should ever have been made or filed. The persons who swore to them had, according to the testimony they have since given, no such knowledge as justified them in stating under oath that anything had ever been misrepresented or concealed in connection with their assents. They relied solely on

what was told them by the attorneys for the petitioning creditors, who were actively endeavoring to support the petition by as many creditors' interventions as they could get. The affidavits are not on information and belief, but as of the personal knowledge of the affiants, and no fact said to have been misrepresented or concealed is specified. They afford no support whatever to the case of the petitioners or interveners. If the claim is still insisted upon that the assent of either of the above interveners was induced by misrepresentation or concealment, the misrepresentation or concealment must have been of facts existing at or before the time the assents were given, and nothing of this kind appears, so far as I can see, from what the referee has found. Nor is there, so far as I can discover, proof of anything of the kind in the evidence. The settlement with Martin, to which the referee refers in connection with the intervention by Perkins & Co., Incorporated, was not made until the latter part of October, as I understand the evidence; but, whenever it was made, I am unable to find in it anything upon which a charge of misrepresentation, concealment, or fraud of any kind can possibly be based. The evidence regarding it seems to me also inadequate to charge the common-law assignee with having wrongfully paid any creditor in full, and to show that he was dealing, or had reasonable cause to believe that he was dealing, with a case in which the goods involved had been consigned to, and never purchased by, the alleged bankrupt. And I think it clear from Mr. Cook's evidence that neither he nor any client of his was dissuaded from further intervention by the disposition made of the Martin claim.

8. The referee's conclusions from the evidence are that there has been such conduct on the part of the alleged bankrupt, or of Mr. Parsons as its assignee, or of persons acting in its or his interest, as to constitute a fraud upon its creditors, disentitle it to avail itself of any defense to the petition which it has set up, or absolve from their assents all creditors who have ever accepted the assignment. In these conclusions, also, I have found myself unable to concur.

Conceding that payment of a creditor by the alleged bankrupt, or out of its property in its assignee's hands, whether such payment was directly or indirectly made, or however it may have been disguised, would constitute such fraud, and would therefore have the results described, the evidence does not seem to me to prove that any such payment has been made. Mr. Parsons testifies expressly that no part of the estate in his hands as assignee was ever so used, either directly or indirectly, and I cannot see why he is not to be believed. I do not find in the evidence anything sufficient to overcome his testimony.

I fail to see how any finding is warranted that the Dennison Company's claim has been "paid in full," or even that the assignee or any one else, through the agency of the Merchants' Bank or otherwise, has bought it, whether with or without the understanding that the company's intervention was to be withdrawn. No connection of the bankrupt, at least, with any such transaction appears.

The relations shown by the evidence to exist between the alleged bankrupt and Parsons, its assignee, though of course intimate, do not in my opinion compel or require his identification with it, so as to make it of necessity a participant in all his acts. Granting that he did in fact

arrange with the Merchants' Bank to "take care of" or "assume" the claim of any creditor, and that such action on his part was in any way improper, I do not think the arrangement can properly be said to have been made at the instance of the debtor, through Parsons as its agent. Further evidence than is here presented is necessary before the complicity of the debtor in the transaction can thus be asserted. It is not to be presumed, and the evidence seems to me equally consistent with the theory that Parsons acted at the instance of the creditors or some of them and as their agent. He is the bankrupt's agent only for the purposes declared in the assignment.

It sufficiently appears from the record that this case is one in which only a comparatively inconsiderable minority of the creditors desire the administration of the estate in bankruptcy, and that by far the greater proportion of them, in number and amount, regard the common-law assignment as more for their interests. Notwithstanding what is said in *Lowenstein v. McShane Co.* (D. C.) 130 Fed. 1007, 1009, I should not regard these facts as warranting the court in "resolving every doubtful question of fact or law against the petitioning creditors." If there are three bona fide creditors whose claims amount in all to \$500, Congress has given them the right to insist on bankruptcy, however great the majority of creditors who disagree with them. But, on the other hand, I cannot doubt that those creditors, so long, at least, as they act independently of the bankrupt, who, if he interferes, is in danger of offending against the provisions of the act, are at liberty to take any measures not otherwise unlawful to avert the filing of an involuntary petition, or the joinder of any creditor in such petition. In a mere endeavor to uphold a common-law assignment as against a bankruptcy petition, involving no collusion with the bankrupt and no use of funds or property belonging to the estate, I see nothing necessarily unlawful, whether the endeavor be made by creditors or by a common-law assignee, acting with them or in their interest.

I am unable to think that any fraud on the part of the bankrupt, of Parsons, or of the Merchants' Bank is fairly established by the evidence. For this reason, as well as for the other reasons set forth, I must hold that up to February 15, 1909, the date of the hearing before the court on the referee's report filed January 28, 1909, there were only two creditors seeking to maintain the petition who have the right to do so, viz., *Stroheim & Romann* and *Dodman*. The *Dennison Company* is permitted to withdraw its intervention if desired. *Perkins & Co., Incorporated*, is estopped to join. The petition is to be dismissed, unless *Leahy*, whose petition to intervene was filed February 25th, shall hereafter be allowed to join.

In re LEWIS F. PERRY & WHITNEY CO.
(District Court, D. Massachusetts. April 17, 1909.)

No. 14,121.

1. BANKRUPTCY (§ 88*)—PETITIONING CREDITORS—RIGHT TO JOIN.

An issue having been made on a bankruptcy petition, and the attorneys for the original petitioners fearing they would not succeed thereon, their father, who was not a creditor of the bankrupt, either when the act of bankruptcy was committed or when the original petition was filed, after the hearing purchased a note against the bankrupt, which he assigned to intervener, a member of the bar, absolutely, who thereupon signed a petition to intervene and join as a petitioning creditor; the petition being drawn and filed by the attorneys for the original petitioners. Intervener gave for the note nothing but his services rendered or to be rendered in the matter; nothing being said to him as to the amount of his compensation or concerning what he was to do with any dividend that might be received on the note. *Held* that, though intervener was a "creditor" having a provable claim within Bankr. Act July 1, 1898, c. 541, § 59b, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), authorizing such creditors to file a petition in bankruptcy, he was, nevertheless, not entitled to intervene, owing to the manner in which he had procured the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 110; Dec. Dig. § 88.*]

2. BANKRUPTCY (§ 76*)—PETITIONING CREDITORS—ASSIGNMENT OF CLAIMS—ESTOPPEL.

Where a trust company held a bankrupt's note at the time it made an assignment for the benefit of creditors, and for four months thereafter did not attempt to become a party to involuntary bankruptcy proceedings, it was thereafter estopped from maintaining an involuntary petition against the bankrupt, and hence could not confer such right on its subsequent assignee of the note.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 99; Dec. Dig. § 76.*]

In the matter of the Lewis F. Perry & Whitney Company, an alleged bankrupt. On petition of Francis T. Leahy to join as a petitioning creditor. Petition dismissed.

See, also, 172 Fed. 744, 745.

Jacobs & Jacobs, for petitioning creditors.

Charles E. Heywood, for alleged bankrupt.

Morse & Friedman, for objecting creditors.

Francis T. Leahy, pro se.

DODGE, District Judge. It was held in this case on April 7, 1909, that, unless Leahy's application to join as a petitioner is to be allowed, there are only two creditors before the court, seeking to maintain the original petition filed September 23, 1908, who can be recognized as entitled to maintain it, and that it must be dismissed unless Leahy is so entitled. Upon his petition there has now been a hearing. That his petition is not to be dismissed merely because it was filed too late has been decided. See the opinion herein dated March 27, 1909. 172 Fed. 744. The present hearing has been upon his petition and the answers thereto, filed since March 27th, and is to determine whether or not he can be recognized as a creditor entitled to join in and maintain the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

original petition. If he cannot, that petition must be dismissed for want of parties sufficient in number to maintain it.

The material facts brought out at the hearing are undisputed, and are as follows:

The petitioner is a member of the bar of this court. Neither at the time of the assignment, made September 10, 1908, by the alleged bankrupt, upon which the original petition is founded, nor when the original petition was filed, on September 23, 1908, was he a creditor of the alleged bankrupt. He has since acquired and now holds a note given by it, to which his petition refers. He produced and identified it at the hearing. Its date is June 1, 1908. It is for \$1,000, payable four months from date, to the alleged bankrupt's order, and indorsed by it and some of its officers. It was protested for nonpayment on October 1, 1908, and has the certificate of protest annexed.

The petitioner first received this note on February 25, 1909, from Charles Jacobs, whom he then met for the first time, and to whom he was then introduced by Philip W. and Joseph B. Jacobs, also members of the bar of this court and attorneys for the original petitioners in this case. They are the sons of Charles Jacobs.

It was stated to the petitioner in their office that Charles Jacobs had a note of the alleged bankrupt and that he wished to join in these proceedings as a petitioning creditor. Leahy was asked to act as his attorney for that purpose, and consented to do so. It was then further stated to him that Jacobs did not want to appear in his own name, and it was proposed that the note be transferred to Leahy, and the intervention be made in Leahy's name. Leahy said the note would have to be transferred to him absolutely; and, this being agreed to, he took the note, and has since kept it. On the same day this petition by him to intervene was filed in court; he appearing pro se. The petition was drawn by Philip W. or Joseph B. Jacobs, and they also filed it in court after Leahy had signed it.

Leahy gave for the note nothing but his services rendered or to be rendered in the matter. Nothing was said about the amount of compensation he was to have for such services, or about what he was to do with any dividend or proceeds that might be received on the note. Nothing has ever been paid him in connection with the matter.

Charles Jacobs was not a creditor of the alleged bankrupt, either on September 10th, when it made its assignment, or on September 23d, when the original petition against it was filed, or at any time before he obtained the note passed over to Leahy as above. He first obtained the note, either on February 25, 1909, or a day or two before, from the International Trust Company, which held it on September 10, 1908, and had continued to hold it ever since. He paid the trust company \$1,000 for it. He stated at the hearing that his only reason for buying it was that he had heard that certain national banks were buying up claims and trying to defeat his sons (i. e., in the attempt to secure adjudication in this case), and had thereupon made up his mind that he would buy a claim to stop that. He further stated that he had no expectation of receiving anything for the note, and that to have an intervention upon it in these proceedings was all he was looking for.

A few days before the above transactions regarding this note, which

resulted in Leahy's petition to intervene, viz., on February 15 and 16, 1909, there had been a hearing before the court on the referee's report regarding adjudication, filed January 28, 1909. All the disputed issues involved in the question of adjudication, which had been raised up to that time, were at that hearing discussed and submitted for the decision of the court, which had taken them under advisement, but had not on February 25th rendered any decision. Its decision was not rendered until April 7, 1909. See the opinion of that date herein. 172 Fed. 745. It was, of course, obvious on February 25th that if the court should (as it ultimately did) hold that on February 15th there were only two petitioning or intervening creditors capable of maintaining the original petition, the dismissal of that petition must follow, and the manifest object of Charles Jacobs' purchase of the note, its transfer to Leahy, and the filing of Leahy's petition was, therefore, to avoid this result by providing an additional intervening creditor.

When he filed this petition on February 25th, Leahy "owned a demand or claim provable in bankruptcy," and was thus within the language of the definition of "creditor" in section 1 (9) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3421]). The same is true of Charles Jacobs after he bought the note and before he delivered it to Leahy. "Creditors who have provable claims" may, by the language of section 59b, file a petition to have the debtor adjudged bankrupt, and this language would include Leahy or Jacobs.

The court, however, is not in every case bound by the mere words of the act to recognize the holder of a provable claim for the time being as necessarily entitled to maintain an involuntary petition. Thus, though he owns a provable claim, a creditor who has accepted an assignment may not maintain a petition founded on the assignment as an act of bankruptcy. I have referred in the opinion in this case, dated April 7, 1909, to the authority in support of the proposition that a creditor, though he owns a provable claim at the time he appears in court, cannot maintain an involuntary petition unless he was a creditor when the act of bankruptcy was committed, so as to have the right to complain of the act as an injury to him. Whether the right to maintain such a petition would have to be denied under all circumstances, or not, to a creditor who acquired his provable claim subsequently to the act of bankruptcy, it seems to me clear that justice requires its denial to a "creditor" whose claim has been acquired under circumstances such as appear in this case. If one creditor may lawfully purchase the claims of others in order to assist involuntary proceedings, it does not follow that all the rights of an original creditor may be acquired at any time by the mere purchase of a claim against the debtor, no matter how long after the act of bankruptcy, or how long after the filing of the petition, or who the purchaser may be.

The adjudication in involuntary proceedings, for which the bankruptcy act provides, seems to me intended to be the result of the respective rights and obligations of the debtor and his creditors as they exist at the time of the act of bankruptcy or of the filing of the petition. Whether there shall be adjudication or not concerns them, and does not

properly concern any one between whom and the debtor no relations existed at either of those times. I do not believe it to have been intended that adjudication should result from or depend upon an altered situation arising later, still less a situation artificially created in order to affect the proceedings, by one with whom the debtor has never dealt in any way.

If the petitioner, Leahy, is recognized as a creditor entitled to maintain this petition, and adjudication is ordered, the respondent will have been adjudged bankrupt, not because there are three creditors having a right to complain of its assignment made September 10th, who desire this result, but because Charles Jacobs, to whom the debtor owed nothing when the assignment was made, and who never had any claim of any sort upon the debtor, until more than four months had passed since the assignment was made, has now undertaken to interfere in proceedings with which he had until now no concern at all, for the purpose, openly declared by him to have been his sole purpose, of enabling his sons, the attorneys for the original petitioners, to prevail in the controversy regarding adjudication.

In my opinion, to permit this would be to permit a use to be made of bankruptcy proceedings for which they were never intended and which is contrary to the policy of the act.

It is further to be considered that upon the uncontroverted evidence at the hearing the trust company, from whom Jacobs bought the note referred to, though it owned the note on September 10, 1908, and though it was fully informed at the time regarding the assignment which the debtor that day made, never became or attempted to become a party to the involuntary proceedings against the debtor, but allowed four months from the date of the assignment to expire without doing so. It had thus become estopped, in my opinion, before it transferred the note to Jacobs, from maintaining the involuntary petition as holder of the note. Jacobs, in view of the time and circumstances under which he got the note, ought not to be allowed rights greater than those which the trust company could have asserted.

The petition to intervene is to be dismissed.

The original petition filed by Stroheim and others on September 23, 1908, is also to be dismissed.

SUNSET TELEPHONE & TELEGRAPH CO. v. CITY OF EUREKA et al.

(Circuit Court, N. D. California. July 18, 1902.)

No. 13,248.

1. COMMERCE (§ 28*)—INSTRUMENTALITIES OF INTERSTATE COMMERCE—TELEGRAPHS AND TELEPHONES—"INTERSTATE COMMERCE."

Communication by telegraph or telephone between points in different states is "interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TELEGRAPHS AND TELEPHONES (§ 10*)—RIGHT TO USE STREETS—CALIFORNIA STATUTE.

The Broughton act (St. Cal. 1901, p. 265, c. 103), which provides conditions on which franchises may be granted by municipalities for the use of their streets for various purposes, but which excepts, *inter alia*, "telegraph or telephone lines doing an interstate business," does not require a telephone company doing an interstate business to obtain the consent of a city for the construction or maintenance of its lines in the streets, although they are used for local and intrastate business also.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*

Rights of telegraph and telephone companies to use streets, see note to *Southern Bell Tel. & Tel. Co. v. City of Richmond*, 44 C. C. A. 155.]

In Equity. On motion to dissolve restraining order.

See, also, 122 Fed. 960.

E. S. Pillsbury, for plaintiff.

J. H. G. Weaver and A. J. Monroe, for defendants.

BEATTY, District Judge. This is a suit brought by the Sunset Telephone & Telegraph Company, a corporation, against the city of Eureka, a municipality of the state of California, and the officials of that city, for an injunction to restrain and prevent their interference with the erection and maintenance of its telephone and telegraph lines, with the necessary appliances and appurtenances, in the streets of said city, and to prevent its officials from interfering with or removing the same, or instituting suits or prosecutions against the company or its agents, to prevent the construction of its lines, or the performance of its usual and ordinary business as a telephone and telegraph company, or from the collection of such rates for services rendered to subscribers as are now established. Upon filing the bill a restraining order was issued as prayed for, and an order to show cause why the same should not be continued *pendente lite*, and the defendants have appeared and moved to dissolve this restraining order.

It is charged in the bill that the complainant has constructed, owns, and is operating certain telephone and telegraph lines in the states of California, Oregon, Washington, Idaho, and Nevada, by which it transmits both telegraph and telephone messages and communications between these states, as also between the various cities and towns of each state, upon the payment of certain rates, and that such messages and communications are sent by its patrons from the city of Eureka, and by them also received in said city. While it is not claimed by complainant that all the patrons and subscribers of the company in the city of Eureka and doing business on its lines actually send and receive messages and communications to and from points outside of the state, it is asserted that some of them do make such use of its instruments and lines, and that facilities are afforded for so doing to all such patrons and subscribers for telephones.

It appears that on September 4, 1897, complainant duly accepted the provisions of the act of Congress approved July 24, 1866 (Act July 24, 1866, c. 230, 14 Stat. 221), entitled "An act to aid in the construction of telegraph lines and to secure to the government the use

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the same for postal, military and other purposes," and is included in the list of companies published by the Postmaster General, for which a schedule of rates for government business has been established by that official. It also appears that, for several years before the present trouble arose between complainant and the city of Eureka, the company had, from time to time, by the permission of the city and in compliance with its regulations as to the method of construction, erected lines in various streets, and at the time of bringing this suit was operating a telephone exchange there, with about 750 subscribers; that prior to this suit the city council had passed certain ordinances regulating the manner of constructing telephone and telegraph lines in Eureka, which complainant had always complied with, and alleges its willingness to still so comply, or with any other reasonable regulations in that respect.

The principal causes leading to this suit were the passage of two ordinances by the city council attempting to compel the company to maintain separate lines for its interstate business, and to procure a franchise from the city for the erection of lines used to transact local business. The first of these, No. 285, adopted January 27, 1902, is entitled an ordinance "regulating telephone, telegraph and telephone poles and wires used in doing interstate business in the city of Eureka," and declares it to be unlawful for any person to erect or maintain any poles or wires in the streets of the city used for doing an interstate telephone or telegraph business, or both, without first obtaining permission therefor from the city council, and complying with the provisions of said ordinance touching such erection and maintenance. It provides, further, among other things, that it shall be unlawful to use any poles or wires, the permission to erect or maintain which has been granted under the provisions thereof, for any purpose or purposes other than interstate telephone or telegraph, unless a franchise has been first obtained for doing an intrastate or local business within the city. The second, No. 286, adopted on the same day, is entitled an ordinance "regulating telephone and telegraph and telephone poles and wires used in doing an intrastate telephone and telegraph business and local telephone business within the city of Eureka," and declares it to be unlawful to erect or maintain poles or wires in the streets to be used in doing intrastate telephone or telegraph business or local business in the city of Eureka, without first obtaining a franchise for so doing, in accordance with the laws of the state and the charter of the city, and prescribes penalties for noncompliance therewith. About the time of the adoption of these ordinances another ordinance was passed, reducing the rates to be charged by the complainant in the city to an extent alleged to be unremunerative and prohibitory, and an injunction is also sought against its enforcement. Charges of fraud are also made concerning the motives of certain members of the council in securing the passage of these ordinances, but these are denied by affidavits read upon the hearing, and that issue will not be considered in passing upon this motion.

Counsel for defendants did not insist upon the hearing that complainant should be prevented from collecting its present rates before the trial of the case, and the principal question left for decision upon

this motion is as to the right of complainant to use and occupy the streets of the city of Eureka, to set poles and string wires, with all necessary and proper appliances and appurtenances for the purposes of its business, without first procuring a franchise from the city permitting such use and occupation. Counsel for the city have contended that under its charter and the laws of the state such a franchise is requisite, and that the city is entitled to the payment of a percentage upon the gross annual receipts of the company, as provided by the law of the state known as the "Broughton act" (St. of Cal. 1901, p. 265, c. 103). No provision of the charter of Eureka has been pointed out under which a franchise may be granted by the city or be required by it, in order to enable a corporation like complainant to erect lines for a telephone or telegraph business, and the liability, if any, of complainant to be compelled to procure such a franchise, arises under this act of 1901. In any event it would be presumed that the charter of the city is subordinate to a general law on the subject. Section 1 of the act of 1901 reads as follows:

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchise for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise."

It is contended on behalf of complainant that, as all its lines are doing both an interstate telephone and telegraph business, they are not within the operation of the act. It is shown that telegraph messages are sent over these lines from persons in this state to persons in other states, and received from the latter; also that telephone communications to and from the state are sent and received over the lines by some of the subscribers, though not by all, but that such use is open to any person renting a telephone instrument of the company, or applying to any of its public exchanges for telephone service; that all such services are rendered by complainant on the payment of established rates. It has been repeatedly held that such intercourse by telegraph and telephone messages and communications between different states is interstate commerce. *W. U. Tel. Co. v. Pendleton*, 122 U. S. 356, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 55 C. C. A. 208; *In re Penn. Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462; *N. W. Tel. Co. v. Chicago*, 76 Minn. 334, 79 N. W. 315.

It would seem that the Legislature of California had in view the law as declared by these decisions when the act of 1901 was passed, and that the lines of complainant are, on this account, exempted from its provisions. If complainant could be compelled to apply for a franchise as a condition precedent to doing business, the granting body might refuse its application, and instruments of interstate commerce be thereby prevented from transacting business. Conditions might also

be attached to such use which might impair or in effect work a denial of its exercise. In re Wm. Henry Johnston, 137 Cal. 115, 120, 69 Pac. 973.

The Supreme Court of California had already declared, when this act was passed, that in the statutes of the state the word "telegraph" included the telephone. *Davis v. Pac. States T. & T. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698. The same construction has been placed upon similar statutes in numerous other instances. *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *San Antonio Ry. Co. v. Southwestern T. & T. Co.*, 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884; *People's T. & T. Co. v. Turnpike Road*, 199 Pa. 411, 49 Atl. 284; *Wisconsin Tel. Co. v. Sheboygan*, 114 Wis. 505, 90 N. W. 441; *City of Rochester v. Bell Tel. Co.*, 52 App. Div. 6, 64 N. Y. S. 804; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *Summit Township v. Telephone Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *Telephone Co. v. Railway Co.* (Tex. Civ. App.) 52 S. W. 106. This court will follow the interpretation placed upon a statute by the highest court of the state in which it was enacted.

Complainant has also invoked section 536 of the Civil Code of California, and claims the right to construct its lines thereunder, and cites *Davis v. Pac. States T. & T. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, and other cases before noticed in that connection. Support is found for this claim in *Abbott v. Duluth (C. C.)* 104 Fed. 833, *Northwestern Tel. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, and other well-considered cases.

Complainant further contends that as the lines which it constructed prior to the commencement of this suit were erected under ordinances of the city permitting such erection, and particularly Ordinance No. 260 (Exhibit B to the bill), passed March 18, 1901, expressly accepting all pole lines erected by the company to that date, its relations with the city became contractual, and cannot be annulled by any subsequent action of that body, and cites in support of this proposition: *Abbott v. City of Duluth (C. C.)* 104 Fed. 837; *Telephone Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Sunset T. & T. Co. v. Medford (C. C.)* 115 Fed. 202; *New Orleans v. Southern Tel. Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. Rep. 502; *Wisconsin Tel. Co. v. Sheboygan*, 114 Wis. 505, 90 N. W. 441; *Northwestern Tel. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 74, 53 L. R. A. 175; *Chesapeake Tel. Co. v. Baltimore*, 90 Md. 638, 45 Atl. 446—which seem to sustain this contention. It is also urged, further, on behalf of complainant, that, having lawfully established its lines in that city, it has the right, as an incident to this circumstance, to extend such lines, with all necessary and proper appliances and appurtenances, to accommodate the increasing demands for telephone service, according to the doctrine announced in *Abbott v. Duluth (C. C.)* 104 Fed. 839, and *Mich. Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520. But, under the view taken of the act of 1901, it is not necessary to pass upon these points.

Of course, a telegraph and telephone corporation engaged in conducting an interstate business would be required to conform to all rea-

sonable police regulations adopted by municipal authorities as to the manner of constructing and maintaining its lines. This proposition is conceded by counsel for complainant, and it is pointed out that this company has always discharged its obligations to the city of Eureka in this respect, and has expressly alleged in the bill that it is willing to do so hereafter. This protects the public against any misuse of the streets.

The motion to dissolve the restraining order is denied.

NEW JERSEY PATENT CO. et al. v. MARTIN et al.

(Circuit Court, N. D. Iowa, C. D. February 4, 1909.)

No. 171.

COURTS (§ 290*)—FEDERAL COURTS—JURISDICTION—PATENT INFRINGEMENT.

A bill charging that, after termination of a contract between complainants and defendants for the sale of complainants' patented devices, defendants obtained large numbers of such devices from sources to complainants unknown and sold the same within the district, without right or authority, alleged an infringement of complainants' patents after the termination of the contract, and was sufficient to confer federal jurisdiction, regardless of the amount involved.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 290.*

Jurisdiction of federal courts in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Suit by the New Jersey Patent Company and others against E. H. Martin and others for patent infringement. Demurrer to amended bill. Overruled.

See, also, 166 Fed. 1010.

Frank L. Dyer and Kelleher & O'Conner, for complainants.
Wesley Martin, for defendants.

REED, District Judge. The demurrer is for want of equity in the bill, and also challenges the jurisdiction of this court upon the ground that the bill is founded upon an alleged breach by the defendants of the contract entered into by them with the complainants for the sale of their phonograph records, and that the amount of damages sustained by complainants because of such breach is not stated or shown. But the original bill, as well as the amendment thereto, alleges that after the contract between complainants and defendants had been terminated the defendants obtained from some source unknown to complainants large numbers of defendants' patented devices, and sold them in this district without right or authority from the complainants, or any of their authorized agents, and in infringement of their patent. This shows an infringement by defendants of complainants' letters patent after the termination of the contract, and is sufficient to confer upon this court jurisdiction of the suit, under the patent laws of the United States, to enjoin such infringement and for an accounting, regardless of the amount involved.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Whether or not a sale by defendants of the patented articles which they procured under the contract with complainants, but sold in violation of its terms, would at once terminate the contract, and at the same time be an infringement of complainants' patent, as maintained by complainants and denied by defendants in argument, need not now be determined, for the bill and amendment plainly allege that after the contract had been terminated, and defendants no longer had any rights thereunder, they procured the patented articles from some unauthorized source, and sold them in this district in violation of complainants' rights and in infringement of the letters patent.

The demurrer is therefore overruled, and defendants may answer the bill as amended by the March rules, if they shall so elect. It is ordered accordingly.

UNITED STATES v. BREESE et al.

(District Court, W. D. North Carolina. August 10, 1908.)

GRAND JURY (§ 5*)—QUALIFICATION OF JURORS—NORTH CAROLINA STATUTE.

Code N. C. § 1722, as it stood in 1897, providing that grand jurors should be selected from persons only who had paid tax for the preceding year, does not disqualify a person from being a legal grand juror who did not own property above the amount exempt from taxation, and was not therefore assessed with any tax for the preceding year.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 12; Dec. Dig. § 5.*]

On Motion to Quash Indictment.

See, also, 172 Fed. 765.

A. E. Holton, U. S. Dist. Atty.

Moore & Rollins, Adams & Adams, and Locke Craig, for defendants.

NEWMAN, District Judge. This is a motion to quash the indictment in the above-named case upon the ground that certain members of the grand jury that found the bill of indictment now under consideration had not at their time of service upon the grand jury paid taxes for the preceding year in conformity with the requirements of the statute of North Carolina on that subject, which is as follows:

"The commissioners for the several counties, at their regular meeting on the first Monday of June in each year, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid tax for the preceding year and are of good moral character and of sufficient intelligence." Code, § 1722.

The bill of indictment now before the court was found at Greensboro, N. C., October 6, 1897. Since that time other bills of indictment have been found against the above-named defendants separately, and there has been one trial of Dickerson resulting in a conviction in 1899, the judgment in which case was reversed by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Circuit Court of Appeals in 1901, and several trials of Breese, resulting first in a conviction, which was reversed by the Circuit Court of Appeals (*Breese v. United States*, 106 Fed. 680, 45 C. C. A. 535; *Id.*, 108 Fed. 804, 48 C. C. A. 36). On the second and third trials the jury failed to agree, and the fourth trial in 1904 resulted in a verdict of guilty on certain counts in the indictment and judgment of imprisonment against Breese in the Atlanta penitentiary. This last case was taken to the Circuit Court of Appeals (*Breese v. United States*, 143 Fed. 250, 74 C. C. A. 388), and there the case was reversed on the ground that two of the grand jurors who found the bill of indictment in that case had not paid taxes for the year preceding the one in which they served on the grand jury. The motion to quash the indictment in that case was entertained and heard because of an order made November 6, 1897, by Judge Dick, presiding in the District Court at Asheville at that time, when the defendant Breese was arraigned and pleaded not guilty. The order in that case was as follows:

"The United States v. W. E. Breese.

"Filed November 6th, 1897.

"In the above entitled action it is ordered by the court that the defendant, being now arraigned, be and he is now required to enter his plea to the indictment in said cause and he does so plea not guilty thereto, but such plea shall not operate or have the effect to prevent him taking advantage upon motion in arrest of judgment or on a motion for a new trial of all matters and things which could be taken advantage of by motion to quash or demur. Upon motion in arrest of judgment or for a new trial, all such matters and things shall be heard and determined as if the same were being heard upon motions to quash or demur. This order shall apply to any and all other indictments pending in this court against the defendant.

"Robert P. Dick, U. S. Judge.

"Concurred in. Covington, Assistant United States Attorney."

It appears from the records of this court that a similar order to the one taken above in the Breese Case was taken in separate cases against each of the other defendants, Dickerson and Penland, so that the three defendants were each arraigned, pleaded not guilty and had the benefit of the order just quoted. The District Attorney insists that this motion to quash comes too late. There is much ground for this insistence. The defendants not only have waited for more than 10 years to make this question, but they have even had two years since the decision of the Circuit Court of Appeals in the Breese Case on this subject. But assuming, without deciding, that this motion to quash is made in apt time, I do not believe that upon its merits it can be sustained. In the motion as filed it was urged that three jurors, James Davis, Jr., A. R. Couch, and N. W. Blackburn, members of the grand jury finding this bill, had failed to pay taxes for the preceding year. The motion was abandoned before the hearing as to Davis, and abandoned upon the hearing as to Couch, and is only urged now as to N. W. Blackburn. It appears from the records that no taxes were listed or assessed against N. W. Blackburn for 1896, which is the year in question here, in the country of Forsyth, where he lived

at that time. It may be gravely questioned from the decision of the Circuit Court of Appeals in the Breese Case, *supra*, in which this question was passed upon, whether the ruling was not restricted to taxes regularly "assessed" against a citizen who afterwards becomes a juror. The court referred many times in the opinion to "taxes assessed," and there is to my mind much force in the argument of the District Attorney that it was the intention of the court to restrict the ruling to jurors against whom taxes had been listed or assessed. Be this as it may, I am thoroughly satisfied that the juror Blackburn was not liable for any taxes for the year 1896. Under the statute of North Carolina (Revisal 1905, vol. 2, § 5223) he was entitled to an exemption on \$25 worth of personalty, and evidence has been submitted as to what property he really had during the year 1896.

In 1890 Blackburn and his wife, Nancy C. Blackburn, conveyed to Mrs. Blackburn's son, and Blackburn's stepson, Charles W. Brinkley, a piece of real estate in Forsyth county, containing 70 acres, more or less. Contemporaneously therewith Brinkley executed a bond in which he agreed to "take good care of the said N. W. Blackburn and his wife, Nancy C. Blackburn, during their natural lives, and furnish them with good food and clothing, and all that is necessary for their comfort and pay all medical expenses necessary, and at their death to furnish them a decent burial, and all other matters necessary for their comfort." The evidence shows that after this Blackburn and his wife continued to live on the place conveyed to Brinkley in their old home, and Brinkley built a new house. In 1894 Mrs. Blackburn died. The evidence also shows that prior to her death they had disposed of a cow and horse and certain farming utensils, and it is satisfactorily shown that, when she died, all they had was their very simple household furniture.

Affidavits have been introduced from several witnesses to the effect that Blackburn had on June 1, 1896, \$200 worth of personalty. No details are given in these affidavits, and they are in almost the same language, and certainly the same handwriting. Attributing no bad motive or wrong to any one, it is still true that these affidavits are entitled to little probative value. However honest they may have been in their statements, the contents of the affidavits are too general to be given any great weight. One of the affiants, J. T. Boyer, was put on the stand by the District Attorney, and modified very much the statement made in his affidavit.

The most valuable witness in this matter was J. H. Tesh, who was introduced by the government. He was a man of mature years who lived near Blackburn, and he testified that after his wife died Blackburn began to sell off his things. He further testified that Blackburn lived in a simple log house with a back room, and the substance of his testimony is that there were only a very few cheap articles in the house. He said, when they had a sale of Blackburn's things after his death, they did not bring more than \$15 or \$20. It was claimed that Blackburn had some feather beds of considerable value, but this witness says that at the sale one of

them sold for 50 cents. The following brief extract from the testimony will show the substance of what this witness said:

"Q. What was the value of the stuff this old man had after the cow and horse and wagon were sold? A. He had his household and kitchen furniture.

"Q. He retained that after he made the trade with Brinkley? A. Yes, sir; after his wife died he began to sell that off.

"Q. What did he have—do you know? A. He had some beds and tables, and something like that—all old property.

"Q. Would you estimate it at over \$25? A. No, sir; not what I saw after he sold his horse and wagon and cow."

I am thoroughly satisfied from the evidence that this juror, N. W. Blackburn, was not liable for taxes for the year 1896, as he had not more than \$25 personal property, and this was exempt from taxation.

It is further urged that under the act in force at the time this grand jury was drawn, which has been quoted above, jurors could only be selected from the tax returns for the preceding year, and that consequently whether a man was liable for taxes or not, if he was not on the tax returns, he would not be a competent juror. I do not think the Circuit Court of Appeals would have decided this, nor does the opinion on the subject of tax returns indicate this. The court in this opinion says:

"The statute in question requires the clerks of the boards of county commissioners to lay before them 'the tax returns for the preceding year.' So far as we have been enabled to discover, there is no statute requiring the tax collectors to make a 'tax return' showing the names of the taxpayers. Where the tax collector desires credit for taxes assessed against insolvents, he must return a list of such insolvents. But we have found no provision requiring a return of a list of citizens who have paid all or a part of the taxes assessed against them. In practice, as we are led to believe, the statute in question is in great measure disregarded by the boards of county commissioners," etc.

I do not believe that the Court of Appeals would have held on this question that a citizen who was an intelligent man and of good moral character, because he was poor and did not own more than \$25 worth of property, could not be a competent juror. It seems entirely probable, however, that Blackburn's name was obtained as a juror from a former tax list. Blackburn died in 1902, and his testimony cannot be had. The evidence obtainable fails to satisfy me of Blackburn's disqualification as a grand juror, but, on the contrary, satisfies me that he was competent. As I reach the conclusion that the grand juror Blackburn was not disqualified even under the law as it stood at the time the indictment was returned, it is unnecessary to consider the effect of the act of the Legislature of North Carolina of 1907 (Pub. Laws N. C. 1907, p. 63, c. 36), providing that motions to quash for the cause suggested here should not be sustained, or its applicability to the present motion.

The motion to quash the indictment on the ground that Blackburn was not a qualified juror must be overruled and denied; and it will be so ordered.

UNITED STATES v. BREESE et al.

(District Court, W. D. North Carolina, Asheville Division. June 29, 1909.)

1. COURTS (§ 352*)—FEDERAL COURTS—MANNER OF DRAWING.

Under Rev. St. § 800 (U. S. Comp. St. 1901, p. 623), providing that jurors in the federal courts shall be drawn or selected in accordance with the practice in the state courts as nearly as practicable, and section 810 (U. S. Comp. St. 1901, p. 627), providing when grand juries shall be summoned in such courts, construed together, a venire of jurors may be drawn and summoned for a term without designating them as grand or petit jurors, and at the term a grand jury may be selected therefrom, where such is the state practice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 928, 929; Dec. Dig. § 352.*]

2. INDICTMENT AND INFORMATION (§ 196*)—RETURN—WAIVER OF OBJECTIONS.

Where the record in a criminal case shows that the indictment was properly indorsed "a true bill" by the foreman of the grand jury, and was filed by the clerk on the same day, and a motion to quash, subsequently made and overruled, recited that the indictment was found a true bill and returned into open court, the defendants cannot after the lapse of 12 years attack the indictment on extrinsic evidence to show that it was not returned in open court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 631; Dec. Dig. § 196.*]

3. INDICTMENT AND INFORMATION (§ 11*)—RETURN INTO COURT—NECESSITY OF PRESENCE OF GRAND JURORS.

Where it is conceded that an indictment was found by a vote of the requisite number of grand jurors, and, after being properly indorsed as a true bill by the foreman, was taken by him into the courtroom, which opened from the grand jury room, and presented to the judge on the bench, when the court was in session, and by him handed to the clerk, such indictment is not invalidated by the fact that the other grand jurors did not accompany the foreman into the courtroom.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 62; Dec. Dig. § 11.*]

On Motion to Quash Indictment.

See, also, 172 Fed. 761.

A. E. Holton, Dist. Atty., for the United States.

Moore & Rollins, Adams & Adams, and Locke Craig, for defendants.

NEWMAN, District Judge. The indictment in this case appears on its face to have been found "a true bill" by the endorsement thereon at Greensboro, at the October term; that is, on October 6, 1897. On October 7, 1897, an order was made by Judge Purnell, presiding, transferring the case to Asheville for trial. In the United States District Court at Asheville on November 6, 1897, in connection with the plea of not guilty by the defendants in this case and other cases against them, an order was entered as follows:

"In the above-entitled action it is ordered by the court that the defendant, being now arraigned, be and he is now required to enter his plea to the indictment in said cause and he does so plead not guilty thereto, but such plea shall not operate or have the effect to prevent his taking advantage upon mo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion in arrest of judgment or on a motion for a new trial of all matters and things which should be taken advantage of by motion to quash or demurrer. Upon motion in arrest of judgment or for a new trial, all such matters and things shall be heard and determined as if the same were being heard upon motion to quash or demurrer. This order shall apply to any and all other indictments pending in this court against the defendant.

"Robert P. Dick, U. S. Judge.

"Concurred in. Covington, Asst. U. S. Attorney."

I have heretofore determined that matters proper to be heard by demurrer or motion to quash might be heard under this order as well in advance of trial as afterwards on motion in arrest of judgment or for a new trial. No action whatever has been taken in the case since the plea and order referred to, except that at an adjourned term of the District Court, at Asheville in July, 1908, the defendants filed a plea, or motion as it is termed on the paper, sworn to by all of the defendants, to quash the indictment on the ground that certain members of the grand jury which found the bill of indictment had not paid their state and county taxes for the year 1896, as required by the statutes of North Carolina. In a motion as filed it was urged that three, James Davis, Jr., A. R. Couch, and N. W. Blackburn, members of the grand jury finding this bill of indictment, had failed to pay their taxes for the preceding year. The motion was abandoned before the hearing as to James Davis, Jr., and abandoned on the hearing as to Couch, and was only urged in the end as to Blackburn. After hearing the evidence on this matter, the court overruled and denied the motion to quash the indictment, finding that Blackburn, the juror whose disqualification was insisted upon, did not owe any taxes for the year 1896.

The case being now called for trial, what is denominated a "plea and motion" is interposed, sworn to by each of the defendants, which makes two questions: First. That the grand jury that found this bill at Greensboro was not properly drawn and impaneled; and, second, that the bill of indictment was not properly returned into court.

As to the first question, it appears from the records that at the April term, 1897, of the United States District Court for this district, at Greensboro, an order was entered on the minutes of the court, as follows:

"Ordered by the court that the jury commissioner, John J. Nelson, and the clerk of this court, S. L. Trogdon, draw a jury for the October term, 1897, of this court."

At the opening of the October term of the District Court at Greensboro on October 5, 1897, there appears the following:

"James F. Millikan, U. S. marshal, returns into court the following venire, duly executed."

Then follows the venire, signed by the clerk, with 54 names appended, and then this entry:

"Executed August 26th, 1897, by summoning each person named to appear at 10 o'clock October 5th, 1897, answer as juror and not depart the court at Greensboro, N. C."

There then appears on the minutes of the court the following:

"Ordered by the court that the clerk draw a grand jury of twenty-one. The following were drawn and sworn."

Then follows 19 names. Why the 21 were not sworn does not appear, but presumably because they were excused from service or failed to appear. Then follows the appointment of James M. Allen, as foreman of the grand jury, by the court. The minutes for the same day show that Hon. Thomas R. Purnell, judge of the Eastern district of North Carolina, had been designated by Judge Simonton, circuit judge, to hold the court on account of the sickness of Judge Dick, the then judge of this district.

The contention of the defendants is that this grand jury was not drawn conformably to the requirements of the statutes of the United States on the subject. The practice in the United States courts in this district seems to be for two commissioners provided for by the United States statute to draw from the box containing the names of qualified jurors at the term at which they are to serve, 54 names to appear and serve as jurors, without any distinction being made at the time between grand and traverse jurors. When the court meets, by direction of the court, the clerk causes the names of these 54 jurors, on slips of paper, to be placed in a hat, and has a child, under 10 years of age, to draw therefrom a sufficient number of names to constitute the grand jury for the term (it appears in this district usually 21 names), and they are sworn and impaneled as grand jurors. This practice conforms substantially with the state practice of the state of North Carolina. This practice is shown in the Revisal of 1905 of the laws of North Carolina. Section 1958 is as follows:

"The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, and the other by the chairman of the board of commissioners, and the box by the clerk of the board."

Section 1959, omitting some immaterial things, is as follows.

"At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls, * * * except when the term of the court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn, and the scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners, shall, at the same time and in the same manner, draw the names of eighteen persons who shall be summoned to appear and serve during the second week, * * * and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. * * * The said commissioners may, at the same time, and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned."

The manner in which grand juries are then obtained is shown by section 1969 of the Revisal 1905, as follows:

"The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons

returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen shall be a grand jury for the court; and the residue shall serve as petit jurors for the court."

While the practice in the United States courts here does not appear to follow with exactness that provided by the statutes for the state courts, it is substantially and in effect the same.

Section 800 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 623) is as follows:

"Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such state."

As we perceive from this section, the jurors to serve in the courts of the United States are to be designated by ballot, lot, or otherwise, according to the mode of forming such juries practiced, when they are drawn, in the state court "so far as such mode may be practicable by the courts of the United States or the officers thereof." As I have stated, the method adopted by the United States courts here seems to be in substantial conformity with the practice in the superior courts of North Carolina, and doubtless as nearly so as the presiding judges have deemed practicable.

Counsel here, however, rely on section 810 of the Revised Statutes (U. S. Comp. St. 1901, p. 627), which is as follows:

"No grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such circuit or the judge of such district, in his own discretion, or upon a notification from the district attorney that such jury will be needed, orders a venire to issue therefor. And each of the said courts may in turn order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment it may be proper to do so. * * *"

The evident purpose of this statute was to prevent the unnecessary attendance of a grand jury and the expense and trouble of the same, at a term when there was no need for a grand jury and no business to be brought before it. If a grand jury is deemed unnecessary before the court meets, and afterward it is found that a grand jury is needed, the court may by order in term direct that they be summoned.

It is urged by counsel here that the meaning of this section 810 is that a grand jury by name must be ordered by the judge of the Circuit or District Court, and that the practice appearing to have existed in the court at Greensboro in this instance does not conform to this meaning. It is the duty of the court, of course, to consider this section in connection with section 800, which provides for conformity with the state practice as nearly as may be practicable.

Taking the two sections together, was this or not a legal grand jury? By an order of the court, at the April term, 1897, a jury was

drawn by the commissioner and the clerk and a venire issued therefor by the clerk. The marshal returned the same at the October term with the names of the jurors attached, and from that it appears the grand jury was drawn by order of the court. What difference is there in practical effect between that practice and drawing from the box, as is done in some districts, a grand jury by name, and a traverse jury by name, a separate venire issuing for each? The only difference appears to be that in the one instance the jurors themselves know, and those interested by examining the records would know, the persons who are to serve as grand jurors and those who are to serve as traverse jurors; whereas, in the other instance, under the practice here, no one would know, not even the jurors themselves, until the drawing took place in open court, in what capacity they were to serve during the term. The latter practice in some respects at least would appear to be preferable. Certainly no wrong is done by this to persons against whom indictments are to be preferred. I do not find anything wrong whatever in the manner in which this grand jury was drawn, summoned, and impaneled.

The next ground of the motion is that this bill of indictment was not properly returned into court, and this motion is based largely on the recent decisions of the Circuit Court of Appeals for this circuit in the two cases of *Renigar v. United States*, 172 Fed. 646, and *Angle v. United States*, 172 Fed. 658.

In the *Renigar Case*, which is not yet reported, the facts appear from the opinion of Judge Brawley as follows:

"On the 17th day of March, 1908, in the trial of case of the United States v. Pinkney Ayers, the evidence was concluded on the afternoon of said March 17th, and court was adjourned until 10 o'clock a. m., March 18, 1908. On March 18th, the judge of this court, in his office beneath the courtroom in the Federal Building in the city of Lynchburg, by appointment met counsel for government and for said Pinkney Ayers at or about 9 o'clock a. m., and the said judge and counsel were engaged in the consideration of the instructions in the case of the United States v. Pinkney Ayers until about 2:30 o'clock p. m., with the exception of about one hour, during which they were separated and were at lunch. While the judge and counsel were so engaged in the office of the judge beneath the courtroom, the paper herein, purporting to be an indictment, was by the foreman of the grand jury, who came alone into the courtroom, handed to the clerk at his desk in said courtroom, and by him marked 'Filed' about 12 o'clock noon, while the judge and counsel for Pinkney Ayers, who were also of the counsel for the defendant in this case, were engaged in the judge's chambers; the judge of this court never having, at that time, been in the courtroom at any time during that day, and did not make his appearance in the courtroom until about 2:30 o'clock p. m., an hour or more after the said filing of the said alleged indictment, since which appearance of the judge in the courtroom no proceedings have been had upon the said indictment, except such as appear of record herein.

"Counsel for defendant moved the court to correct its order above set forth, and to make the same conform to the state of facts herein set out, and at the same time stated to the court the fact that the indictment had been handed to the clerk and marked 'Filed' in the absence of the judge from the courtroom was known to counsel for the defendant on the 18th day of March, 1908, at 1:30 o'clock p. m., and before pleading in abatement or in bar of the said alleged indictment; the court stating that the jury, clerk, marshal, and other officers of the court did meet in the courtroom at 10 o'clock a. m. on the 18th day of March, and were simply awaiting the return of the judge until he could finish the consideration of the instructions, which for convenience was

being done in the judge's chambers, on the floor below, also that the court has at a previous term given instructions to the clerk and to the assistant district attorney that no further announcement should be made of an indictment found by the grand jury, and that the same, after endorsement should be brought by the foreman and handed to the clerk, who would thereupon mark the same 'Filed,' and proceed to make the regular order of entry; the reason for such instructions being that frequently parties who were indicted learned of the facts through the public announcement thereof in the courtroom before capias for their arrest could be served, thus leading to difficulties in making arrests and to flights. But the court certifies that the defendant, W. H. Renigar, was in attendance upon this court on a bond not to depart without leave of the court, and that nothing contained in the direction hereinbefore referred to in any manner applied to this particular case."

In the District Court a motion to quash the indictment upon the ground that it was not properly returned to the court was overruled, and the case was reversed by the Circuit Court of Appeals on the ground that the court erred in this.

Judge Brawley closes an able opinion in this case in this language:

"We have been extremely reluctant to set aside the judgment in this case upon the ground which may appear technical, and for that reason have given unusual time to its consideration, and to an investigation of the practice in every state, where the institution of the grand jury is preserved. Nothing is more clear than that the 'established mode of procedure' is for the grand jury to make its presentments publicly in open court; all of the grand jurors being present and answering to their names. It follows that a paper purporting to be an indictment handed by the foreman to the clerk when the court is not in session and in the absence of the grand jury is no indictment. This is not a question of irregularity, but of substantive law, based upon the direct terms of the constitutional guaranty that no man shall be 'held to answer' for an infamous offense except on an indictment by a grand jury. The indictment—and that means, of course, a valid indictment found and presented according to the settled usages and established mode of procedure—is a prerequisite to the jurisdiction of the court to try the person accused, an indispensable condition and requirement, the absence of which rendered the proceeding not simply voidable, but absolutely void."

It will be seen from the facts of this case that the indictment was returned by the foreman of the grand jury to the clerk when the judge was not even in the courtroom, although in another part of the building, and when the court was not in session; that is, the judge was not on the bench.

In the Angle Case the bill of exceptions contained in the transcript of the record, which I have before me, shows the facts in that case to have been as follows:

"The said indictment, after being found by the grand jury, was not returned and never has been returned by the grand jury, as the law requires, to the court in open court, but was returned by the foreman of the grand jury, the other jurors not being present, to and delivered by the foreman of the grand jury, to the clerk of the court, during the session of the court, but in the absence of the other jurors, and without the attention of the court being called thereto."

The questions arising for determination on this motion are probably three, as follows: (1) Can defendants go behind the record of the court? (2) Is the motion made in time, and can it now be entertained, particularly in view of what transpired in 1908 on motion to quash? (3) Even if defendants are allowed to go behind the record of the court and introduce what they propose to show, would this showing

be sufficient to justify the court at this late date in quashing the bill of indictment?

It is well understood, of course, that the records of a court of record import usually and generally absolute verity. In the present case the record of the court shows the following: On the clerk's "New Bill Docket" for October term, 1897, appears the following:

"No. 24 and No. 3220. United States vs. William E. Breese, William H. Penland, and J. E. Dickerson."

Then opposite to that:

"Indictment for conspiracy and embezzlement at Octo. Term 1897. Indorsed: 'A True Bill. J. M. Allen, Foreman.' Transferred to Asheville."

And then in pencil what appears to be a memorandum of the clerk with reference to his letter on his official letter book transferring the case to Asheville. On the District Court Criminal Docket, the following:

"United States v. Wm. E. Breese, Wm. H. Penland, J. E. Dickerson, Buncombe Co., No. 3220. Indictment: Conspiracy and Embezzlement. Octo. Term, 1897. 'A True Bill. J. M. Allen, Foreman.'"

On the records appears an order transferring the case to Asheville, which, it is conceded, was recently entered, having theretofore appeared only on the official letter book, and by the original order itself, made by Judge Purnell October 7, 1897, transferring the case, which has been presented as a part of the record in the case. The original indictment in this case which is before the court as a part of the record has indorsed on it the term of the court, the case, and the offense, and an entry "A True Bill, J. M. Allen, Foreman," and "Filed October 6th, 1897, S. L. Trogdon, Clerk." That is the record in the case, which shows undoubtedly that a bill of indictment against the defendants for the offense charged was signed "A True Bill" by the foreman of the grand jury according to the proper practice in this respect. It shows that the indictment got into court, and was there entered on the clerk's "New Bill Docket" and on the "Criminal Trial Docket" on the same day that the foreman indorsed "A True Bill" on it.

Can the court go behind this record, and hear extrinsic evidence to add to or to take from or explain it? This may be gravely questioned. Assuming, however, that under the decisions of the Circuit Court of Appeals for this circuit in the two cases referred to, the question may be heard if raised during the term and in ample time; should the defendants here, after nearly 12 years have elapsed, and in view of all that transpired in the motion made by them and the proceedings thereon last year, be now heard? Many terms of court have elapsed, and this bill of indictment has been in the clerk's office all the time unquestioned until more than 10 years had passed, when in July of last year the defendants filed the motion referred to, to quash the indictment upon the ground that certain grand jurors had not paid taxes as required by law. In that motion, which was sworn to by all of the defendants, is repeated three times this language with reference to the three grand jurors—that:

He "was summoned, drawn, sworn, and charged as one of the said grand jury and constituted a part of the body of said grand jury, and as such took

an active part in the deliberations of said grand jury upon said bill of indictment and concurred with his fellow grand jurors in finding the same a true bill and * * * at the time he was summoned, drawn, sworn, and charged as such grand juror as aforesaid, and at the time * * * constituted a part of the body of said grand jury as aforesaid, and * * * took an active part in the deliberations of said grand jury upon the said bill of indictment, and concurred with his fellow grand jurors in finding the same a true bill, as aforesaid, and at the time the said grand jury returned the said bill of indictment into open court, as aforesaid."

Then the following:

"Which was the year preceding that in which the state and county taxes of the state of North Carolina (county of Guilford in two places, and county of Suffolk in one) at the time their said bill of indictment was returned into open court, as aforesaid, then been last appraised and assessed," etc.

So that, in this verified motion, it is in terms acknowledged that this bill of indictment was found "a true bill" by the grand jury and returned "in open court." That motion was made and urged without the slightest suggestion of any other objection to the formation of the grand jury or to the return of the bill of indictment. The motion, in effect, acknowledged that, if the members of the grand jury were all qualified by reason of the payment of taxes for the year preceding their service as grand jurors, the bill of indictment was properly found and properly returned into the court. The defendants knew, or ought to have known, as well when this indictment was returned as they know now, how the same was returned into court, yet they waited all these years to raise the question. I am very much inclined to think that the objection comes too late, and I am satisfied, in view of what occurred last July, and what was conceded by the defendants, under oath, in the motion then made, that they are not entitled to be heard to make this objection to the manner in which the indictment was brought into court.

I am not overlooking the contention of counsel so ably presented, to the effect that no action has been taken by the government in the way of pressing to trial this bill of indictment, and that the defendants by the express order of Judge Dick of November, 1897, had reserved to them the right to interpose objections by demurrer or motion to quash, and, even after verdict, by a motion in arrest or for a new trial, and that consequently it was not incumbent upon them to do anything until the government moved in the matter. This view was strongly presented, and I was greatly impressed with it, and I am not prepared to say certainly what the result would be on this branch of the case but for the admissions of the defendants in their verified motion made last summer to the effect that the indictment was correctly returned into court.

But even if I am wrong in the foregoing, and it would be proper for the court to hear the defendants' evidence upon motion to quash or for the purpose of amending and correcting the record, as they desire, I do not believe that the evidence they propose to submit would change the result. By consent of the district attorney and counsel for the defendants, in order to allow certain witnesses in attendance upon the court to return to their homes, a statement of facts was agreed upon as to what occurred at the time, in connection with the action of the grand jury on

this bill of indictment and its return to the court. It appears from that statement that the grand jury found a true bill; that it was marked "a true bill" on the back and signed by J. M. Allen as foreman; that the requisite number of grand jurors more than 12, voted to find a true bill; that, when this action had been taken, the grand jury was in session in a room adjoining the courtroom, on the same floor, with a door opening into the courtroom; that the foreman left the grand jury, went into the courtroom with the bill of indictment, and handed it to Judge Purrell, the presiding judge, in person, the judge being then on the bench and the court open; and that the judge looked over the indictment and handed it to the clerk in open court, and that the foreman then returned to the grand jury room and proceeded with business; that the grand jury did not accompany him when he brought the bill of indictment into the courtroom and handed it to the court. It would appear, therefore, that the facts in this case are materially and essentially different from those in the case of either Renigar or Angle. In the former case the indictment was handed to the clerk when the judge was not in the courtroom and the court was not in session, and in the latter case to the clerk without the attention of the court being called to it. Surely the facts are sufficient to distinguish this case entirely from the two cases referred to.

But, more than this, the same evidence which would show that the grand jury did not accompany the foreman into the courtroom would show, and does show, that the grand jury voted for and directed the return of a true bill. That evidence of the fact that the grand jury voted for and found a true bill by the requisite number may be given by the foreman or any member of the grand jury in another matter is conceded by the eminent counsel for the defendants; indeed, this view of the law was urged by them upon another branch of the case; so that, if we should go into the evidence in this matter, the reason given in the Renigar Case and in the cases therein cited for holding that it is best that a bill of indictment should be brought into court by the entire body of the grand jury—that is, that otherwise there would be no certainty that the foreman returned the correct action of the grand jury—would not apply in this case, because the evidence which would show that the foreman's action might have been wrong would at the same time show clearly that it was right. Of course, the decision of the Circuit Court of Appeals for this circuit is controlling on the court here—absolutely so. I have stated the facts of the cases recently decided by that court. While some of the language used by the eminent and learned judge delivering the opinion in the Renigar Case may indicate that it is necessary to the validity of a bill of indictment that it be returned into open court by the grand jury in a body, yet I think the decision should be considered somewhat at least in connection with the facts of the case in which the decision was made and the opinion handed down. I do not believe that the Circuit Court of Appeals has held or will ever hold that in a case where the facts are like the facts here the indictment should be quashed. I do not understand the Circuit Court of Appeals in either of these cases to hold that the defendants may not admit that the bill of indictment was properly

returned into court. Nor do I understand that they have held that if the evidence which shows that the foreman alone brought the bill into court, unaccompanied by the body of the grand jury, at the same time shows that the bill of indictment had been regularly found true by the grand jury, and that the foreman was authorized to make such return, the indictment would be held invalid. There is a statute in North Carolina, and has been since 1889, which authorizes the foreman of grand juries to return a bill of indictment into court except in capital cases. The statute now appears in section 3242 of the North Carolina Revisal of 1905. It is as follows:

"Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body."

While I do not say that this is controlling as to the practice to be followed in the United States courts in this state, it does show, at least, that the Legislature of this state, of which the defendants are citizens, believe that foremen of grand juries, always selected for their high character as well as for their intelligence, may be trusted, especially in view of the solemn oath they take, to report correctly to the court the action of the grand jury, and that in cases of felony except capital cases (as to which it was thought there should be greater formality) no harm would result to the defendants from this practice.

It may be properly added that I recognize to the fullest extent the right of the defendants under the Constitution of the United States (article 5), when charged with an infamous crime, to have an indictment of the grand jury, and agree, of course, with all that was said and strongly pressed in the able argument by the defendants' counsel as to its absolute necessity; and, if I did not believe that the bill of indictment was properly and regularly found by the grand jury in this case, I would so hold. Nothing is specified in the Constitution, however, as to the manner of getting the indictment into court. Whatever is necessary as to that is at most a safeguard thrown by the courts around the proceeding and intended to prevent any imposition or wrong. In this case the facts not only fail to show that any imposition or wrong has resulted, but show affirmatively that there has been nothing of the kind in the case.

I conclude, therefore, that it is doubtful, at least, whether the defendants have a right to go behind the records of the court at all, and that by the lapse of time and by what was set up in their motion to quash the indictment in 1908 they have certainly lost this right, if they ever had it; and, further, if there be a mistake about this, and the evidence that they propose to submit should be heard by the court, it would not show such facts as would justify the court in quashing this indictment. Counsel have frequently alluded on the argument of this motion to the trial of these defendants on other indictments and to the results of these different trials. Nothing of that sort is proper to be considered on the present hearing. The question here is whether the motion to quash this indictment should be allowed or denied. I know

nothing whatever about the merits of the case. I do know this, however, that the defendants stand before the court with the presumption of innocence in their favor, and that this presumption will go with them in the trial and remain with them until the government by competent evidence shall establish, to the satisfaction of a jury, and beyond a reasonable doubt, every ingredient necessary to their conviction under this indictment. To this view of their case they are entitled, and this they have. I do not believe under the whole record presented here, or even under such evidence as counsel say they would submit, a case is made which justifies the court in quashing this bill of indictment, and consequently an order will be made overruling and denying the motion upon both grounds stated therein.

I have discussed this question at some length, perhaps at an unnecessary length, but I have done so in deference to the earnestness and evident sincerity of counsel for defendants in pressing this motion, and also that my views may fully appear upon the record. The case has received the most careful investigation and consideration, and the result of this is the conclusion reached above.

DAVIS HOTEL CO. v. PLATT.

(Circuit Court, N. D. West Virginia, at Clarksburg. June 13, 1908.)

CARRIERS (§ 199*)—CARRIAGE OF GOODS—VALIDITY OF REGULATIONS.

Discrimination by a carrier against a particular commodity is not necessarily illegal if reasonable grounds therefor can be shown.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-903; Dec. Dig. § 199.*]

In Equity. On motion for preliminary injunction.

James Edward Law, for complainant.

Warder & Robinson, for defendant.

GOFF, Circuit Judge. This case, while similar in some particular, is in a number of instances quite different from *Crescent Liquor Company et al. v. Platt* (C. C.) 148 Fed. 894. The bills in both cases are in effect the same. Therefore, for a statement of the controversy now under consideration, reference is made to the case above mentioned. The jurisdiction of this court is questioned by the defendant, but I reach the conclusion after a careful examination of the authorities cited that it is my duty to retain and dispose of the case.

In the matter of the *Crescent Liquor Company* I held that the discrimination of the United States Express Company against the complainant was unreasonable, the effect of which was to cause great injustice to that complainant; hence pending the hearing I granted a mandatory injunction. In the present case the facts submitted for my consideration are materially different from those passed upon in the *Crescent Liquor Company Case*. I have now before me complainant's bill duly verified, which on this motion is used as an affidavit, as also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the affidavit of two of the officials of the defendant company, and on these I am to dispose of the motion for an injunction. The defendant in the affidavits mentioned sets forth that it has not by custom nor long usage committed itself to the transportation of C. O. D. packages, but that, on the contrary, it has never offered to render such service to the public generally; that it has frequently declined so to do, and has reserved such service to such parties as it deemed it proper to make special contracts with; that it has frequently refused to make such contracts, and has declined to transport the articles tendered by shippers, such articles so refused being packages of liquor, as well as of other commodities of commerce; that its refusal to receive and transport C. O. D. packages of liquor is founded on the experience of the express company in the years past, by which it has been demonstrated that such business has imposed upon that company such a great burden, accompanied by such financial loss, that in fairness it should not be required to continue the same; that, if given the opportunity, defendant will conclusively demonstrate the correctness of the contention of said company that its refusal to accept and deliver such packages is because of sound business principles, not unreasonable in their character.

The complainant does not attempt by affidavit or otherwise to refute this contention of the defendant, but relies solely upon the alleged discrimination against it. In the Crescent Liquor Company Case the discrimination was found to be unreasonable, as the legislation cited to sustain it was held to be unconstitutional, and the regulations regarding it partial and unjust. It is quite evident in the present case that discrimination against the complainant exists, but it does not necessarily follow that the rules and regulations now relied on by virtue of which such discrimination is shown are unreasonable. Other matters of defense than the legislation referred to are now presented. The defendant then accepted from some shippers C. O. D. packages of liquor, and declined to accept such packages from the Crescent Liquor Company. Defendant now declines to receive such packages from all dealers at all points, and insists that the facts will make evident the propriety of such action. Therefore defendant asks that time be given for the purpose of taking testimony, the object of which is to prove that the insistence now made by the express company is not without merit. I conclude that it is my duty before passing on the motion for injunction to give the defendant an opportunity to properly present the facts on which it relies to justify its action in declining altogether to receive for transportation and delivery C. O. D. packages of liquor. Let the pleadings be perfected and the proofs taken.

With the propositions of law announced in the Crescent Liquor Company v. Platt, when the motion for an injunction in that case was disposed of, I am in full accord, and, when the proofs shall have been taken in the case now under consideration, it will be determined whether or not they are pertinent to it.

BURKE v. PLATT.

(Circuit Court, N. D. West Virginia. September 16, 1909.)

CARRIERS (§ 199*)—CARRIAGE OF INTOXICATING LIQUORS—LEGALITY OF DISCRIMINATION.

A rule of an express company by which it declines to receive shipments of liquor C. O. D. is reasonable and valid where it applies to all shippers and all localities alike, and where it is shown that the acceptance of such business has resulted in loss to the company and detriment to its business through unclaimed packages, delays in deliveries, rendering its places of business unpleasant to other patrons and in other ways, such as to justify the rule as a business regulation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 901; Dec. Dig. § 199.*]

In Equity. Suit for injunction.

John Bassel and J. E. Law, for complainant.

Warder & Robinson and Frank H. Platt, for defendant.

GOFF, Circuit Judge. The complainant, a duly licensed retail liquor dealer, whose place of business is at Clarksburg, W. Va., alleges that the United States Express Company, a common carrier, doing business in this district, unreasonably and illegally fails and refuses to receive from him and to transport and deliver liquors ordered of him when tendered to be shipped "collect on delivery" to any of his customers residing at any place where said company is engaged in business, greatly to his loss and injury. Complainant asks the court to restrain said express company, its officers, and agents from failing to perform its duty as a common carrier, and from refusing to receive, transport, and deliver to complainant's consignees upon the payment of the reasonable and customary express charges packages of liquor ordered of, filled, and tendered by him to that company for transportation and delivery, both collect on delivery and otherwise, in the same manner and under the same conditions as other goods, wares, and merchandise are transported and delivered by defendant. Pending the suit a temporary restraining order of like character was prayed for. The answer admits that complainant is a regularly licensed retail liquor dealer, doing business as set out in his bill; that the defendant, Thomas C. Platt, is the president of the United States Express Company; admits that the company has been and now is engaged as an express company doing business in West Virginia and elsewhere as set out in the bill; admits that the United States Express Company has refused to receive, transport, and deliver liquors ordered of complainant tendered by him to be shipped "collect on delivery." The answer also admits that the express company makes special contracts with shippers by which it undertakes to collect in certain instances from the consignee the purchase price of the shipment, for which a special charge is made, but insists that such service has never been offered to all who applied for it, the company having reserved the right to make the "collect on delivery"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract with certain shippers, and to refuse to make it with others, that, while intoxicating liquors have been received and forwarded, it has always been done subject to reasonable rules and regulations found necessary to protect the interests of the company and its patrons, which rules have been changed from time to time as the situation required until April 14, 1908, when all liquor shipments "C. O. D." were discontinued.

When the motion for a restraining order was submitted for my consideration in connection with the bill and affidavits filed with it, as also the affidavits submitted by the defendant, I refused the decree asked for, and directed that the proofs be taken for use on the final hearing. Important questions of law and practice, raised by the demurrer to the bill—which was overruled—would be further alluded to were it not that the conclusion I now reach renders their consideration unimportant. The case of *Crescent Liquor Company v. Platt*, 148 Fed. 895, heretofore decided by this court, has some points similar to those now involved, but the defense in that case was chiefly based upon a statute which the court found itself compelled to disregard because of its unconstitutionality. In that case the express company refused to accept from the complainant any shipment of intoxicating liquors to be delivered at certain points in the state of West Virginia, whether "C. O. D." or not, while at the same time it was receiving and transporting such packages for other liquor dealers. In the case of *Davis Hotel Co. v. Platt*, 172 Fed. 775, in denying the motion for a temporary injunction, this court said:

"It is quite evident in the present case that discrimination against the complainant exists, but it does not necessarily follow that the rules and regulations now relied on by virtue of which such discrimination is shown are unreasonable."

Similar language was used by the court when the restraining order was refused in the case now to be disposed of, and it was then plainly indicated that if the facts relied upon by defendant—as then presented in answer and affidavits—were substantiated by testimony formally taken, that the refusal of the express company to accept, carry, and deliver "C. O. D." packages of liquors would not be held to be unreasonable. It is that matter only that I have now to decide.

It is well to notice the fact that the express company does not decline to receive, transport, and deliver "C. O. D." packages of ordinary merchandise, but, in effect, concedes the right of shippers to resort to that method of shipment under special arrangements reasonable in character, the insistence being that, in view of the unusual situation shown to exist in connection with the carriage and disposition of liquor shipments, the company is compelled, having due regard to its duty to the public and to its stockholders, to refuse such "C. O. D." shipments. It still receives, carries, and delivers liquors of all kinds when offered under its regulations applicable to general shipments other than "C. O. D." It is clearly shown by the testimony that the expense, difficulties, and results attending the "C. O. D." liquor contracts are entirely different from those connected with "C. O. D." shipments of other kinds of traffic. The proofs offered on this subject justify the claim

made by the defendant that they have resulted in undesirable conditions and in financial loss to the company. Under such circumstances, it would be unreasonable and inequitable for the courts to compel the company to perform such service, to require it to undertake to collect from consignees of intoxicating liquors the purchase price thereof. It may be conceded that complainant's business is legitimate, and that the commodities in which he deals have the same status under the law as have other commercial articles, but in this connection it is well to recall that common carriers have the right to make and enforce reasonable regulations fixing the manner in and by which they will receive and transport the articles of commerce they undertake to carry. Presumably such regulations are proper and reasonable, and it is incumbent on those who maintain to the contrary to prove their contention. In my judgment the evidence offered by the complainant fails to show that the regulations complained of are unreasonable or unjust.

The complainant insists that it is the duty of the express company under the common as well as the statutory law to receive and transport all articles of lawful commerce tendered to it for that purpose. In my judgment this insistence cannot be sustained, as all such shipments offered by the patrons of the company are subject to the reasonable and lawful rules duly promulgated by it. The complainant is not discriminated against as the rule applies to all engaged in his business; nor are the articles of commerce peculiar to that business refused shipment, but the manner of shipment is regulated, and "C. O. D." packages of liquor are declined. This refusal applies to all shippers, and to all localities, not only in West Virginia, but in all the states where the United States Express Company is engaged in business. The defendant has shown by the testimony of many intelligent witnesses residing in this and other states, men of great experience, who have been for years employed in the discharge of duties connected with the express business, that the "C. O. D." liquor shipments tend to demoralize the employes of the express companies, and to diminish their efficiency; that as a result thereof the express companies have been retarded in their efforts to render prompt and satisfactory service to the public; that such companies have been frequently subjected to vexatious and expensive litigation, to prosecutions by county and municipal officials, and to seizures of property and searches of their places of business by officers of the law because of such shipments; that such places of business to which "C. O. D." packages of liquor have been consigned were thereby made unpleasant for the public, and that the patrons of the company on that account have been inconvenienced and prevented from transacting their business with its agents; that such companies have been compelled to secure additional storage room at considerable expense at various points in order to provide for the care and protection of such packages, which are frequently not called for by the consignees promptly, and which are often returned to the consignor after having been held for some time by the companies; and also that in certain localities the business of the company has been lost or impaired because of hostility engendered in such communities on account of such shipments. A rule founded on these facts, on condi-

tions producing such results—facts and conditions not controverted by complainant, and concerning which no testimony has been offered by him—cannot be held to be unreasonable, will not be adjudged unjust.

The injunction asked for is refused. The bill will be dismissed.

In re LEVY.

(District Court, D. Massachusetts. December 29, 1908.)

No. 14,092.

BANKRUPTCY (§ 384*)—COMPOSITION—MOTION FOR CONFIRMATION.

An application for confirmation of a composition by a bankrupt referred to a referee to ascertain and report as to the reason for the withdrawal of objections, charging the bankrupt with acts which would be a bar to his discharge, and in general as to whether the composition would be for the best interests of creditors; holders of a bare majority in amount of claims scheduled having accepted the same, including probable relatives of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 591, 592; Dec. Dig. § 384.*]

In Bankruptcy. On application for confirmation of composition.

DODGE, District Judge. This bankrupt filed a voluntary petition September 12, 1908, scheduling his total liabilities at \$4,529.18 and his assets at \$1,500. He had been doing business under the name of Dartmouth Furniture Company at New Bedford. The assets scheduled were stated to consist of his stock in trade, \$1,000, and debts due him, amounting to \$500. \$4,366.68 of his indebtedness is stated as unsecured.

He has now offered in composition 5 per cent. on claims allowed or to be allowed, excepting those entitled to priority, and the referee reports that this has been duly accepted by creditors and the funds required to carry the offer into effect deposited.

The assent signed by creditors who have proved their claims shows that creditors whose claims amount to \$2,429.18 in all have assented to the composition, making a majority in number and amount. One of these claims, however, amounts to \$2,130, and the creditor who has proved it is Max Levy, of New Bedford. Edward Levy, of New Bedford, has proved a claim of \$23.98, and has also assented. The amount of assenting claims other than these two is \$275.20. The amount of claims proved by creditors who have not assented is \$246.79. The amount of claims scheduled, but not yet proved, is \$1,774.39.

Since the application for confirmation was filed here, two creditors have objected and filed specifications of objection. This was on December 17, 1908. On December 22, 1908, both objections were withdrawn. The specifications of objection charged the bankrupt with having obtained property on credit upon a materially false statement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in writing made to the objecting creditor for the purpose of obtaining such property on credit.

I do not think that the proposed composition should be confirmed, under the circumstances which appear, without further inquiry. The application will be sent to the referee to ascertain and report whether anything has been done by or in behalf of the bankrupt to secure the discontinuance of objections to confirmation. His investigation may properly include an inquiry whether Max or Edward Levy are related to the bankrupt, whether they were connected with the withdrawal of the objections, whether there are grounds for believing that the objections were well founded, and what grounds there are for believing that the composition offered will be for the best interests of the creditors.

UNITED STATES V. SIXTY-EIGHT CASES OF SYRUP.

(District Court, E. D. Illinois. October 1, 1909.)

1. FOOD (§ 7*)—LABELS—BLENDED SYRUP.

Certain cases containing syrup seized by the United States were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio." The bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." *Held* that, construing all the words of the bottle labels together, the same meaning was intended as in the labels on the cases, namely, that the bottles and the boxes contained blended maple syrup.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 7.*]

2. PLEADING (§§ 8, 214*)—CONCLUSIONS—DEMURRER—FACTS ADMITTED.

Where a libel to forfeit certain syrup for alleged violation of the food and drug act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]) stated that the boxes and bottles did not contain a blend of maple syrup, as stated on the labels, but alleged that the contents consisted of a mixture or compound of refined cane sugar flavored with an extract of maple wood, the negation of a blend of maple syrup was a conclusion of the pleader, which was not admitted by a demurrer to the libel.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 527; Dec. Dig. §§ 8, 214.*]

3. FOOD (§ 7*)—ADULTERATION—"BLEND."

Food and Drug Act, June 30, 1906, c. 3915, § 8, 34 Stat. 770 (U. S. Comp. St. Supp. 1907, p. 932), provides that an article which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded, if labeled so as to plainly indicate that it is a compound imitation or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for coloring or flavoring only. *Held* that, where syrup consisting of refined cane sugar flavored with an extract of maple wood was sold under a label describing it as "Western Reserve Ohio Blended Maple Syrup," the word "blend" indicated that the article was a mixture and imitation, and there was therefore no violation of the act.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 1, p. 808; vol. 8, p. 7591.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Libel by the United States against Sixty-Eight Cases of Syrup, to condemn the same for violation of the food and drug act. Demurrer to libel sustained. Proceeding dismissed.

S. M. Clark, Asst. U. S. Atty.
Frank Lindley, for defendant.

WRIGHT, District Judge. This is a libel presented by the United States against Sixty-Eight Cases of Syrup under the provisions of Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928). The libel charges that the cases of syrup were shipped from Cleveland, Ohio, to Danville, Ill., and that 48 of them contained each one dozen bottles, and 20 of them contained each two dozen bottles, of syrup; that the cases were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio"; and that the bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." It is further charged in the libel that the cases and bottles were misbranded in violation of the act of Congress to which reference has been made, subjecting the property to condemnation as provided in said act, for the reason that the cases and bottles do not contain maple syrup, or a blend of maple syrup, but do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, and that the labeling before mentioned is misleading and false, so as to mislead the purchaser, and so as to offer the contents for sale under the distinctive name of another article. The goods were shipped to the Webster Grocery Company, doing business in Danville, Ill., and by this proceeding seized, and are now in the custody of the marshal. The Western Reserve Syrup Company, of Cleveland, Ohio, the manufacturer, shipper, and seller of the goods, has appeared by its attorney in this proceeding and filed its demurrer to the libel; and the court, having heard the argument of counsel, thereupon took the case under advisement and for future determination.

In the argument at bar of the case it was contended for the respondent that there is a distinct and substantial difference in the labeling upon the cases and that upon the boxes; that in the former the word "Maple" is used, and in the latter, the case of the bottles, that word is omitted, as a qualifying word in the description of the syrup. Without again quoting the words of the labeling, but referring again to them as above set out in this opinion, it will be seen that, while the word "Maple" is not used as a qualifying word to syrup, yet further on in the words of the label it is found that respondent describes itself as blenders of "Fancy Maple Syrup and Maple Sugar," so that, when all the words of the label put upon the bottles are seen, and its full meaning comprehended, I think the same meaning was intended in the use of both labels, and from either of them, that upon the cases and that upon the bottles, a person of ordinary intelligence, after reading them or either of them, would infer the same meaning that the bottles,

as well as the boxes, contained blended maple syrup. So it seems to me that the contention of the respondent that the label upon the boxes, which alone was intended to induce the purchasers, even conceding this, is without force. It then being determined that the labeling upon the cases and upon the bottles mean the same thing, namely, that each contained blended maple syrup, it only remains to decide whether, in view of the other averments of the libel, a violation of the statute is shown.

If the brands or labels correctly or truthfully disclose the contents of the cases and bottles, and no poisonous or deleterious ingredients are apparent, there can, I am persuaded, be no violation of the law, and this action could not be supported. There is no claim that poisonous or deleterious ingredients entered into the compound. The libel avers it was not maple syrup. The labels do not purport to state that the contents of the boxes and bottles was maple syrup; but, as said before, both labels represent the same fact—that the contents of the boxes and bottles was blended maple syrup. The libel avers that the cases and bottles do not contain a blend of maple syrup, and then specifically states they do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood. The demurrer of the respondent to the libel admits all the facts well pleaded in the libel, and, while it is stated by the libel that the boxes and bottles do not contain a blend of maple syrup, the following statement in the libel, that the contents consisted of a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, renders the previous negation of a blend of maple syrup nugatory as a fact stated, but leaves it as a mere conclusion of the pleader, that is not admitted by the demurrer. So it seems to me the case resolves itself to the single question whether a mixture or compound largely of refined cane sugar flavored with an extract of maple wood is blended maple syrup.

The plain and manifest object of the statute under consideration is to protect the purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representations, and to insure that the commodities are such as they are represented to be. If the brands or labels upon the goods in question were truthful, and such as the law permitted upon such goods as they actually were, then there was no violation of the law, and the goods were wrongfully seized, and should be returned to the person or persons from whom they were taken. The proviso to section 8 of the statute under which this libel is being prosecuted provides in legal effect, amongst other things, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; and the term "blend" so used, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

I have already said that the brands or labels in question plainly indicate that the article of food, the syrup in this case, was a blend of maple syrup, and the statute itself declares that the term "blend" shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients, used for the purpose of coloring and flavoring only. I think I may take judicial notice of all that an ordinarily intelligent person knows, and in doing this I know that food syrup is a saccharine solution of a superior quality, frequently called molasses, and it may be made of any of the various sugars of commerce, such as cane, beet, or maple. These sugars are alike, in that they are saccharine. The statute defines a blend of anything to be the mixture of like substances not excluding the flavoring. In the case presented the mixture is cane sugar flavored with extract of maple wood. It seems to me no argument is necessary to prove that all food sugars are of like substances, and to them or any of them add the flavoring extract of maple wood and thereby is produced the very blend contemplated by the exception of the statute I have endeavored to point out.

Even without this plain exception provided for by the law itself, no ordinarily intelligent person could be deceived by the labels in question into buying the articles so labeled for real maple syrup. The word "blend" is clearly used, both as to the articles and their manufacture, and of its own clear import indicates a mixture and imitation. Entertaining the views I have expressed, it follows that I am of the opinion the libel is insufficient in law, and the demurrer will therefore be sustained.

Let an order be prepared sustaining the demurrer, dismissing the libel, and awarding a return of the property, without costs.

TREMONT COAL & COKE CO. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,656.

1. MASTER AND SERVANT (§ 129*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY.

Plaintiff, a miner employed by defendant, was coming out of the mine, riding on the front bumpers of a cable car being drawn up a slope, with his arm resting on the top edge of the car, when he was struck by a stream or sheet of water escaping from a defective joint in a pipe used for pumping water from the mine, which was supported along the roof of the tunnel, was thrown around to one side, and his arm was crushed against the roof timbers, which were some six inches above the top of the car. *Held* that, to render defendant liable for the injury, it was not necessary to show that the force of the water was such as to physically throw plaintiff around and bring his arm in contact with the timbers, but that it was sufficient if it caused him to instinctively throw up his arm.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

2. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMED RISK.

The fact that there had been a small leak in the pipe at the same place for some time was not sufficient to charge plaintiff as matter of law with assumption of the risk, where it had not before been such as to cause any reasonable apprehension of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 129*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY.

In such case the primary act of negligence was that of defendant in maintaining the pipe in its defective condition, which was a breach of its legal duty to furnish plaintiff with a reasonably safe passageway to and from his work, and was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

This is an action at law, brought by the plaintiff, Charles G. Johnson (defendant in error here) against the Tremont Coal & Coke Company, defendant (plaintiff in error here), for injuries received while employed in defendant's coal mine as a rock miner. The suit was originally commenced in the superior court for King county, Wash., and was transferred later to the Circuit Court of the United States for the Western District of Washington because of diversity of citizenship.

It appears from the evidence that plaintiff was employed by defendant in its coal mine as a rock miner; that he was a miner of about 17 or 18 years' experience, and had been working in the mine about a month before the accident happened; that the only means of ingress and egress to the work in the mine was the cable railway cars operated by defendant upon a track constructed down the slope running into the mine at an angle of about 45 degrees; that defendant maintained, in connection with its equipment for working the mine, an engine and pipe line for the purpose of pumping water from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
172 F.—50

the mine as it accumulated at the bottom. This engine was situated at the surface of the mine, and the pipe line ran down the slope or drift to the bottom of the mine. It was a cast-iron pipe, flanged, and about eight inches in diameter, made up of a number of lengths of pipe. At the end of each length was a collar or flange, and these were fastened together with from six to eight bolts.

The testimony on the part of the plaintiff tended to show that the pipe line was not properly installed; that it was insecurely fastened, so that under the pulsation and throbbing of the pump it vibrated to a considerable extent—this constant vibration, together with the loosened joint, being the supposed cause of the break or leak. The leak was at a flange joint in the pipe, and from the constant jarring of the pipe one of the bolts holding the flange became loosened, which permitted the water to flow out in a thin sheet through the crevice between the two flanges. The evidence tended to show, further, that on the morning of July 18, 1906, plaintiff was returning to the surface after finishing his work on the night shift. He took a place upon one of the front bumpers of the car in going out of the mine. He was sitting on the front bumpers, with his back braced against the front end of the car; his right arm resting on the top edge of the car. When the car ascending the slope had reached a point about 250 feet from the surface, it encountered the water falling from the leak in the pipe, which struck plaintiff on the left side and twisted him around, so that his arm caught between the car and the beam. The stream had sufficient force to knock a person against the car. It put out the lights carried by those on the car. Plaintiff's arm was caught between the car and the timbering of the slope, and was broken at the wrist and permanently injured. The cross-beam where he was injured was about 6 inches above the top of the car. Plaintiff and other miners, on their way down to work on the night shift the evening before, noticed a leak at the point where the accident afterwards occurred; but it was not such a leak as they met on the trip up in the morning. It was customary for the miners to ride upon the front end or bumpers of the cars in going into and coming out of the mine. Instructions were given by the mine authorities that two men should ride on the front end of the front car coming out of the mine, because the front trucks were apt to leave the tracks and this tended to prevent it.

The evidence on the part of the defendant tended to show that this pipe line ran down some distance before it took an elbow; that a break or leak in the pipe occurred about three lengths above this elbow; that the water ran down the pipe and off the end of the elbow, making it appear as though the break was at the elbow; that the mine was known as a wet mine, and it was necessary to operate the pump continuously to keep the water down; that, although this leak was known to the mine authorities, it was not thought of sufficient importance to necessitate shutting down the pumping plant in order to repair it at that time.

The case was tried before a court and jury, and a verdict rendered against the defendant for the sum of \$1,500. To this judgment the plaintiff in error prosecutes this writ of error.

Blattner & Chester, Shepard & Flett, and L. B. Da Ponte, for plaintiff in error.

Frank A. Steele and Harrison Bostwick, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges

MORROW, Circuit Judge (after stating the facts as above). The defendant contends that the evidence did not show that plaintiff was injured, substantially as alleged in his complaint, by having been knocked over by the force of a stream of water issuing from a vent in the pipe, but does show that the injury was due to the carelessness of plaintiff in permitting his arm to come in contact with the walls of the drift. The complaint alleged that:

"Said pipe, by reason of its faulty and insufficient construction, was broken at one of the joints thereof, and water flowing therefrom, by reason of the great pressure as a result of the pumping of water through it, struck the plaintiff with great force on the head and face, and he was thrown against the side of the car, where his right arm was caught between the car and the timbers of said slope and was broken at the wrist and permanently injured."

The complaint further charged the defendant with negligence in permitting the pipe to become unsafe and out of repair. The plaintiff testified:

"That the stream of water struck him with force enough to throw him around on the car and put out all the lights. His arm came between the timber and the car and was broken."

On cross-examination he testified:

"That he was sitting on the front bumpers, with his back braced against the front end of the car; his right arm resting on the top edge of the car. The water, striking him on the left side, twisted him around, so that his arm was caught between the car and the beam."

John Gillis testified:

"That he was on the car with plaintiff at the time plaintiff was injured—about 7 o'clock in the morning of July 18, 1906. That the car was coming up out of the slope. Plaintiff and Johnnie Pete, the pump boy, were riding on the front bumpers of the car, while he (witness) rode inside the car. That when they reached within 200 or 300 feet of the top of the drift there was a stream of water or something put out the front lights, and before he realized what had happened the water struck him in the face, and knocked his cap and light off his head, and turned his head over against the car, and left them in total darkness until they got to the top of the slope. After getting up out of the slope, and out of the car, the pump boy told him that plaintiff had hurt his arm; and witness looked at his arm, and plaintiff said that it happened as the lights went out."

This testimony describes the accident substantially as alleged in the complaint. It is true there is testimony on the part of the defendant describing the accident in different terms. John Pete was called as a witness on the part of the defendant. He testified:

"That he rode on the front bumper in question with the plaintiff at the time he was injured. Gillis was in the car. Plaintiff was sitting at witness' left. At the point where the old slope goes up, the water came down and put out their lights. When the water struck Johnson, it did not throw him around or change his position. He had his arm on the edge of the car before the water hit him. The water did not come in a violent stream, but in the form of a shower. At first, when he saw it, it seemed to be coming out of the joint above the beam; but he soon discovered that it was not, but out of the joint farther up the old slope."

The objections to the allegations of plaintiff's complaint and the evidence introduced in support thereof is the fact that the evidence introduced on the part of the defendant tends to show that there was no leak in the pipe near the place of accident, and, therefore, no force of water coming from the pipe at that point; but the leak or break was some 50 feet further up the pipe, from which point the water flowed along the pipe to an elbow opposite the place of accident, where the water fell in a shower, giving the appearance of a leak or break in the pipe at that point. Conceding that the testimony of the defendant does appear to establish this fact, we do not see how it is material here. The

plaintiff did not, in his complaint or in his testimony, attempt to locate the leak in the pipe. All he did was to locate the place where he was injured as the place where he was struck by the falling water. And conceding, further, that he may have overestimated the force of the water, under the impression that the leak in the pipe was at the place of the accident, we do not see how that fact, if it is a fact, presents a question for this court to determine.

The evidence tended to show that defendant was negligent in maintaining the pipe in a defective condition. The question, then, was whether there was a sufficient force of water coming down at the place of the injury to cause plaintiff to change his position, so that his arm was thrown out, and caught between the car and the beam, and broken; and that was a question of fact for the jury to determine. The fall of the water need not have been at the point of the leak or break in the pipe, and need not have been of sufficient power as to have physically forced the plaintiff around and to have thrown his arm up against the beam. It was sufficient if it caused the plaintiff to make an instinctive effort, reasonable under the circumstances, to avoid what he supposed was imminent danger; and this effort caused the plaintiff to throw his arm where it was injured.

The ultimate facts to be alleged and proven were the neglect of the defendant in maintaining the pipe in a defective condition, the resulting injury to the plaintiff, and his freedom from contributory negligence. A leading case on this subject is the English case of *Jones v. Boyce*, 1 Starkie, 493. The action was on the case against the defendant, a coach proprietor, for so negligently conducting the coach that the plaintiff, an outside passenger, was apparently placed in a perilous position, which caused him to leap from the coach to the ground, whereby his leg was broken. The coach was not overturned, and evidence was introduced on the part of the defendant tending to show that there was no necessity for the plaintiff to jump from the coach. Lord Ellenborough, in submitting the case to the jury, said:

"It is for your consideration whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent man would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

In *Coulter v. American Merchants' Express Co.*, 56 N. Y. 585, the complaint was that the plaintiff had received injuries caused by the negligence of defendant's servant. The plaintiff was walking on the sidewalk of a street in Syracuse, when an express wagon belonging to defendant was driven up rapidly upon the sidewalk behind her. She sprang sideways to escape the danger, and struck her head against the wall of a building, and was injured. The court said:

"The instinctive effort on the part of the plaintiff to avoid the danger did not relieve the defendant of responsibility."

In *Beven on Negligence in Law* (3d Ed.) vol. 1, p. 156, the author says:

"Persons who, in a sudden emergency, are distracted by terror, and thus, between two courses, choose the wrong one, are not disentitled to recover. This is plain; for the very state of incapacity to judge calmly, which induces

the improvident act, is produced by the negligent act of the defendant. To hold that a plaintiff is disentitled to recover in such a case would be to hold that the defendant can set up the state of terror produced by the wrongful act as a protection against the consequences."

The uncontradicted evidence is that the force of the water was sufficient to put out the lights carried by those on the car, leaving them in total darkness, except for an electric light about 100 feet up the slope. The plaintiff testified that the water struck him with such force as to throw him around on the car and put out all the lights. John Gillis testified that the water put out the lights before he realized what had happened. The water struck him in the face, and knocked his cap and light off his head, and threw his head over against the car, and left him in total darkness until it got to the top of the slope. John Pete, a witness for the defendant, testified that the water put out the lights; there was an electric light about 100 feet up the slope; when the water struck him, he put his head down, but the plaintiff did not. This evidence was sufficient to support the allegations of the complaint; and whether, under such circumstances, the defendant was negligent in maintaining the pipe in its defective condition, and the plaintiff free from contributory negligence, were clearly questions of fact for the jury.

The contention that plaintiff assumed the risk, because there had been a shower of water at the point of the accident for several days prior to the injury, is answered by the testimony of the plaintiff and others that the volume of water was not so great when they passed this point before. The plaintiff testified that there never was any danger there from water before; that there never was any leak there before of that amount; that he had no reason or occasion to fear the water when he went up the gangway or slope. If the jury believed this testimony, it was sufficient to warrant it in finding that the plaintiff did not assume the risk incident to the position in which he was placed by reason of the falling water.

It is assigned as error that the court refused to give the jury certain instructions requested by the defendant defining proximate cause. These instructions defined proximate cause as meaning substantially such a cause as might have been foreseen or reasonably expected to result in the injury sustained by the plaintiff. One of these instructions was as follows:

"You are instructed that the water escaping from the joint is not to be deemed the proximate cause of the injury, unless the injury was such a consequence under all the surrounding circumstances of the case as might or ought to have been foreseen or anticipated by the defendant, in the exercise of ordinary care, as a natural result of such defect."

A clear and comprehensive definition of the term "proximate cause" is undoubtedly required in an instruction to a jury in a case where there is a succession of causes, and the question is whether there is a new and independent cause intervening between the primary cause and the injury to the plaintiff. As stated by Mr. Justice Cooley in his work on Torts (3d Ed., p. 99):

"It is not only requisite that damage, actual or inferential, should be suffered; but this damage must be the legitimate sequence of the thing amiss."

In discussing this subject the author lays down the following propositions:

"(1) The one, already more than once mentioned, that in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

"(2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.

"(3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote."

The author refers to cases illustrating these propositions, among others, the celebrated case of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892. In that case defendant threw a lighted squib made of gunpowder from the street into a market house where a large concourse of people were assembled. The squib was thrown from one market stand to another by the keepers of the stands, in self-protection, until it struck the plaintiff in the face, and, exploding, put out one of his eyes. Judge Cooley says of this case:

"Here was but a single wrong, the original act of throwing the dangerous missile; and though the plaintiff would not have been harmed by it, but for the subsequent acts of others throwing it in his direction, yet as these were instinctive and innocent, 'it is the same as if a cracker had been flung, which had bounded and rebounded, again and again, before it had struck out the plaintiff's eye,' and the injury is therefore a natural and proximate result of the original act. It is an injury that should have been foreseen by ordinary forecast; and, the circumstances conjoined with it to produce the injury being perfectly natural, these circumstances should have been anticipated."

The evidence in the present case tends to show that there was negligence on the part of the defendant in maintaining a defective water pipe, and that there was a natural and continuing sequence uninterruptedly connecting this breach of duty with the injury to the plaintiff. There was but a single wrong, and this wrong constituted an invasion of plaintiff's right to a reasonably safe place in which to work. There was evidence that the injury to plaintiff was a natural one under the circumstances, and should have been anticipated by a reasonably careful and prudent employer. The case comes, therefore, under Judge Cooley's first proposition.

Upon the evidence the court gave the following instructions:

"Your object all the time will be to determine whether there was that degree of negligence which amounted to a breach of duty which an employer owes to the employes. The employer is not legally obligated to insure absolute safety to employes. The obligation of the employer is to exercise the same degree of care for the safety of employes that men of ordinary sense and prudence habitually exercise for their own safety, so as not to expose

employés to dangers and hazards which prudent men do not voluntarily and ordinarily expose themselves to. It is the duty of the employers of labor, who are operating machines or dangerous machinery, to constantly inspect and see that the machinery and appliances in places where men are employed shall be kept in a state of repair, so as to be reasonably safe and to avoid the unnecessary dangers.

"If, after having weighed the evidence and reached a conclusion in your own mind as to what the facts are, you come to the conclusion that there was not that degree of negligence, or if you are unable to find that there is a preponderance of the evidence proving that there was that degree of negligence, which amounted to a breach of duty, your verdict will be for the defendant, without investigating the case any further. If, on the other hand, it appears to you to be proved by a fair preponderance of the evidence that the defendant was negligent as charged in the complaint, then you will come to the second inquiry in the case; and that is whether or not that negligence was the direct or the proximate cause of the injury which the plaintiff suffered. If not, even though the defendant was negligent, if that negligence failed to produce the injury, your verdict should be for the defendant. If those two facts concur—that is, if it is proved by a fair preponderance of the evidence that the defendant was negligent as charged in the complaint and that the plaintiff's injury was a consequence of that negligence—then you will have to inquire, further, whether the plaintiff himself brought the injury upon himself by his own contributory negligence. Here the burden of proof is on the other side. You have no right to find the plaintiff guilty of negligence, unless it is proved by a fair preponderance of the evidence that he was negligent; and his negligence is not an element in the case, unless it is so connected by the testimony that you can find that he was negligent and that his negligence was a contributory cause of the injury."

To these instructions no exception was taken by the defendant. We think, upon the evidence before the court, they were correct and sufficiently explicit; and those requested by the defendant erroneous for the reason that they defined proximate cause in such terms as to take from the jury the question whether there was such a degree of negligence on the part of the defendant as amounted to a breach of duty to the plaintiff to furnish him with a reasonably safe passageway through the shaft in going to and from his work to the mine.

The objection to the instructions of the court appears to be that the court did not define proximate cause as a cause from which the specific injury to the plaintiff was the natural and probable consequence, which should have been foreseen and guarded against by an ordinarily careful and prudent person. In other words, the defendant, to be liable for his negligence, must, under the requested instructions, have foreseen that the water escaping from the defective water pipe would have for its natural and probable consequence the particular injury received by the plaintiff. We do not understand this to be the law in a case involving the question whether there was a primary act of negligence on the part of the employer amounting to a breach of duty to the employé, and a natural and continuous sequence connecting this breach of duty with the injury to the employé. If the jury determine this question of primary negligence adversely to the employer, then he is liable for the consequence of his negligent act, and it need not appear that he anticipated or had reason to anticipate an injury to the particular person who was in fact injured, or the particular kind of injury produced.

It is assigned as error that the court refused to instruct the jury that the plaintiff had testified that he knew the pipe was defective and im-

properly installed, and, therefore, likely to leak; that he knew that it did leak; that he had no right to assume that the leak would be repaired; that he was therefore charged with the assumption of all risks and dangers incident to a sudden increase in the amount of water and its force flowing from the leak; and that if he did not properly protect himself, either by assuming a safe place upon the bumpers or by riding inside the car, his own negligence in failing to do so contributed to the injury and was the proximate cause thereof, and the verdict should be for the defendant if they so found. The instruction was properly refused. The knowledge of the plaintiff that the pipe was defective and leaked did not, as a matter of law, deprive him of the right to assume that the pipe would be repaired. Whether the leak from the pipe might suddenly and unexpectedly increase, as the evidence tended to show that it did, was a question of fact for the jury; and whether, under all the circumstances, the plaintiff assumed the risk of the employment, was a question of fact for the jury, to be determined under proper instructions. Such instructions were given by the court, and no exception taken.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

THE SALTON SEA CASES.

CALIFORNIA DEVELOPMENT CO. v. NEW LIVERPOOL SALT CO.†

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

No. 1,584.

1. WATERS AND WATER COURSES (§ 177*)—FLOWAGE—INJUNCTION.

A court of equity has jurisdiction to enjoin the diversion of water from a stream by means of canals, whereby the property of complainant is flooded and threatened with irreparable injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 260, 264; Dec. Dig. § 177.*]

2. INJUNCTION (§ 197*)—CONTINUING TRESPASS—DAMAGES IN ADDITION TO INJUNCTION.

Where a court of equity has acquired jurisdiction of a suit to enjoin a continuing trespass upon land, it may also, to prevent a multiplicity of suits, award damages for the injury already done, although the same would also be recoverable by an action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 417; Dec. Dig. § 197.*]

3. COURTS (§ 262*)—JURISDICTION—ADEQUATE REMEDY AT LAW—FEDERAL STATUTE.

Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), providing that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, is merely declaratory, and does not narrow the jurisdiction of courts of equity, nor prevent the granting of legal relief therein where jurisdiction has been acquired to grant equitable relief, and the legal remedy is not as practical and efficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 798; Dec. Dig. § 262.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 4, 1909.

4. WATERS AND WATER COURSES (§ 263*)—SUIT TO ENJOIN INJURY BY FLOODING—PARTIES.

Defendant corporation undertook to divert water from the Colorado river near the boundary line between California and Mexico through canals for irrigation purposes. It contracted with a Mexican company, which it owned, and with other local irrigation companies which it organized in California, to deliver water to their canals and ditches. It constructed three intakes from the river, two of which were on Mexican territory on land of the Mexican company and nominally under its control, but which were, in fact, constructed and controlled by defendant. These intakes were so constructed without controlling gates that in a time of flood one of those in Mexico was so enlarged by washing that a large part of the water of the river poured through and passing through canals of the other companies overflowed and damaged, and finally destroyed the property of complainant situated in the Salton Basin below the level of the river. *Held*, that having sole control of the intakes, from the improper construction of which the damage resulted, defendant was responsible therefor, and that to a suit to enjoin further flooding and to recover for the damage done the other corporations were not necessary parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

5. EQUITY (§ 36*)—PREVENTING INJURY TO REAL PROPERTY—JURISDICTION OF COURT.

A court of equity having jurisdiction of the parties may enjoin a continuing injury to real property within its jurisdiction by flooding caused by the improper construction of works maintained by defendant for diverting the water of a river into a canal, although such works are across the boundary within the republic of Mexico.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 94, 96; Dec. Dig. § 36.*]

6. WATERS AND WATER COURSES (§ 177*)—INJURY TO REAL ESTATE—INJUNCTION.

A court of equity has jurisdiction to enjoin the maintenance of works which caused the flooding and injury of lands owned by complainant, notwithstanding the fact that pending the suit the flooding continued and entirely destroyed the present value of the property for which damages were awarded; the title to the land still remaining in complainant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 260-264; Dec. Dig. § 177.*]

7. WATERS AND WATER COURSES (§ 262*)—IRRIGATION COMPANIES—LIABILITY FOR FLOODING OF LANDS—CONCURRING NATURAL CAUSES.

An irrigation company which negligently constructed the intakes from the Colorado river into its canal without headgates or other means of controlling the flow, by reason of which in a time of flood the water flowed through in such volume as to wash away the river bank and overflow the lands of others, is not relieved from liability therefor by the fact that the flood was extraordinary.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 262.*]

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of California.

See, also 172 Fed. 820.

John S. Chapman and E. A. Meserve (Eugene S. Ives, of counsel), for appellant.

Edward J. McCutchen and Purcell Rowe (Page, McCutchen & Knight, of counsel), for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORROW, Circuit Judge. The Colorado river is formed in the southwestern part of Utah by the junction of the Green river from the north and the Grande river from the northeast; the former rising in the Wind River Mountains of Wyoming, and the latter in the Rocky Mountains of Colorado. The waters of the Colorado river carrying its wash of silt, sand, and earth, and, flowing south and west, empties into the Gulf of California about 75 miles below the international boundary line between the United States and Mexico. It is probable that many centuries ago the Gulf of California extended in a northwesterly direction into what is now known as the Salton Basin in California, but, by reason of the discharge of silt, sand, and earth by the Colorado river into the Gulf of California near Yuma, the present delta has been gradually formed, pushing the waters of the gulf further and further south, and extending the barrier of the delta across the northwest arm of the gulf to the foothills on the southwest, thus separating the Salton Basin from the waters of the gulf. The lowest part of Salton Basin is 287 feet below the level of the sea, and is called the "Salton Sink." There is geological evidence that the Salton Basin was once filled with the salt waters of the gulf, which have since evaporated, leaving the basin practically dry, except when the Colorado river during high water has overflowed its banks and poured into the basin. The river in a normal condition has, however, followed its shifting channel down the delta into the Gulf of California, spreading its deposit of sediment over a constantly enlarging area. The region is arid, but with the aid of irrigation the soil becomes enormously productive. The international boundary line between the United States and Mexico crosses this basin north and west of the Colorado river and its delta. There is a large area of land north and west of the river, both above and below the boundary line, capable of being brought under cultivation by the use of water diverted from the Colorado river.

The present action arises out of such a diversion through intakes for which no provision had been made for the regulation and control of the water drawn from the river into irrigation canals, and as a result the diversion grew to such proportions as to turn nearly the entire Colorado river into the irrigation canals, and through them into the Salton Sink, overflowing the land and destroying much property in that section. This suit was originally commenced by the appellee on March 8, 1905, in the superior court of the state of California in and for the county of Riverside, and later was moved, upon the petition of the appellant, to the United States Circuit Court for the Southern District of California, Southern Division. The appellant is a corporation organized under the laws of the state of New Jersey. The appellee is a corporation organized under the laws of the state of California. The action was brought to recover the damage resulting from the flooding and overflowing of complainant's lands by the defendant's diversion of water from the Colorado river and for an injunction restraining the continuance of such diversion. After the case had been removed to the United States Circuit Court, the complaint was framed as a bill in equity in accordance with the practice of federal courts. The bill of

complaint alleged that complainant, the New Liverpool Salt Company, was a corporation duly organized and existing under the laws of the state of California, with its principal place of business at Los Angeles, Cal.; that it was the owner of certain tracts of land situated in township 8 south, range 10 east, San Bernardino meridian, and was engaged in the business of mining, gathering, and refining salt, owning and operating a plant for the manufacture of salt, consisting of a mill, drying sheds, and warehouses, equipped with the necessary machinery for reducing and refining salt; that this plant was situated upon the northeast quarter of section 14 in said township; that the buildings and equipment were valued at more than \$50,000; that it carried on an extensive business, selling many thousands of tons of salt yearly; and that sections 15 and 23 of the lands in said township and owned by complainant were of great value because of their salt deposits; that the Colorado river is a large and navigable stream of water, carrying many thousand second feet of water, and flowing naturally from its sources in Colorado, Nevada, and Utah, to the Gulf of California, and that no part of the waters of said river flow naturally upon or near the lands of complainant above described. It is alleged that defendant had carried on the business of diverting the waters of the Colorado river by means of three intakes constructed for that purpose, carrying the water of the river to Calexico, Cal., distributing it for irrigation purposes by means of various canals; that defendant by means of said intakes and canal had been for many months, and then was, diverting from the Colorado river a stream of water varying in amount of flow from 800 to 3,000 cubic feet per second, which flow of water, after entering said canal, was carried therein and thereby to various points, passing into the New river, the Alamo river, and various waste and distributing canals. It is alleged that the lands of the complainant were about 280 feet below sea level; that, by reason of the contour and slope of the land from the points to which the water is carried by the defendant, the water except such as was absorbed and evaporated found its way through the various waste and distributing canals and water courses to the Salton Sink and to the lands of the complainant; that, for a period of more than six months, defendant had been diverting a large amount of water, and that a flow of between 300 and 500 cubic feet per second passed through this canal in excess of the amount absorbed, evaporated, or used for irrigation purposes; that such an amount of water had been for three months continually wasting from the canal system of defendant and pouring into Salton Sink, making a lake over 20 miles in length and several miles in width, overflowing and covering completely certain sections of complainant's lands, and had reached within 200 feet of its mill, compelling complainant to erect and maintain dykes; that the water was continuing to increase, and, if not checked, would overflow the dykes and flood the ground about the buildings, and destroy many thousand tons of salt which belonged to complainant and was piled upon the ground; that this water carried large quantities of sand and silt which was being deposited upon the lands covered by the salt, thereby covering up the salt deposits, and making it impure and more diffi-

cult to mine; that the railroad which complainant owned and operated had been entirely covered by the overflow of waste water and the sand and silt deposits; that this waste water was still running into the lake in large quantities, increasing its size because no provision had been made by defendant at its intakes for the regulation and control of the waters; and, that if this flow was not stopped, complainant would suffer irreparable loss, and eventually its property and business would be destroyed, to its damage in a sum exceeding \$200,000. It was alleged that the complainant had no speedy or adequate remedy at law. The principal facts stated in the bill are supported by affidavits attached to the original complaint. A temporary injunction was issued as prayed for in the complaint.

As the waters increased and the damage became greater, complainant on January 29, 1906, filed a supplemental bill containing the same allegations, and alleging that, by the continuance and increase in the amount of the flood, additional damage had been done its lands and salt deposits in the sum of \$180,000, and that its plant had been utterly destroyed, whereby complainant had sustained a further loss of \$30,000. On December 19, 1907, complainant filed an amendment to this supplemental bill, substituting \$325,000 for \$180,000 as additional damage to its lands and salt deposits, and substituting \$75,000 in place of \$30,000 as the damage to its sheds, mill, and machinery. This amended and supplemental bill was filed after the complete destruction of complainant's plant, when damage was asked for in the above amounts, and a writ of injunction prayed for enjoining defendant from diverting said waters unless suitable headgates were provided to control the water, so that the flow would not be in excess of the amount used for irrigation purposes. To the bill the defendant demurred upon the ground that it appeared upon the face of the bill that complainant was not entitled to the relief prayed for; that the bill was multifarious because it united two different suits, one for legal, and the other for equitable, relief, and that the same could not be united; that the causes set forth in the bill were not within the jurisdiction of the court sitting as a court of equity. The demurrer was overruled, and thereupon the defendant answered the bill, and subsequently filed an amended answer to the bill and supplemental bill. The defendant in its answer denied generally the allegations of the complaint; admitted that complainant's land was below the level of the sea, and in what was known as Salton Sink, and that water flowing into the New river or Alamo river naturally found its way to the Salton Sink unless diverted from said rivers; admitted that waste water at the time of the filing of the bill was still running into the lake and increasing its size, but alleged that the waters referred to were diverted from the Colorado river in Mexico by a corporation organized under the laws of the republic of Mexico, known as La Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), which corporation owned all canals leading from the Colorado river in Mexico to the town of Calexico, Cal.; and denied that it diverted any water from the Colorado river which flowed into either the Alamo or New river or upon any of complainant's land; denied, further, that there were no streams of water which naturally run upon

complainant's lands, and alleged that flood water coming down from Alamo and New rivers, in flood times, such as existed during the years 1904-05, and particularly during the winter season of 1905, and waters flowing from the natural drainage from the mountains and surrounding locality of Salton Sink, would flow upon complainant's lands; alleged that the natural flow of these waters would be to the lands of complainant, and that Salton Sink without any water being carried there by canals in 1905 would have become a lake and overflowed complainant's lands; alleged that, if the canals had not been constructed and the waters coming down Colorado river had been allowed to take their natural course, they would have overflowed the banks of the Colorado river, flowed into the channels therefrom, and found their way over the surrounding country through the sloughs and bayous into Salton and Alamo rivers, then to Salton Sink, and to and upon the lands of complainant, and that, if these canals had not been constructed, all of complainant's lands would have been overflowed by these waters; further alleged that, if the flow of waste waters were stopped and defendant not permitted to divert the waters of the Colorado river into the lake, the same would evaporate and disappear, and that it was not diverting any of the waters of the Colorado river into this lake, and denied that complainant had suffered the damage alleged, or any damage at all. In an amended answer it further denied that complainant had since the commencement of the action or by reason of any acts of defendant been damaged in any sum whatsoever.

Defendant set up in its answer: That certain public land of the United States in San Diego county, Cal., known as Imperial Valley, was practically desert land, being of a dry and sandy character, but with proper irrigation could be made fertile and valuable. That in 1896 the defendant California Development Company was organized under the laws of the state of New Jersey for the purpose of obtaining water from the Colorado river to supply said Imperial Valley, together with a large tract of land in the republic of Mexico. That defendant, through an arrangement with a Mexican corporation, undertook to divert the waters of the Colorado river at a point a short distance above the boundary between the United States and Mexico, and by means of a canal to conduct this water through the Mexican tract and to the boundary line between the United States and Mexico for irrigation purposes in both republics. That defendant in 1900 began the construction of a canal which when completed ran through, down to, and across the lands in Mexico and to the boundary westerly from the Colorado river. That divers water companies were organized under the laws of the state of California, and known, respectively, as Imperial Water Companies Nos. 1 to 8, inclusive, which were organized for the purpose of taking the waters from the said canals and furnishing it to settlers upon the lands situated in San Diego county, Cal., for irrigation and domestic purposes, and contracts were entered into between the defendant and the several Imperial Water Companies for furnishing this water. That in pursuance of these contracts divers lateral canals were constructed by them, through which the waters so diverted by the said canals were to be delivered and distributed to the settlers

upon the said tracts. That these several lateral canals were completed, and a large amount of the lands in Imperial Valley had been settled upon by persons who became purchasers of stock in said several water companies. That, prior to the commencement of this suit, over 100,000 acres of land in Imperial Valley had been brought under cultivation, and water had been furnished to the owners of this land and settlers thereon for irrigation and domestic uses, and that the lands had proven to be of great agricultural value. That for more than two years defendant had furnished the several Imperial Water Companies from the main canal connecting with the Colorado river. That this canal at its head had become filled up with silt, so that it was incapable of carrying water sufficient to furnish the owners and settlers of the valley with water in quantities sufficient to insure the successful cultivation of their lands, and for that reason a second canal was constructed a few miles south of the first intake, which also became silted, and in the course of time a third intake was made because of the prospective demand for water during the season of 1904. Meantime towns had sprung up in the valley which were to be supplied with water, and there were more than 10,000 people who were dependent upon this water for irrigation and domestic usages. That in the construction of these canals—both the main canal, intakes, and laterals—defendant had provided for the use of water diverted thereby, and for taking care of the same by wasting upon a broad expanse of territory more than 25 miles south of Salton Sink in such a way that under ordinary conditions, and conditions which from the past conditions could be foreseen, the waters could have been handled and distributed so that no injury would have occurred to the property of complainant. But in 1904 and 1905 the rains falling in that locality and in the surrounding mountains were greatly in excess of anything that had occurred previously which made the demand for water less than it otherwise would have been; also later in 1904 and 1905, and particularly in the summer of 1905, enormous floods occurred in the Colorado river with greater frequency and longer duration than had ever been known to occur before, and because of these and the overflow of the Colorado river the main canal became washed out and vast amounts of water from the Colorado river continued to flow through it until practically all the waters of the Colorado river were flowing through this canal, and defendant alleged that but for this canal Salton Sink would have been filled to an extent probably greater than was actually experienced. That these canals by embankments thrown up in their construction prevented a large amount of water flowing from the Colorado river into Salton Sink by diverting it into other directions. It alleged that more than \$250,000 had been spent for the construction of its irrigation system, and that not less than \$5,000,000 had been spent in the settlement and improvement of Imperial Valley, and that the value of this property dependent upon the waters from said water system for irrigation and domestic purposes exceeded \$10,000,000, and that this property would be rendered worthless without the use of these waters, and alleged that there was no other source from which the people can be supplied with water. It further alleged that since the floods began it had spent large sums of money to prevent these overflows, exclude the

flood waters, and confine the river to its natural channel, and alleged that it had not been by any act or negligence on its part that the floods have filled Salton Sink, but that the lake was caused by the enormous, frequent, and long-continued floods of the Colorado river.

The complainant filed its replication and upon the issues thus presented testimony was taken, and thereafter a decree was entered by the court in favor of the complainant perpetually restraining and enjoining the defendant from diverting from the Colorado river any of the waters thereof in excess of the substantial needs of the people dependent upon the canal described in complainant's bill of complaint for water supply for domestic and irrigation uses and purposes, and such other lawful purposes as the same might be applied to; that the water so diverted, whatever might be the amount, should be so controlled and used that the same should not flow upon the lands of the complainant described in the bill of complaint; that the defendant regulate the flow of any water that might be diverted by it so that there should be no waste water flowing therefrom as the result of such diversion upon or over the lands of complainant; that defendant should be restrained from turning out of its canals any waste water at any point whence the same would naturally flow upon or over the lands of complainant or into the lake covering the Salton Sink, and thereby substantially increase the amount of water therein, or prevent the decrease thereof by any causes. It was further adjudged that the complainant had been damaged in the sum of \$456,746.23 by reason of the commission of the acts mentioned in the bill of complaint by defendant, that complainant was entitled to recover compensation therefor; and it was ordered, adjudged, and decreed that complainant should have and recover from the defendant the said sum of \$456,746.23, together with costs and disbursements. The defendant has brought the case here on appeal.

It is assigned as error that the court sustained the jurisdiction of the Circuit Court as a court of equity to restrain the wrongful diversion of the water of the Colorado river and awarded damages resulting from such diversion. The original bill of complaint invoked the equity jurisdiction of the Circuit Court on the ground that the complainant had no speedy or adequate remedy at law, in that an irreparable injury was then threatened and being done by the continuing act of the defendant in diverting the waters of the Colorado river to such an extent as to overflow complainant's lands and destroy its salt deposits, mill, drying sheds, warehouses, and other property used in reducing and refining salt. In 2 Daniell's Chancery Pleading & Practice (6th Ed.) p. 1631, the rule is stated as follows:

"An injunction will also be granted in some cases where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more complete relief than that which they would obtain at law. It has accordingly been granted where the injunction amounted in fact to an injunction to stop a trespass; for, if the court would not interfere against a trespasser, he might go on by repeated acts of damage, which would be absolutely irremediable."

In *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 560, 28 L. Ed. 1113, the Supreme Court of the United States held that:

"It is now a common practice where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title of the premises be in litigation."

To the same effect is *Northern Pac. R. Co. v. Hussey*, 61 Fed. 231, 9 C. C. A. 463; *Oolagah Coal Co. v. McCaleb*, 68 Fed. 86, 15 C. C. A. 270; *Dimick v. Shaw*, 94 Fed. 266, 36 C. C. A. 347. In *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470, the bill of complaint was filed to restrain the defendants from diverting the waters of the Culebra river in Colorado from the natural channel in excess of the amount that they might show themselves lawfully entitled to for irrigation and domestic purposes, such diversion being to the damage of complainant's land. The Circuit Court of Appeals for the Eighth Circuit held that:

"A continuing trespass upon real estate or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly reoccurring actions for damages would be more vexatious and expensive than effective"—citing cases.

In *Dimick v. Shaw*, 94 Fed. 266, 36 C. C. A. 347, the appeal was from an interlocutory order granting a temporary injunction restraining the appellants from working a mine, and from extracting or removing ores therefrom. The title to the mine had been in litigation between the parties, but had been finally determined in favor of the appellee. While the litigation was pending the appellants went into possession of the land in controversy under the verbal permission of the appellee's manager for the purpose of prospecting, only until the final determination of the case. After the case had been determined, the appellants had been notified to quit the premises, but refused, and had commenced mining operations on a larger scale, and continued their mining operations and trespasses. In the Circuit Court of Appeals it was contended that appellee had a complete and adequate remedy at law, and that the suit in equity deprived the appellants of their constitutional right of a trial by jury. The Circuit Court of Appeals held that the Circuit Court as a court of equity had jurisdiction of the case, referring to authorities, among others, to the case of *Oolagah Coal Co. v. McCaleb*, 68 Fed. 86, 15 C. C. A. 270, where it had been said:

"It is now well settled by many adjudications, beginning with the case of *Mitchell v. Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character standing upon lands, are readily enjoined, because, as has sometimes been said, such acts tend to destroy the estate, and to occasion irreparable loss and damage."

In *Story's Equity Jurisprudence*, § 927, it is said:

"Cases of a nature calling for the like remedial interposition of courts of equity are the obstruction of water courses, the diversion of streams from mills, the back flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction."

In *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, the Supreme Court of California held that the diversion of waters by a canal whereby the land of another is flooded by water that would not flow there naturally is to create a nuisance per se, for which a court of equity will grant relief by its writ of injunction.

In the present case the title to the land is not in litigation. The right of the complainant to the land claimed by it and to dig and remove the salt therefrom is not in controversy. The question is the right of the complainant to have the aid of a court of equity to protect its estate from destruction. This is clearly a subject of equitable jurisdiction under all the authorities, and, as we understand, it is not controverted; but the question is whether the Circuit Court, having acquired equity jurisdiction of the controversy for the purpose of administering relief by way of injunction, may proceed and award damages for the injuries sustained by the complainant by reason of defendant's diversion of the waters of the Colorado river and the flooding of complainant's land which it was the purpose of the action to enjoin.

It is contended on behalf of the appellant that, as the Constitution of the United States (article 7, § 1) secures the right of trial by jury in all actions at law where the amount in controversy exceeds twenty dollars, the right to such a trial in a federal court cannot be defeated by blending legal and equitable causes of action. But it has been held that this provision correctly interpreted cannot be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law. *Shields v. Thomas*, 59 U. S. 253, 262, 15 L. Ed. 368.

In *High on Injunctions* (4th Ed.) § 669, the rule is stated as follows:

"Where, therefore, a proper case is presented for an injunction, an account of the waste already committed and a decree for damages may be had in the injunction suit. Indeed, this would seem to be but the exercise of the ordinary prerogative of equity, that, when one resorts to a court of equity for one purpose, his case will be retained until the entire matter is disposed of upon the principle that the court having jurisdiction of the cause for one purpose will retain it to give general and complete relief, thereby preventing a multiplicity of suits."

The same general rule is stated by Pomeroy in section 231 of his work on *Equity Jurisprudence*, as follows:

"Where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will, in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law."

In section 237 of the same work it is said that:

"Equity therefore assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which, in many instances, is not complete, the court will retain the cause, and decree full and final relief, including damages, and, when necessary, an abatement of whatever creates the waste or causes the nuisance."

In 1 Beach, *Modern Equity Proceedings*, § 91, the author says:

"Upon a bill for an injunction to prevent a threatened trespass, the court may under a prayer for general relief, and, in order to avoid a multiplicity of suits, award damages for the injury done by such trespass before the injunction was issued."

In *Winslow v. Nayson*, 113 Mass. 411, 421, Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts (afterwards a Justice of the Supreme Court of the United States), said:

"And the court, having obtained jurisdiction in equity of the case for this purpose (to restrain trespass), may properly, in order to prevent multiplicity of suits, and to do complete justice between the parties under the prayer for general relief, also award damages for the injury already done by the defendants to the plaintiff's premises, instead of obliging them to bring a separate action at law therefor. *Jesus College v. Bloom*, 3 Atk. 262; *Cathcart v. Robinson*, 5 Pet. 263, 278, 8 L. Ed. 120; *Franklin v. Greene*, 2 Allen (Mass.) 519; *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Milkman v. Ordway*, 106 Mass. 232; *Brown v. Gardner*, Har. (Mich.) 291."

In *Omaha Horse Ry. Co. v. Cable Tramway Co.* (C. C.) 32 Fed. 727, 729, 730, in a suit for an injunction against the unlawful construction of a street railway, the defendant moved to dismiss the proceedings with reference to the assessment of damages on the ground that the court had no jurisdiction of such matter. The motion of the defendant was overruled. The court (Judge Brewer, now Mr. Justice Brewer of the Supreme Court) said that:

"Inasmuch as the prayer for relief contains also the general prayer for other and further relief, it is familiar law that the court may award such other relief as is justified by the facts stated in the bill, and may fairly have been considered within the contemplation of the parties in the litigation."

The decree ordered by the court awarded damages. In *Woodbury v. Marblehead Water Co.*, 145 Mass. 509, 15 N. E. 282, the action was to restrain a water company from maintaining its pipes on plaintiff's land. It appeared that the original description of the land taken was not sufficiently accurate for identification, but that, after the bill was filed, the company had made a new taking and filed a complete description of the land with the exception that the names of the owners were omitted. Mr. Justice Holmes (now Mr. Justice Holmes of the Supreme Court) held that the injunction could not be granted, but that the bill might be retained for the assessment of damages, if any, with reference to the injury before the lawful taking.

It is further contended that under the provisions of section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) the court had no jurisdiction to combine legal and equitable remedies and award relief by way of damages in an action for an injunction. Section 723, Rev. St., provides as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

It has been repeatedly decided that this provision is merely declaratory, making no alteration whatever in rules of equity on the subject of legal remedies, but only expressing the law which has governed proceedings in equity since their adoption in the courts of England.

In *Bean v. Smith*, 2 Mason, 252, 2 Fed. Cas. No. 1174, Mr. Justice Story said:

"I take this clause to be merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts."

In *Boyce v. Grundy*, 3 Pet. 210, 213, 7 L. Ed. 655, the Supreme Court said:

"This court has been often called upon to consider the sixteenth section of the judiciary act of 1789 (section 723, Revised Statutes), and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

In *Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533, the action was to restrain the defendant from flooding the lands of complainant by means of a culvert maintained by the defendant and for damages caused by the discharge of water upon complainant's premises. The court said:

"The defendant also claims that the orators have an adequate remedy at law, and therefore cannot resort to chancery. The case of *Field v. West Orange*, 36 N. J. Eq. 118; 37 N. J. Eq. 434, above referred to, which is very much like this case in its facts, is full authority for granting the injunction prayed for; and it is a familiar rule that, when a court of chancery has jurisdiction of a case for one purpose, it will retain it for all other purposes, and dispose of the whole matter. And this is a salutary rule, for it prevents litigation, and to that end is for the public good."

We do not find anything in the authorities cited by the appellant in conflict with the doctrine of these cases, and upon a careful examination of the facts of the present case we do not find that they have any proper application. We are clearly of the opinion that the remedy at law would not have been "as practical and efficient to the ends of justice and its prompt administration" as the remedy afforded by the proceedings in this case.

It is contended that the corporation organized under the laws of the republic of Mexico known as *La Sociedad de Yrrigacion y Terrenos de la Baja California* (*Sociedad Anonima*), referred to in the case as the "Mexican Company," and the several water companies, organized for the distribution of water, referred to as "Imperial Water Companies," and designated by number as No. 1, 2, 3, 4, 5, 6, 7, or 8, as the case might be, were all necessary parties. It appears from the testimony that the defendant, the California Development Company, was organized under the laws of the state of New Jersey on April 23, 1896, for the purpose of diverting water from the Colorado river to be supplied to a large tract of land susceptible of irrigation in San Diego county, Cal., and also to supply water to a large tract of land likewise susceptible of irrigation in the republic of Mexico, and lying immediately south of the boundary line between California and the republic of Mexico. The construction of a canal in accordance with the purpose of the defendant corporation originally contemplated a diversion of the water of the Colorado river at a point in California known as "Hanlon's Heading." This was a rocky point on the west

bank reaching down to the river where the diversion could be placed under control. The first actual work of diversion was commenced in October, 1900, by George Chaffey, an engineer, who entered into an agreement with the California Development Company, and who undertook to divert the water and construct the canals in accordance with the proposed system of that company. The point of diversion selected and adopted by Chaffey was a short distance above the international boundary line in California about a mile below the rocky point known as "Hanlon's Heading." The reason given for this selection and making the diversion at that point was the fact that:

"The water could be secured quicker at this point, and Mr. Chaffey thought that he could control it for a time, and could secure water for the settlement much quicker that way, and cheaper, and he made a cut into the river at that point for the purpose of serving the settlements as quickly as possible and as cheaply as possible."

It was not intended to be a permanent work, but "it was called a temporary heading." From this point of diversion by the line of the canal to the point where the canal crossed into Mexico the distance was about 1,600 feet. It was the purpose of the defendant corporation to purchase the lands in the republic of Mexico, but it was found that under the laws of that Republic American citizens could not buy land within a certain prohibited zone except by special permission of the president of the republic of Mexico. Accordingly there was organized the "Mexican Company" having a small capital stock. The title to the land in Mexico and the channel of the Alamo river were vested in this Mexican Company. All the stock of the company, with the knowledge of the authorities of Mexico, was owned by the California Development Company, and the directors of the Mexican Company being all American citizens, there being, however, a Mexican citizen, a resident of Los Angeles, retained by requirement as secretary, and on whom all papers were served by the Mexican government. The charter of the Mexican Company provided that the principal place of business and the place where the annual election was to be held was Mexicala, in Mexico, just across the boundary line from Calexico, in California.

There was introduced in evidence a message from the President of the United States addressed to the Senate and House of Representatives relative to the threatened destruction by the overflow of the Colorado river into the sink or depression known as the Imperial Valley or Salton Sink Region dated, January 12, 1907. Attached to the message are a number of papers, including a statement made by Edwin A. Meserve, attorney for the California Development Company, which contains the following:

"About this time, the California Development Company, in the name of the Mexican Company, was granted by the republic of Mexico a concession by which it was permitted to take 10,000 second-feet of water from the Colorado river, in Mexico, with the right to carry one-half of that water and such water as was delivered to it at the boundary line by the California Development Company, back into the United States; the other one-half of all such waters to be devoted primarily to the irrigation of lands in Lower California, with permission, however, to carry into California all of that one-half of the water which was not needed for use in Mexico. The California Development Company, by

acquiring the title to the lands at Hanlons, had acquired the only site for controlling headgates on the river below what is now known as the Laguna dam. The site also controls what might be called or termed the gateway for the carrying of waters into Mexico and through Mexico again into the United States. By the terms of the concession from the Mexican government to the Mexico Company it was provided that no intake connecting with the Colorado river should be constructed in Mexico until the plans for all proposed structures were first approved by the proper engineering authorities of Mexico."

The time referred to in this statement appears to be the year 1903, when a shortage of water occurred, and the California Development Company found itself obligated to furnish to the settlers of the valley more water than the canal heading would take in, and consequently a second intake from the river to the canal was cut in the spring of 1904, just below the boundary line in Mexico. C. R. Rockwood, an engineer, was a witness on behalf of the defendant upon the trial of the case. From his testimony and that of others it appeared that he was one of the parties who organized the California Development Company; that he discovered from preliminary investigations made in May, 1892, that there was a very large body of fertile land lying to the west and north of the Colorado river, the extent of which he afterwards determined to be in the neighborhood of half a million acres, situated in the state of California, and probably an equal acreage in Lower California, Mexico; that the entire body of land was of a very arid nature, but rich in its soil, and probably would be very productive under irrigation, and his survey showed that the waters of the Colorado river could be distributed upon the land. He estimated that of a total acreage of something over 2,000,000 under the line of gravity flow from the canal heading 50 per cent. of this land would probably be available for agriculture. In its climatic conditions the country was very hot in summer. The annual rainfall he discovered from an investigation of the records was very light. The amount of water required for irrigation would be a maximum. According to his estimate made at the time, he believed that a quantity of water equal to four acre feet per annum for the entire 1,000,000 acres, or 4,000,000 acre feet, would be required during the year for the irrigation of the tract in Imperial Valley. This valley is immediately north of the international boundary line, and forms part of the Salton Basin in California. Reports were made to a corporation for which the witness Rockwood was then working, but the project for an irrigation enterprise failed and went to the wall for the time being. During 1895 he took up the project again, and associated with himself various individuals, and the result of it was the formation of the California Development Company in 1896. He and his associates then undertook the work of promotion. In order to do that, they entered into a contract for the purchase of 350,000 acres of land in Mexico, extending from the Colorado river through to the Cocopah Mountains on the west, and from the international boundary line between the river and Mexico to a line far enough south to include the 350,000 acres. This contract was afterwards cut down to 100,000 acres, and with this as a basis they undertook the capitalization of the company; but for various reasons they were unable to secure funds for the actual construction of the work until the year 1900. The work referred to related to

the diversion of the water from the Colorado river for the purpose of irrigating the lands embraced in the project. He intended to conduct the water from the river to a distance of about 14 miles by constructing a canal at a point where it would be carried into what is now known as the Alamo river. The Alamo river is a stream flowing in the direction of the Salton Sink. From the point where the canal would connect with the river the water would flow to the west, northwest, and across the international line into California. It was to cross the international boundary line at a point about seven miles east of what was afterwards known as Calexico. At this point it was the intention to put in diversion works across the Alamo to raise the water to the ground surface for distribution in California. It was originally intended to carry the water from Hanlon's Heading above the first intake on the Colorado river to a point on the Southern Pacific Railroad designated as Coachella. This point is west of the Salton Sink. The distance by the line of the canal between these points was estimated to be about 150 miles. The distance from Hanlon's Heading to the point of diversion at the international line east of Calexico would be about 49 miles by the road, and by the line of the canal, following the crooks and bends of the Alamo river, about 85 miles. The Alamo river was to be utilized as a part of the canal. The witness testified that the canal flowed along the channel of the Alamo river for a distance of 60 miles. In carrying out the scheme of the California Development Company to construct a system of canals for the distribution of the water diverted by it from the Colorado river, it entered into a contract with the Mexican Company on December 28, 1900, as follows:

"This indenture, made and entered into this 28th day of December, 1900, by and between the California Development Company, a corporation, duly organized and existing under and by virtue of the laws of the state of New Jersey, one of the United States, party of the first part, and La Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), a corporation duly organized and existing under and by virtue of the laws of the republic of Mexico, party of the second part, witnesseth, that:

"Whereas, party of the first part is the owner of a certain tract of land situated in the county of San Diego, state of California, and particularly described as follows, namely: Lots three (3) and four (4), of section twenty-five (25), and the southeast quarter of section twenty-six (26), and lots one (1), two (2), three (3), and five (5), and the northwest quarter of the northeast quarter of section thirty-five (35); and lot one (1) of section thirty-six (36) in township sixteen (16) south, range twenty-one (21) east, San Bernardino Base and Meridian, containing 318.51 acres of land, more or less, according to the United States government survey; and,

"Whereas, the first party has appropriated and is the owner of a large amount of the waters of the Colorado river, and is engaged in the diversion of said waters from said Colorado river upon the lands so owned by party of the first part aforesaid, and is engaged in the construction of head-works and a canal upon said land, for the purpose of diverting said waters, and is engaged in the construction of an irrigation system, and a system of canals whereby the waters of the Colorado river so diverted upon the said land of first party as hereinbefore alleged, may be used for the irrigation of large tracts of land in Lower California, republic of Mexico, and in the state of California, United States of America; and,

"Whereas, said party of the second part is the owner of a tract of land containing about one hundred thousand (100,000) acres, situated in Lower California, republic of Mexico, a portion of which said tract of land is situated

adjoining and immediately south of the international boundary line between the United States of America and the republic of Mexico; and,

"Whereas, the irrigation system and system of canals so being constructed by party of the first part crosses said international line from a point upon the land so owned by party of the first part, to a point upon the land so owned by party of the second part; and,

"Whereas, the proposed extension of said canals and irrigation system extends through and across the lands of party of the second part in a generally southwesterly direction, and then in a generally northwesterly direction across the lands of party of the second part to various points upon said international boundary line, from which lands in California, United States of America, can be irrigated, and also extends to other points upon the land of second party from which the said land of second party and other lands in Lower California, republic of Mexico, can be irrigated; and,

"Whereas, party of the second part has entered into a certain contract with Imperial Water Company No. 1, a corporation organized and existing under and by virtue of the laws of the state of California, United States of America, whereby party of the second part agrees to deliver to said Imperial Water Company No. 1, at a point upon said international line a certain amount of water; and,

"Whereas, party of the second part contemplates entering into additional contracts with other water companies already formed or to be formed in the state of California, for the purpose of delivering to said water companies a large amount of water for the purpose of irrigating certain tracts of land situated in the state of California, which are irrigable from the proposed system and system of canals so to be constructed by party of the first part as hereinbefore stated; and,

"Whereas, party of the second part desires to obtain water for the purpose of complying with the contract so entered into between it (party of the second part) and said Imperial Water Company No. 1, and desires to obtain water for the purpose of complying with the contracts so proposed to be entered into between party of the second part and said corporations already incorporated in the state of California, and said corporations proposed to be incorporated in the state of California; and,

"Whereas, party of the second part desires to obtain a supply of water for the purpose of irrigating the lands so belonging to party of the second part as aforesaid; and,

"Whereas, party of the second part desires to obtain water for the purpose of furnishing the same for the irrigation of other lands situated in Lower California, republic of Mexico; and,

"Whereas, under the contract so entered into between party of the second part, and said Imperial Water Company No. 1, said Imperial Water Company No. 1 has granted to party of the second part the right to sell all of the water stock of it (Imperial Water Company No. 1); and,

"Whereas, party of the second part proposes to obtain similar contracts from other California corporations formed or to be formed;

"Now, therefore, in consideration of the obligations hereinafter imposed upon party of the second part, party of the first part hereby agrees:

"I. To build a system of canals from the point upon the lands of party of the first part, where said water is to be delivered from said Colorado river to and across said international line and across the lands of party of the second part to other points upon said international line from which large tracts of lands situated in the state of California, United States of America, can be irrigated; and also a system of canals from said point upon the Colorado river where said water is to be diverted from which the lands of party of the second part and other lands situated in Lower California, republic of Mexico, can be irrigated.

"II. Party of the first part further agrees to perpetually deliver to party of the second part a sufficient amount of the water so appropriated, owned and diverted, or to be in the future appropriated or diverted by party of the first part from the Colorado river, to enable party of the second part to furnish water for the irrigation of the lands situated in Lower California, republic of Mexico, and state of California, United States of America, which

are irrigable by gravity from the system of canals and irrigating system so to be constructed. Said waters so to be delivered by said system of canals to form an irrigation system for the purpose of irrigating lands situated in California, United States of America, and in Lower California, republic of Mexico, which are irrigable from the Colorado river by gravity. Said agreement to deliver said waters is made subject to and dependent upon the following conditions, namely:

"(1) No contract made or to be made whereby party of the second part has agreed or in the future shall or will agree to grant, transfer, deliver, or in any manner convey the right to use any of said waters to any person or corporation shall, by reason of priority in date, or any other reason, give to such person or corporation any prior or superior right over any other person or corporation who shall in any manner acquire from second party the right to use any portion of said waters.

"(2) Party of the first part shall not be responsible for a failure to deliver the water hereby agreed to be delivered from any cause beyond its control, but party of the first part shall use due diligence in protecting the system of canals so to be constructed by it as aforesaid, and in restoring and maintaining the flow of water therein.

"III. Party of the first part further agrees that it will keep said canals so to be constructed by it, as aforesaid, in repair at its own cost and expense, and that it will enlarge the same from time to time as may be necessary for the purpose of complying with the provisions of this agreement.

"IV. In consideration of the obligations herein incurred by party of the first part, party of the second part hereby grants, assigns and transfers to party of the first part all right which it, party of the second part, has in and to the stock of said Imperial Water Company No. 1, and all right which it has to receive any of the moneys which would otherwise be due and payable to party of the second part under said contract with said Imperial Water Company No. 1, from the sale of the stock of said Imperial Water Company No. 1. Second party further agrees that it will make like assignments in the future of all rights which it may acquire under contracts similar to said contract with Imperial Water Company No. 1, which it may make with other water companies in the state of California for the sale of the stock of said companies, or the proceeds to be derived therefrom.

"In witness whereof, party of the first part has caused its corporate name and seal to be hereunto affixed by its president and secretary, thereunto duly authorized by resolution of its board of directors; and,

"In witness whereof, party of the second part has caused its corporate name and seal to be hereunto affixed by its vice-president and secretary, thereunto duly authorized by resolution of its board of directors.

"Executed in duplicate the day and year first above written."

[Signed by the parties to the instrument.]

With respect to the relation of the California Development Company to the several so-called "Mutual Water Companies," organized under the laws of the state of California, it appears from the testimony that of the eight companies only six developed into active organizations, namely, Imperial Water Companies, Numbered 1, 4, 5, 6, 7, and 8. No. 2 was merged with No. 4, and No. 3 never became active. In an agreement entered into between the Mexican Company (referred to in the agreement as party of the first part) and Imperial Water Company No. 1 (referred to as party of the second part) and the California Development Company (referred to as party of the third part), dated July 24, 1901, the agreement of December 28, 1900, between the California Development Company and the Mexican Company is referred to and made a part of the agreement between the Mexican Company and the Water Company and the California Development Company. The agreement provides among other things as follows:

"VII. Third party hereby agrees that it will construct and maintain a main canal commencing at the point upon said international boundary line where said water is to be delivered to second party, and continuing from said point of commencement, through the lands described in the articles of incorporation of second party; said canal to be of sufficient capacity, either in its original construction or through subsequent enlargements, made from time to time by third party, at its own cost and expense, to convey an amount of water sufficient at all times for the irrigation of the lands owned or located by the stockholders of second party, and being an amount in the aggregate not less than sufficient to furnish four acre-feet of water per annum for each outstanding share of stock of second party. Said canal to be owned and maintained by third party, and third party to have the exclusive right to navigate said canal, and to develop and use all power that may be developed from the waters flowing therein. Third party further agrees to convey the water to be delivered by first party to second party thereunder, through said canal to the lateral ditches to be constructed by it as hereinafter provided.

"VIII. In the event that third party shall fail to construct or maintain the main canal herein agreed to be constructed by it, or to convey and deliver the water agreed by third party to be conveyed through said canal to the lateral ditches to be constructed by third party as hereinafter provided, then the second party shall have the right to enter upon said canal, and to make such additions and repairs thereto and changes therein as may be necessary in order that said canal shall have a capacity sufficient for the conveyance of the water to be conveyed therein hereunder, and second party shall have the right to convey the water through said canal, from the international line to said lateral ditches and the cost of such additions and changes in said canals, and the expense of the conveyance of said water through the same shall be a claim against third party to be recovered by second party from it by suit, if necessary.

"IX. Third party further agrees to construct a system of distributing ditches, together with all necessary gates and water weirs for second party from said canal so as to be constructed by it, as aforesaid, in such manner as to convey the waters from said canal to a point upon each governmental subdivision of 160 acres of land, from which it is practicable to irrigate the same, except as hereinafter provided, except that where the amount of land included in any original entry of any stockholder of second party exceeds 160 acres, then such water shall only be conveyed to such point upon the land included in such original entry; such distributing ditches to be thereafter owned and maintained by second party. Each and all lateral ditch or ditches, as soon as completed, to be turned over to second party and to be thereafter owned, possessed, controlled and maintained by it.

"Said lateral ditches to be constructed wherever necessary to irrigate the lands owned or located by the stockholders of second party, and to be either as originally constructed, or by subsequent enlargement, of ample size to convey to the stockholders of second party an amount of water equal to two-thirds of one (1) acre-foot per month for each share of stock of second party owned by them; Provided, that if any of the stock of second party shall have been sold by third party, and located upon any tract of land, which cannot at an expense of more than double the average cost of the construction of said lateral ditches, be irrigated by gravity from said lateral ditches, then third party at its option, may refund to the owner of the stock, which has been located upon said tract of land which cannot be irrigated as aforesaid, an amount of money for each share of stock located upon such land, which together with any balance then due to third party upon such stock shall equal the price at which third party is then selling such stock, and that upon making such payment, such stock shall thereupon be assigned to third party, and that by tendering said amount, third party shall be relieved from all obligation to construct such lateral ditches in such manner as to enable the owner of such land to irrigate the same therefrom.

* * * * *

"XIII. * * * That the main canal and system of lateral ditches to be constructed by third party hereunder shall be in operation by the first of January, 1902."

An agreement was entered into between the California Development Company and the Mexican Company and each of the other water companies in substantially the same terms as that with the Imperial Water Company No. 1. In the course of the hearing it was admitted by counsel for the California Development Company that that company incorporated the subsidiary water companies and made the contracts with them, and controlled them by its power over the stock. The diversion of water from the Colorado river was made through three intakes, one in California, and the other two in Lower California or Mexico. Intake No. 1 was commenced in October, 1900. The first water distributed or used for irrigation was drawn through this intake and carried by canal and the channel of the Alamo river through Mexican territory back to the international boundary line in the neighborhood of Calexico, where the first water was delivered to the water companies in California about June 15, 1901. Intake No. 2 was constructed in 1904, and was located just below the boundary line in Lower California or Mexico. Intake No. 3 was completed October 6, 1904, and was located about four miles below the boundary line, and, like intake No. 2, was in Lower California or Mexico.

The witness C. R. Rockwood testified that the reason for cutting intake No. 2 was purely political; that the right to take water from the Colorado river in the United States had been attacked by the reclamation engineers. The witness says:

"We then obtained concessions from Mexico which gave us the right to take water on Mexican soil from the river."

George C. Sexsmith, a witness called on behalf of the defendant, testified that from 1901 up to July, 1906, he was in the employ of the California Development Company with the exception of about six weeks. He worked on the Mexican end of the irrigation proposition as a sort of foreman. He was also employed in dredging near the upper heading trying to keep the canal open. His instructions were to keep the canal open if possible, but it silted up as fast as the silt could be removed. The machines employed were a dipper dredge and a hydraulic dredge; but with these two dredges he was not able to keep the canal free and open, so a by-pass was cut around the Chaffey gate to get more water into the canal. But even with the by-pass there was a shortage of water in the canal at the extreme low stage of the river. They closed up the by-pass when floods came down the river. It was opened three times and closed each time. During the times of flood the water was taken into the canal through the Chaffey gate, but the canal silted up from the Chaffey gate to the river. Then a second intake was cut just below the boundary line, and that was used from 2 to 2½ years. The canal was again almost entirely closed with silt when the third intake was cut. The point of diversion of the third intake was selected because they could get water through there and increase the water supply more readily than at any other point. The shortest distance between the river and the canal was at that point. It was simply a matter of removing the material. They were figuring on the shortest distance between the two points. It does not appear from any of this evidence that any provision was made at either of

these intakes for the regulation or control of the water drawn through them into the canal. In the latter part of June or the early part of July, 1904, before making this connection (between the river and the canal through intake No. 3), Mr. Rockwood stated to Mr. Heber, the president of the company (California Development Company), that, if he was furnished with lumber with which to build a controlling gate one month before the time when floods were to be expected, he would not have to close the intake even in the winter season. This Mr. Heber promised he would furnish, expecting to be able to do so, but the financial condition of the company continued to be such that he was never able to furnish the material for this temporary structure. This lower intake silted up once, and had to be dredged in order to keep the water flowing therethrough. The floods in the fall of 1904 came earlier than usual, with the result that the opening at this third intake began to wash and the inflow to increase, and from that day until the close of 1906 the condition continued to grow worse. By the middle of December, 1904, sufficient water was going into the canal through this lower intake to pass into the New river and on through the New river into the Salton Sink, starting what has since been known as the Salton Sea. The current of water flowing into the lower intake commenced to cut or wash some time in February or March, 1905, and while there is testimony that water began to accumulate in the Salton Sink as early as November or December, 1904, the flooding of Salton Basin which is the cause of the present action began about the time of the washing and breaking of the bank of the lower intake.

The California Development Company was beyond question in control of the entire work of diverting the water from the river for this irrigation system. It was so provided in its contract with the Mexican Company and was reaffirmed in the contracts with the Mutual Water Companies. The Mexican Company, if it acted at all, was a mere formal instrument or agent, acting for and under the direction of the California Development Company. It was a creature of the latter company, and the employes who did the work testified that they were employed by the latter company. If it was technically otherwise, they do not appear to have known anything about it. But the important fact is that the California Development Company furnished the means, surveyed the canals, made the diversions from the river to the canals, and was the principal party in carrying forward the scheme. It was therefore charged with the duty of maintaining the intakes in such condition that water flowing through should not carry away the banks, and, admitting a flood, destroy the property of others. But it is claimed with respect to the Mutual Water Companies that they became independent by the sale of the stock of the companies to the settlers. Admitting this to be true, it does not appear that the water companies had any control over the diversion of the water from the Colorado river, and it is this fact that primarily determines whether they or the Mexican Company were necessary parties to this action. The question is: Who was responsible for the diversion of the waters from the Colorado river to the damage of the complainant? The testimony answers that question beyond a doubt. It was the California Development

Company and neither the Mexican Company nor the Mutual Water Companies were therefore necessary parties to this action.

It is objected that the court had no jurisdiction to compel the defendants to construct headgates in the republic of Mexico for the reason that the defendant would not have been permitted by the laws of Mexico to construct such headgates until the plans for such structures had been approved by the proper engineering authority of Mexico. The answer to this objection is the fact shown by the evidence that the only site for controlling headgates on the river below what is known as the Laguna dam, above Yuma, is at Hanlon's Heading, in California. This point was originally selected for that purpose and the title to the land for such headworks was acquired by the California Development Company. "This site," said Mr. Meserve, in his statement attached to the President's message, "also controls what might be called or termed the gateway for the carrying of waters into Mexico, and through Mexico again into the United States." This statement is fully confirmed by the evidence we find in the record. The decree does not compel the defendant to construct headgates in Mexico. The flow of the river into the Salton Sink was finally placed under control in February, 1907, but this was done by placing permanent dams across the breaks in the river bank with a concrete heading in the canal about eight or nine miles below Yuma, and this appears to be the only permanent and effective control that can be placed upon the river below the international boundary line. There is no evidence that the consent of the republic of Mexico was necessary or ever obtained or asked for the building of these dams or the placing of the concrete heading.

It is further objected that the court had no jurisdiction to decree an injunction in effect abating a nuisance caused by the construction of intakes in the republic of Mexico, and it is claimed that there is a rule supporting this objection to the effect that a court of equity can never compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court. This rule undoubtedly obtains where the property injured is itself outside the jurisdiction of the court, which was the case in *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 56 U. S. 232, 14 L. Ed. 674, cited by appellant. In that case the action was brought in the United States Circuit Court for the District of Michigan. Relief was prayed for an injury threatened or done to complainant's real estate in Indiana, and to its franchise which was inseparably connected with the realty in that state. The Supreme Court held that the Circuit Court in Michigan was without jurisdiction to protect property in Indiana. The same situation was found in *Mississippi & Missouri R. Co. v. Ward*, 67 U. S. 485, 17 L. Ed. 311. In that case the action was brought in the District Court of the United States for the District of Iowa. The bill charged the defendant with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island. The complainant was part owner of three steamboats, and commanded one of them. These boats were accustomed to pass through the draw of this bridge in navigating the Mississippi river. It was alleged that the boats were much in-

jured and delayed by the bridge, which it was charged was a great obstruction to navigation. The Illinois draw passage embraced the main channel of the river, and it was through this passage that steamboats had at all times navigated, and it was in the Illinois draw that the complainant's boats sustained the injury alleged in the complaint as special damage. The complainant was therefor suffering an injury to his property by reason of an obstruction in the river in that state, and he brought suit in Iowa for the abatement of the bridge as a nuisance because of its danger to navigation. The trial court ordered the removal of so much of the bridge as was in the state of Iowa; the middle of the Mississippi river being the dividing line between the states of Iowa and Illinois. The Supreme Court of the United States held that the navigation of the river so far as complainant was concerned would not be improved by the removal of the Iowa end of the bridge, and that the court had no jurisdiction over the local object inflicting the injury to complainant's property in Illinois.

In the case of *Gilbert v. Moline Water Power & Manufacturing Co.*, 19 Iowa, 319, it was held that an Iowa court could not restrain a defendant from maintaining a dam across a portion of the channel of the Mississippi river between points in the state of Illinois whereby plaintiff's land in Iowa was overflowed, citing the case of *Mississippi & Missouri R. Co. v. Ward*, supra, as authority. It does not appear that the overflow of plaintiff's land was because of any negligence on the part of the defendant in erecting or maintaining the dam. It had been maintained for many years, was supposed to have been placed where it was by consent of the state of Illinois, and was a legal structure in that state serving a legitimate and useful purpose. The controversy in the case was over the question of the concurrent jurisdiction of the states of Illinois and Iowa over the Mississippi river in such a case. The jurisdiction was denied. It would seem, however, from the facts stated that the remedy was an action at law for damages in a court of competent jurisdiction. We do not think that the law of such a case is applicable here.

The injury charged in the present case was an injury to property within the jurisdiction of the court, and the party charged with the commission of the injury was also within the jurisdiction of the court. The cause of the injury was not serving a useful purpose for any one, and the relief asked for was that the party causing the injury might be enjoined from continuing to injure complainant's property within the jurisdiction of the court. Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court? In criminal law he who on one side of a boundary shoots a person on the other side is amenable where the blow is received. *Wharton's Criminal Law*, § 279. In *United States v. Davis*, Fed. Cas. No. 14,932, the indictment was for

manslaughter. The accused was master of an American ship lying in the harbor of Raiatea, one of the Society Islands and a foreign government. A gun in the hands of the accused on board the American ship went off, and killed a person on board a schooner belonging to the natives lying in the same harbor. It was held by Mr. Justice Story that the act was in contemplation of law done on board of the foreign schooner where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States having jurisdiction over the American ship. In *Simpson v. State*, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75, it was held by the Supreme Court of Georgia that one who in the state of South Carolina aims and fires a pistol at another who at the time is in the state of Georgia is guilty of the offense of "shooting at another in the state of Georgia." The court said:

"Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual. * * * So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes."

In the *State v. Hall*, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822, the defendants were indicted, tried, and convicted of the crime of murder in North Carolina upon testimony tending to show that the deceased was wounded and died in the state of Tennessee, and that the fatal wounds were inflicted by the defendants by shooting at the deceased while they were standing within the boundary of the state of North Carolina. It was held by the Supreme Court of North Carolina, citing numerous authorities, that the courts of North Carolina had no authority to prosecute a person for murder who while standing within the boundaries of that state wrongfully shoots across the line and kills a person in another state for the reason that the crime of murder was committed where the shot took effect. In civil actions the jurisdiction of the court depends upon the question whether the action is local or transitory. In *Will's Gould on Pleading*, p. 268, the author says:

"A local action is one which must still be laid in the county in which the cause of action actually arose. A transitory action may be laid in any county which the plaintiff may prefer."

After referring to the fact that the present locality of actions is founded in some cases on common-law principles, and in others on positive enactments of statute law, a number of actions are mentioned which continue local by the common law, and the author says:

"If, however, a tortious act, committed in one county, occasions damage to land or any other local subject situate in another, an action for the injury thus occasioned may be laid in either of the two counties, at the choice of the party injured. Thus, if by the diversion or obstruction of a water course in the county of A. damage is done to lands, mills, or other real property in the county of B., the party injured may lay his action in either of those two counties."

In England the rule has been stated to be that where the action is founded on two things done in several counties, and both are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in which county he will. *Bulwer's Case*, 7 Coke Rep. 1a; 77 Eng. Rep. 411. Among the examples given is the following:

"If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4. 8, or I may bring in Middlesex, for there I have the damage, as it is proved by 11 R. 2. *Action sur le Case*, 36."

In *Barden v. Crocker*, 10 Pick. (Mass.) 383, the rule in the *Bulwer Case* was held to be decisive of a similar question of jurisdiction in Massachusetts. The action was brought in the county of Plymouth against the defendants for erecting a dam in the county of Bristol, across Taunton Great river, by which the passage of alewives up that river and Nemasket river in Middleborough, in the county of Plymouth, was prevented. It was objected by the defendant that the plaintiff was not entitled to maintain an action in the county of Plymouth. In the Supreme Judicial Court the authorities upon this question are fully discussed, and the court says:

"He [the plaintiff] may unquestionably maintain his action in either county, in Bristol where the obstruction was raised, as well as in Plymouth where the injury was sustained. The law to be collected from *Bulwer's Case*, 7 Co. 1, is decisive upon this point. 'When one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he may bring his action.'"

The court also refers to the case of *Thompson v. Crocker*, 9 Pick. (Mass.) 59, where the cause of action was for flowing back of water upon the plaintiff's mills in the county of Plymouth by a dam which was in the county of Bristol. In that case the action was brought in the county of Plymouth alleging "that the defendants had wrongfully kept up a certain mill dam across the river below the said mills" of plaintiff. It appeared that the defendant's dam was in Taunton in the county of Bristol. The defendants contended that this was a fatal variance from the declaration. The Supreme Judicial Court held the variance immaterial "for the injury done to the plaintiff's mills is the substance of the complaint, and the place where the injury was done, to wit, at the mills, gives the locality of the action, and not the source from which the mischief came."

In *Phelps v. McDonald*, 99 U. S. 298, 308, 25 L. Ed. 473, the court said:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam."

In *Miller & Lux v. Rickey* (C. C.) 127 Fed. 573, the action was brought in the Circuit Court for the District of Nevada to restrain the defendants from the wrongful diversion of the waters naturally flow-

ing down the stream of both forks of the Walker river having their source in California, and flowing down into and through the state of Nevada, where the lands of the complainant were situated. The alleged diversion was in the state of California, and the injury caused by such diversion was in the state of Nevada. It was contended on behalf of the defendant that the Circuit Court in Nevada was without jurisdiction, first, because the suit was of a local nature, and could not be brought outside of the state of California; second, because the water right in controversy was in California; third, because the wrongs and injury alleged to have been committed by the defendant were committed wholly in the state of California; fourth, that complete relief could not be decreed by the Nevada court in favor of the complainant without reaching the property rights of the defendant which were situated wholly in California. Judge Hawley in an elaborate opinion considered the question of jurisdiction as presented by these objections, and reviewed the authorities upon the subject, meeting and answering the objection raised and urged by the defendants in this case that the court could not send its process to execute its decree into foreign territory. The court says on page 580:

"That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction, and punish him for contempt if he violates it. This doctrine had its foundation in the equity courts of England at an early day"—citing the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 443, 454; 27 Eng. Rep. 1132, 1139, decided in 1750, where Lord Chancellor Hardwicke said:

"As to the court's not enforcing the execution of their judgment, if they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree in the cause, for the strict primary decree in this court as a court of equity is in personam. * * * In the case of *Lord Anglesey* of land lying in Ireland I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but, the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this court."

The court accordingly maintained its jurisdiction of the action, and on appeal to this court the question was fully considered and the jurisdiction of the Circuit Court sustained. *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 81 C. C. A. 207. It may be further stated that in *Massie v. Watts*, 6 Cranch, 148, 157, 3 L. Ed. 181, Chief Justice Marshall cited the case of *Penn v. Lord Baltimore*, and made the same application of the doctrine of jurisdiction of courts of equity as was made by Judge Hawley in *Miller & Lux v. Rickey*. We are of the opinion, therefore, that the court had jurisdiction in the present case to protect property within its jurisdiction, and to restrain the defendant from diverting the waters of the Colorado river to the damage of such property, notwithstanding the defendant may find it necessary in complying with the decree of the court to perform acts beyond the jurisdiction of the court.

The next objection to the decree is that the court was in error in holding that, if when the suit was brought there were grounds for injunction, such grounds had not been removed by the destruction of complainant's works, and by the closing of the breaks in the Colorado

river. The court was of the opinion that the complainant was entitled to have its freehold right protected without regard to the amount of the damage threatened, otherwise the overflow sought to be abated might by prescription ripen into a servitude upon the land. Furthermore, the present safeguards against overflow might be but temporary, while the complainant's remedial rights if it had any, included permanent relief. Defendant's objection is based upon the theory that the decree provides full compensation for the value of complainant's overflowed land as well as for the works destroyed, and that the decree operates as a condemnation of the entire property, leaving nothing in the complainant to be protected by injunction. The answer to this objection is that the land is not destroyed. It is true there is an award of damages for the "salt crust" destroyed, but it does not appear that the "salt crust" was the entire value of the land. It is true, also, that the land is now under water, and is likely to remain so for some time, but the land itself remains the property of the complainant, and in course of time the water may be removed by seepage or evaporation, and the land again become valuable. At all events, the complainant has a right to the land, and the court has determined that this freehold right should be protected. This is clearly the law in this state.

In *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, the action was for damages for an alleged nuisance and for a mandatory injunction to prevent its continuance. It was alleged that plaintiffs were the owners of certain lands in San Joaquin county; that by reason of certain obstructions placed by the defendant across certain sloughs for the purpose of diverting their waters into a canal the waters were prevented from flowing naturally down the sloughs and away from plaintiff's land, and were turned upon complainant's land to their great injury. It was objected, among other things, that the damage was too small to be considered in determining the question of the nuisance. In answer to this objection the court said:

"But the amount of damage, estimated in money, was immaterial. That finding was only as to the damage done in 1878, when there was water on the land from other sources. The findings show that the waters diverted by the canal 'flow' upon plaintiff's land, which would not flow there if allowed to take their natural course; and that the embankments erected by defendants 'cause' such artificial flowing. And to thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. *Richards v. Dower*, 64 Cal. 64, 28 Pac. 113, and cases there cited; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Wood on Nuisances* (2d Ed.) p. 639. The right to an injunction therefore in such a case does not depend upon the extent of the damage measured by a money standard. The maxim, 'De minimis,' etc., does not apply. The main object of the action is to declare a nuisance, and to prevent the continuance by a mandatory injunction."

In *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381, the plaintiff acquired land by patent from the United States in 1883. In 1865, and while this land was unoccupied land of the United States, the defendants or their grantors constructed across the land a flume ranging from two

to three feet in width and about sixteen inches in depth, and diverted water from Pitt river into said flume, and by means thereof conducted the water across the land to their own adjoining lands, where they used it for beneficial purposes. In the year 1896 defendants, without plaintiff's consent, constructed on plaintiff's land about six rods of ditch on a line different from, and from one to 20 feet distant from, the flume line. In the year 1900 defendants, without plaintiff's consent, extended the six rods of ditch to a ditch four feet in width and three feet in depth, extending across the northern portion of the plaintiff's land for about one-fourth of a mile on a line distant from one to 20 feet from the flume line, but extending in the same direction. Ever since then defendants had carried their water across plaintiff's land by means of the said ditch, and threatened to continue so to do. They had discontinued the use of the flume with the exception of about five rods at the intake of the water from the river. The trial court entered a judgment enjoining the defendants from maintaining the ditch. The Supreme Court, in reviewing this judgment, said:

"It is suggested that the trial court did not find in what particulars the plaintiff will be obstructed in his rights to the free use and possession of his land, or injured in his property, by the maintenance of the ditch. The facts found and detailed above sufficiently show this. By the maintenance and use of the ditch plaintiff is deprived of the free use and possession of his real estate without right—and will be permanently deprived thereof if such maintenance and use are continued. This alone is sufficient to entitle plaintiff to the relief by injunction granted. It is the settled law of this state that irrespective of other damage an injunction will be granted to prohibit the continuance of action that obstructs one in the free use and enjoyment of his land where such action, if continued, will ripen into an easement."

There are a number of objections to the decree directed to the conclusions of the court that the waters which overflowed complainant's lands and destroyed its property were largely, if not entirely, the waters diverted from the Colorado river through defendant's intakes; that defendant was negligent, among other respects, in not selecting proper places for such intakes, and not providing suitable headgates to control the flow of water through the intakes, and that such negligence was the direct and proximate cause of the overflow of complainant's land and the resulting loss of its property; that the flooding of Salton Sink in the year 1905, and the destruction of complainant's property, was occasioned by the fault and negligence of the defendant. We have carefully examined the testimony in this case, and we think it fully supports the conclusions of the court below. It will serve no useful purpose to review this testimony. Its main features are practically uncontradicted. The intakes constructed by the defendant for drawing water from the river into its canals were not properly selected, and were negligently constructed. There were no headgates, or method or device for regulating the amount of water drawn into the canal. The two upper intakes were in succession closed by the deposit of silt, and during the season of flood water coming down the Colorado river in 1905 the banks of the river at the third intake were carried away, and the entire river turned into a channel which carried the flood down into the Salton Basin, destroying complainant's salt works and submerging its land. The diversion of the river was made by the defendant, and

made in such a negligent manner that it resulted in the injury complained of. This was a continuing nuisance and trespass existing at the time of the commencement of the action, and with respect to the land or free-hold estate continuing down to the entry of the decree, for which an injunction was the only plain, adequate, and complete remedy. The fact that an extraordinary flood came down the river contributing to the disaster does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the defendant to have maintained proper control of the water at its headgates.

In Kinney's Law of Irrigation, the author in section 314 states the law upon this subject as follows:

"It is the duty of all irrigation companies in building ditches, canals, aqueducts, reservoirs, and other works to so construct them that, so far as human foresight can reasonably determine, the lives and property of the people living below them will be safe from breakage and overflow. Where a company constructs a ditch which passes over the land of others, it is bound to construct it and use it so as not to injure those lands regardless of the question as to who has the older right or title; and if, through any fault or neglect of the owner of the ditch in not properly constructing, managing, and repairing the ditch, the water overflows or breaks through the banks, and destroys or damages the lands of others, either by washing away the crops or soil, or covering the land with sand or debris, the owner of the ditch is liable for such injury. However, the owners of the ditch or canal may not be held liable for what is known as an act of God, unless the acts of the owners are combined with it in such a manner as to render him liable."

In section 315 the author refers to the case of *Chidester v. Consol. Ditch Co.*, 59 Cal. 203, where Mr. Justice Thornton, rendering the opinion of the court, said:

"No one is responsible for that which is merely the act of God or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, a liability for damages results from such neglect. Such is the rule laid down and applied in *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115. 'The expression' (the expression referred to is that comprised in the words, 'act of God') 'excludes the idea of human agency, and, if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man.' *Polack v. Pioche*, 35 Cal. 423, 95 Am. Dec. 115, per Sanderson, J., delivering the opinion of the court. See cases cited in the opinion; Wharton on Negligence, §§ 553, 559, and cases cited; Broom's Legal Maxims, 'Actus dei nemine facit injuriam,' pp. 227, 228. The learned author just referred to states the rule thus: 'The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning. The above maxim may therefore be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches.' Broom's Legal Maxims, pp. 227, 228." See, also, Farnham on Waters and Water Rights, § 634.

The evidence shows conclusively that it was defendant's method of constructing the intakes that resulted in turning the flood of the Colorado river into Salton Sink. The floods of this river in 1905 and 1906 were great, but no greater than would have been anticipated by a prudent person in view of all the conditions and the history of that river. There is no evidence that the heavy rains in the summer of 1904

in the immediate vicinity of Salton Sink contributed in any degree to the flooding of the sink in March, 1905. There is no evidence that any water reached Salton Sink after November, 1904, and up to January, 1905, except the water diverted by the defendant from the Colorado river, a fact practically admitted by the witness Rockwood who testified on behalf of the defendant.

The decree of the Circuit Court is affirmed.

THE SALTON SEA CASES

NEW LIVERPOOL SALT CO. v. CALIFORNIA DEVELOPMENT CO.
et al. (two cases).

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

Nos. 1,649, 1,659.

INJUNCTION (§ 223*) — ACTS CONSTITUTING VIOLATION—CONSTRUCTION OF DECREE.

Defendant by the negligent construction of the works by which it diverted water from the Colorado river into its irrigation canal caused an overflow through a breach in the bank, creating a lake in the Salton Basin, which covered and practically destroyed the value of complainant's property situated in the basin. In a suit by complainant it was awarded damages for the injury, and also an injunction restraining defendant from diverting water from the river in excess of the substantial needs of the people dependent on its canal, from permitting any waste water to flow on or over complainant's land, or into the lake in such amount as would "substantially increase the amount of water therein," or prevent the decrease thereof by natural causes. Defendant's canal was the only source of water supply for an arid valley some 30 miles long and containing 20,000 people, who were wholly dependent thereon for water for domestic purposes and the raising of crops. It appeared that in order to supply their needs, and especially to meet emergencies, as in case of hot winds to which the valley was subject, it was necessary to run through the canal, which was 61 miles long, a quantity of water somewhat in excess of the average consumption, and that the excess, when unused, was discharged through waste gates and flowed into the lake at a point some 40 miles from complainant's land, but not in such quantity as to materially affect its volume. *Held* that, giving the decree a proper and reasonable construction, such waste of water into the lake did not work substantial injury to complainant, and was not a violation of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 448; Dec. Dig. § 223.*]

Appeal from and Writ of Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

See, also, 172 Fed. 792.

Edward J. McCutchen and Purcell Rowe (Page, McCutchen & Knight, of counsel), for appellant and plaintiff in error.

John S. Chapman and E. A. Meserve (Eugene S. Ives, of counsel), for appellees and defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In *California Development Company v. New Liverpool Salt Company* (just decided) 172 Fed. 792, the decree in favor of the complainant was entered on January 10, 1908. On March 27, 1908, the complainant presented to the court a petition by way of complaint for an attachment to issue forthwith for the arrest of Epes Randolph, H. T. Corey, and F. C. Herrmann, officers of the defendant having supervision and management of the business and operations of the defendant, including the diversion of water from the Colorado river. It was charged in the complaint that these officers had been guilty of contempt of court in disobeying and violating the decree and injunction therein contained, and the prayer of the complaint was that they should be punished accordingly.

The decree contained the following provisions:

"That defendant be perpetually enjoined and restrained from diverting from the Colorado river any of the waters thereof in excess of the substantial needs of the people dependent upon the canal described in complainant's bill of complaint for water supply for domestic and irrigation uses and purposes, and such other lawful purposes as the same may be applied to.

* * *

"That the said water so diverted, whatever may be the amount, shall be so controlled and used that the same shall not flow upon the lands of the complainant described in the bill of complaint. * * *

"That the defendant be required to regulate the flow of any water that may be diverted by it so that there shall be no waste water flowing therefrom as the result of such diversion upon or over the lands of complainant, above described.

"That said defendant be restrained from turning out of its canals any waste water at any point whence the same will naturally flow upon or over the lands of complainant, or flow into the lake now covering the Salton Sink, and thereby substantially increase the amount of water therein, or maintain the amount of water therein, or prevent the decrease thereof by natural causes."

In the complaint filed with the court it was alleged that ever since the rendition and entry of said decree defendant, under the direction and management of said Randolph, Corey, and Herrmann, and by their orders and direction, had maintained at the head of its canal on the Colorado river a headgate through which the flow of water from the Colorado river into said canal was regulated and controlled; that said headgate was so built and devised that defendant could prevent any water from flowing into said canal, or could allow such quantities to flow therein as it might determine; that at all times since the 14th day of March, 1908, defendant, by the orders and direction of said Randolph, Corey, and Herrmann, had taken and diverted into said canal from the Colorado river a large volume of water, to wit, water in excess of 1,000 second feet, and had daily discharged and delivered from its canal at points east and north of Calexico, in the county of Imperial, state of California, into a certain water course or channel known as the Alamo Channel, leading from the places and points at which said water was so discharged into it to Salton Sink, a quantity of water not less at any time than 90 cubic feet per second, and as much at times as 252 cubic feet per second, all of which water so discharged into said channel or water course had naturally flowed over the lands of complainant and into Salton Sink, increasing the amount

of water therein, and preventing the decrease of water therein by natural causes.

It was further alleged that the water in Salton Sink at all times from January 28, 1908, to March 27, 1908, covered complainant's lands described in the final decree, to wit, sections 11, 15, and 23, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 14, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 14, all in township 8 S., range 10 E., San Bernardino meridian, situated in the county of Riverside, state of California. Upon the hearing of the order to show cause the court construed its decree, and upon the evidence submitted determined that the diversions complained of were not violations of the injunction, and the rule against the respondents was accordingly discharged. For the review of this judgment the complainant brings the case here by appeal and writ of error.

It appears from the testimony submitted to the court that during the years 1905 and 1906 there were a number of overflows of the Colorado river, and the time came when nearly the whole of the waters of the Colorado river were pouring through the Alamo Channel and into Salton Sink, and the result of the successive floods was that a lake was created in the Salton Basin about 40 miles in length from north to south and varied in its width, averaging about 10 miles in width; that the area of said lake as computed and estimated by the geological survey of the United States was about 460 square miles; that the depth of the lake at the deepest point was about 80 feet; that, in order to shut out the waters of the Colorado river and control the diversion of the same, it became necessary to expend a large amount of money, which it was estimated on information and belief amounted in the aggregate to \$3,000,000; that this money was furnished by the Southern Pacific Railroad Company under an understanding and agreement with the California Development Company; that the work was completed by the Southern Pacific Company in February, 1907, and a concrete headgate constructed about nine miles below Yuma, whereby the waters were controlled in their diversion through defendant's canal. It appears, further, that the whole area of the Imperial Valley susceptible of cultivation and irrigation in valuable crops is at least 700,000 acres; that the 200,000 acres approximately now under cultivation extends over a considerable distance, being about 30 miles in length from north to south, and about 25 miles in width from east to west in the widest place. There are five towns in Imperial Valley, namely, Cal-exico, Brawley, Holtville, El Centro, and Imperial. The population of these towns is estimated to number about 3,000; and in Imperial Valley, including these towns and the settlers upon the lands, the population is estimated to be about 20,000. In all of these towns the houses are generally lighted with electricity furnished by the Holton Power Company, situated near the town of Holtville. Electricity is also used to some extent in the various towns for mechanical purposes, and it is estimated that perhaps the most important is the manufacture of ice which is necessary in the shipment of products out of the valley as well as for domestic use among the people. There is no source from which water can be obtained for these purposes or to supply the want of Imperial Valley for domestic and irrigation uses and purposes,

except the waters of the Colorado river furnished through the canals of the defendant. The value of the property in Imperial Valley dependent upon the defendant's canal system is estimated at \$10,000,000.

It appears that the water diverted by the defendant from the Colorado river is carried by its canal and the channel of the Alamo river from the point of diversion for a distance of about 61 miles to a point known as Sharp's Heading, where the waste gate is situated, and where the delivery of water is made to the first of the six water companies engaged in receiving and distributing water in Imperial Valley for domestic and irrigation purposes and uses. From Sharp's Heading to the Holton power plant is about 11 miles, from the Holton power plant to the southeast end of Salton Lake is about 28 miles, while complainant's land is from 40 to 45 miles still further to the west and north beneath the waters of the other end of the lake.

The acts of the defendant which were made the subject of complaint to the court below were the turning of water into the channel of the Alamo river through the waste gate at Sharp's Heading and the laterals of the Imperial Water Companies, and at the tailrace of the Holton power plant, and the diversions of water from the Colorado river for the purpose of scouring and removing the silt from defendant's canal. The amount of water thus turned into the channel of the Alamo river and flowing on to the Salton Sea or Lake amounted, as estimated by the defendants, to approximately 150 second feet, but as claimed by the complainant 250 second feet. The use of water for scouring purposes appears to have been only occasional—two or three times a year during the season when there was but little if any irrigation—and the only diversion on that account after the final decree and prior to the entry of the judgment of the court in the contempt proceedings was 617 second feet turned out at Sharp's Heading on February 9, 1908. The showing made by the defendant was to the effect that, while there was more water diverted from the Colorado river than was actually consumed by the people in Imperial Valley for all the purposes named, nevertheless such a diversion was necessary in order to supply the substantial needs of the people dependent upon the canal system, and it was claimed that the entire waste did not substantially increase the amount of water in the Salton Sea or Lake, all of which it was contended was within the provisions of the decree. The explanation made by the evidence on behalf of the defendant for the diverting of more water from the river than was actually consumed in Imperial Valley was the long distance from the point of diversion to Imperial Valley, about 61 miles; the length of time required for the water to flow down to the point of distribution about 36 hours; and the loss in transmission from 15 to 30 per cent. according to the volume of water diverted ranging from 700 to 1,500 second feet. Further, the climatic conditions required that there should be sufficient water flowing in the canal to the points of distribution during the irrigation season to furnish an increased supply of water for emergencies when periods of excessive heat or hard dry winds suddenly absorb the moisture from the soil and destroy the crops unless there is an immediate flooding of the land. Sometimes there are heavy rainfalls within a period of a few hours, and within an equally short time a

dry wind may, and often does, sweep over the country making the immediate irrigation of the fields imperative to save the crops, especially is this the case of young crops of alfalfa, young trees, melons, beans, and all tender and shallow rooted plants. It also appeared that the waste from the tailgate of the Holton Power Plant was unavoidable, as is the occasional scouring of the canal to remove the silt to prevent the filling up of the canal and the destruction of the system. There was evidence that this waste water did not substantially increase the depth of water over complainant's land.

The complainant contends that the defendant can only carry on its business of supplying water to the inhabitants of Imperial Valley if it can do so without discharging any waste water upon the lands of the complainant; that is to say, into the Salton Sink. But if, on the other hand, it cannot carry on its business without discharging waste water into the Salton Sink so that such water with the accumulated water of the Sink flows upon complainant's lands, then defendant must cease to carry on its business of diverting water from the Colorado river. The complainant's construction of the decree amounts to this: That it provides:

"That the defendant be perpetually enjoined and restrained from diverting from the Colorado river any of the waters thereof if any such waters shall flow upon or over the lands of the complainant; that is to say, if any such waters shall flow into the Salton Sink covering the lands of the complainant."

But the court did not enter such a decree.

The decree provides that the diversion of water from the Colorado river shall not be "in excess of the substantial needs of the people dependent upon the canal," and that any waste water turned out of the defendant's canal shall not be such an amount as will "flow into the lake now covering the Salton Sink and thereby substantially increase the amount of water therein or maintain the amount of water therein, or prevent the decrease thereof by natural causes." These two provisions evidently relate to present conditions in the locality where the decree is to operate and while complainant's land is covered by the waters of the Salton Sink. But there are other conditions which appear to relate to the future when by seepage or evaporation the water shall disappear from complainant's land, and the land be no longer covered by the waters of the Salton Sink. The decree provides that the water diverted from the Colorado river "whatever may be the amount shall be so controlled and used that the same shall not flow upon the lands of the complainant." The decree also provides that:

"The defendant be required to regulate the flow of any water that may be diverted by it so that there shall be no waste water flowing therefrom as the result of such diversion upon or over the lands of the complainant."

And further:

"Defendant is restrained from turning out of its canals any waste water at any point whence the same will naturally flow upon or over the lands of complainant."

These last provisions clearly refer to the future time when the complainant's lands shall not be covered by the waters of Salton Sink, but

shall be lands over which waste water might flow. When that condition arrives, then the defendant must so control and regulate the flow of water in the canal that the same shall not flow upon complainant's land, and it must refrain from turning waste water out of its canal so that it shall flow upon complainant's land. It is the province of equity to deal with conditions as they may arise, and provide a remedy to fit the changing conditions of the case. In Pomeroy's Equity Jurisprudence, § 109, the author says:

"Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is, in fact, no limit to their variety and application. The court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

In section 111 the author says:

"Equity has followed the true principle of contriving its remedies, so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."

This is plainly what the court did in this case. It considered the extraordinary conditions prevailing and the probable changing conditions that will prevail in this large territory, and had in view not only the present and future rights of the complainant, but the present and future rights also of a large number of people residing in that territory. It also had in view the fact that the court had in its final decree awarded full compensation for the destruction of its salt beds and works, its houses, and all other improvements which had been upon its land; the various items aggregating \$456,746.23. The only injury not remedied by the award was that to the freehold or the tenure by which the land is held. From the fact that the salt beds and works had been destroyed and the land itself submerged to a depth of 75 or 80 feet, and no probability of a complete subsidence of the lake under 15 years, it is evident that the title to or ownership of the land was not considered worth very much, and not entitling the complainant to a decree of such a positive and sweeping character that it would practically result in destroying all other interests in Imperial Valley.

When it appeared, therefore, that from the evidence that under all the circumstances water in excess of the substantial needs of the people dependent upon the canal was not diverted from the Colorado river, and that the waste water now flowing into the Salton Sink did not substantially increase the amount of the water therein, it was properly determined, as we think, that the acts of the defendant did not come within the prohibition of the decree.

The judgment of the Circuit Court is therefore affirmed.

CAPEWELL HORSE NAIL CO. v. MOONEY.

(Circuit Court of Appeals, Second Circuit. August 20, 1909.)

No. 289.

1. TRADE-MARKS AND TRADE-NAMES (§ 84*)—REGISTRATION OF MARK—COMMON-LAW TRADE-MARK.

In a suit for infringement of a trade-mark, objection to the validity of complainant's registration of the mark was not material where complainant had a common-law trade-mark in the device alleged to have been infringed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 84.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 71*)—INFRINGEMENT—UNFAIR COMPETITION.

The use of complainant's trade-mark on horseshoe nails to simulate complainant's nails, and produce confusion in the minds of dealers and users, was unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. § 71.*]

Unfair competition. see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harpet & Bros., 30 C. C. A. 376.]

3. COURTS (§ 202*)—JURISDICTION—INFRINGEMENT OF TRADE-MARK.

A bill may be maintained in the federal Circuit Court to restrain the infringement of a common-law trade-mark where other jurisdictional facts are present.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 202.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 19*)—CHARACTER OF MARKS—ORNAMENTATION.

That a trade-mark, consisting of a check figure formed by intersecting lines impressed on the bevel face beneath the edge of horseshoe nails, was an ornamental device which added to the appearance of the nails, and also came to represent quality, did not prevent it from operating as a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 22; Dec. Dig. § 19.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 84*)—INFRINGEMENT—NECESSITY—HORSE NAILS.

It was no defense to a suit to restrain the infringement of plaintiff's trade-mark consisting of a check figure formed of intersecting lines impressed on the bevel face beneath the heads of horseshoe nails that such mark was produced while the nail was passing through one of the rolls of the manufacturing machinery by which the nail was gripped and held in place; it not appearing that the pattern of the gripping surface of the roll was required to be the same as the trade-mark stamped on complainant's nails in order to their successful manufacture.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 84.*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit by the Capewell Horse Nail Company against Walworth M. Mooney. From a decree (167 Fed. 575) for complainant, defendant appeals. Affirmed.

This cause comes here upon appeal from a decree of the Circuit Court, Northern District of New York, enjoining defendant from making, using, or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

selling or offering for sale horse nails bearing the trade-mark of complainant such as have been heretofore made and sold by defendant or bearing any mark so similar to complainant's trade-mark as to be likely to deceive purchasers and the public.

The opinion of the Circuit Court is reported in 167 Fed. 575.

Robert W. Hardie, for appellant.

Edmund Wetmore and Oscar W. Jeffery, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The mark consists of a pattern of small checks, formed by lines crossing each other diagonally, stamped upon the under or bevelled side or front face of the head of the horse-shoe nails and substantially covering the surface of that particular face. It is not a rhomboid, but has four sides, the upper and lower sides being parallel but unequal, the upper being the longest. The right and left sides are of equal length, but not parallel. Within these boundaries are the check marks. No complaint is made of the marking or dressing up of the packages in which defendant's nails are sold by him, but it is in evidence that such packages are frequently broken up and the contents sold to users by the pound, and that users are accustomed to look to markings on the nail itself as identifying the maker. Various marks have been placed on the front face of nail heads by different makers—initials, etc.—and in the case of one maker a globe with intersecting meridian lines (readily distinguishable from complainant's mark). There is also some evidence, not especially persuasive, that check marks had been used on the top of the head as the distinguishing mark of another maker. But the record does not show that this particular mark on the front face was in use before its adoption by complainant and its association in the public mind with horse nails made by it.

Complainant registered this trade-mark, No. 56,605, dated October 6, 1906, and the bill charges infringement of such registration. Several objections to the validity of this registration are urged by defendant, but it is not necessary to discuss that branch of the case, since the court found that complainant had a common-law trade-mark, and that defendant had placed the mark on the front face of his nail heads "for the purpose of simulating complainant's nails and producing confusion in the minds of dealers and users and selling his nails as those of complainant's make." Such acts constitute unfair competition in trade. It is idle to contend that the Circuit Court had no jurisdiction to pass upon the question of common-law trade-mark. There is the requisite diversity of citizenship, and the averment in the complaint as to the statutory amount in dispute is not denied in the answer, nor was any such objection interposed by plea.

The opinion of Judge Ray is most exhaustive and no useful purpose would be served by a rediscussion of the facts. He found that:

"This well-defined check mark was first appropriated and adopted by the complainant as a trade-mark and as its trade-mark, and that it was so adopted and appropriated and thereafter used primarily for the purpose of identifying and distinguishing horse nails of complainant's manufacture from those of all other makers and not as an incident of manufacture or primarily for ornamentation."

Also that:

"The fact of such adoption and appropriation was extensively and sufficiently made known to the public by actual and continued use by complainant as such, same being affixed to its nails, and also by publications and otherwise; that by such use thereof on the goods of complainant's manufacture such check mark came to be generally known to the public as complainant's trade-mark and its goods bearing such mark on the nail came to be publicly known and distinguished as those of complainant's make."

The evidence tends to establish the affirmative of the first of these findings, but the second of them is the more important one and the record fully sustains it. The improved appearance of the nail was immediately taken up as a feature for advertising, and was so advertised as the distinctive characteristic of nails made by the Capewell Company. In *Capewell Horse Nail Co. v. Putnam Nail Co.* (C. C.) 140 Fed. 670, a suit to restrain infringement of this same mark, Judge Colt held that complainant had not proved that it had ever claimed the check as a trade-mark nor that there was any association in the public mind of the check pattern with complainant's nails. Except for a circular issued in 1897 calling attention to the check mark as indicating Capewell nails (which is in the record here), we do not know what was in evidence before Judge Colt, but it must be presumed that the proof before us as to the distribution of nearly 100,000 of these circulars among blacksmiths and hardware merchants, as to the statements of salesmen to customers, and as to the recognition of complainant's nails by this mark was lacking in that case. As to the arguments advanced by defendant that check marks have been used on other articles as ornaments or for purposes of utility, that the mark is ornamental and that such circumstance led to its adoption, that it is indefinite and that complainant uses a different mark on its packages from the one applied to its nails, Judge Ray's opinion sufficiently sets forth the law, and we find no error in his conclusions.

The real point in the case is whether the mark which defendant stamps on its nails, a Chinese copy of complainant's, is put there as a necessary incident of the process of manufacture. Checks or knurling of similar pattern had long been in use to form gripping surfaces, as in forceps, tweezers, vises, etc., where they are cut on the interior surfaces of the jaws of the gripping devices. They had also been used on the handles of various tools to prevent the slipping of the hand of the workman when grasping the tools. Conceding that the general public has the right to use this check mark to form a gripping surface when necessary, the Circuit Court states the proposition as follows:

"Whether the defendant used the check mark in manufacturing horseshoe nails, as a gripping surface or for the purpose of imitating the complainant's mark and manufacture so as to pass off his nails as those of complainant."

The mark on the face of the nail head is produced by a check mark on one of the rolls between which defendant's nails are passed, and he contends that without its use as a gripping surface the nail will frequently slip and a large percentage of imperfect nails will be found in the output.

The record contains a large amount of evidence on this branch of the case, and here, as in the Circuit Court, the proposition above stated

has been argued at great length and with great ability. The most we can say is that the proof leaves it doubtful whether or not the defendant could economically and efficiently manufacture its nails without a gripping surface on its small roller which would impress permanent marks on the front face of the nail head.

On this branch of the case, defendant, who cannot reasonably dispute that his mark there placed is substantially like complainant's, has the burden of proof. But we concur with Judge Ray in the conclusions that:

"If it was necessary to have a gripping surface on the roller, it was not necessary to use the only one of many which would produce [on the face of the nail head] the exact counterpart of complainant's distinguishing mark, which had come to be known in the trade and among manufacturers and dealers in and users of horseshoe nails; [and that] the production of this check mark on the defendant's nails is not a necessary incident of manufacture."

The decree is affirmed, with costs.

SUNSET TELEPHONE & TELEGRAPH CO. v. CITY OF POMONA et al.

(Circuit Court of Appeals, Ninth Circuit. August 7, 1909.)

No. 1,678.

1. TELEGRAPHS AND TELEPHONES (§ 10*) — RIGHTS IN USE OF STREETS — CONSTRUCTION OF STATUTE.

Where a telephone company is authorized by its charter to do an interstate business, and uses its lines for that purpose, a right to build and maintain such lines in the streets of a city for that purpose, conferred by statute, is not limited nor affected by the fact that they are also used to transact local or intrastate business.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*]

Rights of telegraph or telephone companies to use of streets, see note to *Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 44 C. C. A. 155.]

2. COURTS (§ 366*) — FEDERAL COURTS — AUTHORITY OF DECISIONS OF STATE COURTS.

In determining whether a complainant has acquired contract rights under a state statute, which are protected from impairment by the federal Constitution, a federal court will follow the construction placed upon such statute by the highest court of the state, where it is in favor of the contract relied on.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 957; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

3. COURTS (§ 366*) — FEDERAL COURTS — AUTHORITY OF DECISION OF STATE COURTS—"TELEGRAPH."

The Supreme Court of California, in construing section 591 of the Penal Code, which makes it a penal offense for any person to maliciously take down or injure any line of telegraph, held that the word "telegraph," as used in such section, included in its meaning "telephone." Pol. Code Cal. § 4480, provides that with relation to each other the provisions of the four Codes are to be construed as though parts of the same statute. *Held*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 1, 1909.

that, under such rule and decision, Civ. Code Cal. § 536, which provides that "telegraph corporations may construct lines of telegraph along and upon any public road or highway * * * within this state," must be construed by a federal court as including telephone corporations, and as authorizing them to construct and maintain their lines in the streets of cities and towns without first procuring the consent of the municipal authorities.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6895-6897.]

4. CONSTITUTIONAL LAW (§ 134*)—OBLIGATION OF CONTRACTS—CONTRACTS OF STATES PROTECTED.

The construction and maintenance by a telephone company of its lines in the streets of a city under authority conferred by a state statute is an acceptance by it of the provisions of such statute, and creates a contract between it and the state, which is protected from impairment by the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. § 134.*]

5. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

A federal court will not adjudge a state statute invalid, as in violation of the state Constitution, where its validity has been expressly recognized by the highest court of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of California.

For opinion below, see 164 Fed. 561.

Lawler, Allen, Van Dyke & Jutten and Pillsbury, Madison & Suttro, for appellants.

Robert G. Loucks, for appellees.

Beverly L. Hodghead and J. P. Wood, amici curæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question presented on this appeal is whether the appellant, a California corporation, has the right to maintain its telephone poles and wires in the streets of Pomona, which is a city within the state, of the fifth class, without obtaining from the city a franchise therefor. No question is presented by the record respecting the right of the city to make a charge against the company for the use of those portions of the streets actually occupied by it. A controversy between the company and the city and its officers over the question stated having arisen, and the city authorities having commenced to cut down the poles of the company, the suit was commenced by it to secure injunctive relief, resulting, on the final hearing, in a decree dismissing the appellant's bill of complaint, from which decree the present appeal comes.

While, in the court below, the complainant's alleged rights were in part based upon the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the gov-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ernment the use of the same for postal, military and other purposes" (chapter 230, 14 Stat. 221), which act entered into the consideration of the court below and is much discussed on the present appeal by counsel for the appellees, no right growing out of that act is here asserted on the part of the appellant, and hence we omit all reference to it.

The appellant here bases its alleged rights upon certain provisions of the statutes of the state of California, and upon a claimed contract between it and the city, arising out of (1) the construction, maintenance, and operation of its plant in Pomona since August 8, 1898, and, more particularly, the maintenance, operation, and additional construction of its telephone system between the years 1898 and 1902, by and with the acquiescence and consent and under the direction of the city, at a cost of more than \$10,000; (2) the change and removal, in the year 1904, by the appellant, of its poles and wires from Second street, at the request of the city, and their reconstruction on others of its streets, with its approval and under its direction, at a cost to the appellant of more than \$6,716.48; (3) the extension of the appellant's telephone system by the alleged permission of the city, under a resolution thereof of date October 23, 1903, at a cost of about \$1,500; and (4) the assessment and taxation by the city to the appellant of a franchise for several years preceding the commencement of this suit, including the years 1904-05 and 1905-06, and the acceptance and use by the city of two free telephones from the appellant for more than three years prior to and after the commencement of the suit.

The appellant was incorporated in April, 1889, for the purpose of doing a general telephone and telegraph business in the states of California, Oregon, and Nevada, and the then territories of Washington, Utah, and Arizona, and elsewhere. Prior to its incorporation, to wit, on the 8th day of August, 1888, the city of Pomona passed an ordinance, numbered 30, granting to another and distinct corporation, called the Sunset Telephone-Telegraph Company, a franchise to erect telephone poles and wires along the public streets of the city for a period of 10 years, and in the month of May of the following year that company transferred to the appellant all of its property, including whatever rights it acquired under that ordinance. Since the month of May, 1889, the appellant has carried on a general telephone business throughout the state of California, including the city of Pomona, and in many parts of Oregon, Washington, and Nevada; its lines of poles and wires in Pomona being an integral part of its system, and its subscribers and all other persons using its system in any place in the states or territories mentioned, holding conversations from time to time by telephone with other subscribers and persons in other cities and places reached by the said system. On the 8th day of August, 1898, the term of the franchise granted by the aforesaid ordinance numbered 30 to the appellant's aforesaid assignor expired by limitation, notwithstanding which the appellant, according to the record, continued to construct, maintain, and operate its telephone system in Pomona without question on the part of the city as to its right to use the public streets and highways therein for its poles and wires, until

February 2, 1899, when the board of trustees of the city for the first time notified the appellant that it had "no franchise, privilege, or other legal right in the city." The record shows subsequent extensions and changes of the appellant's poles and wires in the city, made with the consent, and in some instances at the suggestion, of the city; but the contentions of the respective parties were such, from and after February 2, 1899, that no consent on the part of the city to the permanent maintenance of the appellant's poles and wires in the streets of the city without the procurement of a franchise from it can be properly affirmed of the matters occurring subsequent to that date. At no time, so far as the record shows, has the appellant disputed the exercise by the city of its police power in the matter of designating and indicating the places where, in the streets and highways of the city, appellant's poles should be set and its wires strung, and until some time in the year 1903 the city had always, through its proper officers, made such designation. In the latter year, upon the making of applications by the appellant for permission to set new poles and to make extensions so as to accommodate its new subscribers, the city refused to grant such applications, upon the ground that the appellant should secure a franchise from it.

In effect, the court below treated the appellant's telephone system as if it constituted two separate and distinct systems—one interstate and the other intrastate. In our opinion there is no valid ground for such a view. The appellant's poles and wires were erected under and by virtue of a charter which empowered it to transact an interstate telephone business. That such companies, like telegraph companies, are important agencies in the transaction of interstate commerce, is well settled. *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 55 C. C. A. 208; *Southern Bell Telephone & Telegraph Co. v. Richmond* (C. C.) 78 Fed. 858, and cases there cited. Each pole and wire erected formed an integral part of that system, just as each rail and tie of an interstate railroad constitutes an integral part of its system; and if there be any statute conferring upon the appellant as an interstate telephone company the right to construct and maintain its poles and wires in the streets of the city of Pomona (subject, of course, to the proper exercise of the police power of the city), we do not understand that any of them can be legally cut down or destroyed by municipal authority. The main question in the case, therefore, is, we think, whether there was any statutory authority for the erection and maintenance in the streets of Pomona of the appellant's poles and wires. As has already been said, the right of the city to impose a charge upon the company for the use of such portions of the city as it actually uses is not here involved.

Municipalities are the creatures of state Legislatures, and are, of course, subject to state legislation. By its Constitution of 1879 California undertook, in respect to certain privileges in the streets of the cities and towns of the state, to control even the power of the Legislature of the state, and by section 19 of article 11 of that instrument made a direct grant to the persons therein designated of the right to lay pipes in the streets of any city or town within the state, for the

purpose of supplying such cities and towns and their inhabitants with water and light, such work to be done under the direction of the superintendent of streets, and under such general regulations as the municipality should prescribe for "damages and indemnity for damages," and with the right on the part of the municipality to regulate the charges therefor. See *People v. Stephens*, 62 Cal. 209. In the subsequent case of *In re Johnston*, 137 Cal. 115, 120, 69 Pac. 973, the Supreme Court of California said:

"When the sovereign authority of the state, either in its Constitution or through its Legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The Constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of, its exercise. The provision that the work is to be done under the direction of the superintendent of streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment."

And the Supreme Court of California then proceeded to refer with approval to the case of *Township of Summit v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146, saying:

"Under the statutes of New Jersey any telephone company was authorized to use the public roads and highways on the line of its route for the purpose of erecting poles thereon to suspend its wires and other fixtures, upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in any incorporated cities and towns of the state should be subject to such regulations and restrictions as might be imposed by the corporate authorities of said cities and towns. The authorities of the township of Summit passed an ordinance that no wire should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township, the court held that this ordinance was not a 'regulation or restriction' under the statute, and was therefore invalid, saying: 'A right to prevent the use of the streets for suspending wires, unless previous consent is obtained, if such a right be lawfully conferred, authorizes a refusal to consent at discretion, and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the Legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration, in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise.'"

The Codes of California took effect January 1, 1873. Section 286 of the Civil Code contained the provision that:

"Private corporations may be formed for any purpose for which individuals may lawfully associate themselves."

At that time there was no specific provision in respect to telephone companies; but section 536 of the same Code provided as follows:

"Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within

this state, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters."

Section 591 of the Penal Code provided that:

"Every person who maliciously takes down, removes, injures or obstructs any line of telegraph or any part thereof, or appurtenances or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor."

Subsequently, and while the above provisions of the California statutes stood as quoted, the case of *Davis v. Pacific Telephone & Telegraph, etc., Company*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, came before the Supreme Court of the state, in which it became necessary for the court to determine whether the word "telegraph," used in section 591 of the Penal Code, also included in its meaning "telephone." In holding that it did, the Supreme Court, in our opinion, in effect held that the same word "telegraph" in section 536 of the Civil Code of California also included within its meaning "telephone," since by section 4480 of the Political Code of the state the Legislature declared that:

"With relation to each other the provisions of the four Codes must be construed (except as in the next two sections provided [which two sections do not bear upon the present question]) as though all such Codes had been passed at the same moment of time, and were parts of the same statute."

And it has been, in effect, so decided by the Supreme Court of California in several cases. *People v. Applegarth*, 64 Cal. 229, 30 Pac. 805; *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860; *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341. In the latter case the court held that the word "elisor," as used in the Code of Civil Procedure, must be deemed to have been used with reference to its definition given in the Political Code—saying that by section 4480 of the Political Code it is provided that:

"With relation to each other the provisions of the four Codes must be construed (except as in the next two sections provided), as though all such Codes had been passed at the same moment of time, and were parts of the same statutes. (The next two sections refer to cases of conflict, and have no application here.) When, therefore, 'elisor' is used in one Code, it must be taken to have been used with reference to its definition given in another Code."

In its opinion the court below held that the case of *Davis v. Pacific Telephone & Telegraph Company*, *supra*—

"is not controlling authority in the federal courts for at least four reasons: First. The word 'telegraph' is so often employed throughout the country in legislative enactments and judicial decisions that its definition would seem to be a matter of general, rather than local, law. Second. The *Davis Case* does not establish a rule of property, but only determines a question of criminal liability. Third. Said case is not a construction of section 536 of the California Code, but simply a definition of the word 'telegraph' in section 591 of the Penal Code of the state. In that case, the court, after giving to the word 'telegraph' a wider scope than consistent with its etymology, says: 'But is this construction justifiable in the case of the penal statute: Section 4 of our Penal Code provides that "the rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice." In contemplation of this action, in recognition of the fact that a substantial identity exists between the two

words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.' Thus it appears that the conclusion of the court was reached only by disregarding the common-law rule of strict construction, which section 4 of the Penal Code requires to be done; whereas section 536 of the Civil Code, being a grant from the state, upon its acceptance by the corporation, should be strictly construed. The Davis Case, therefore, is not a construction of section 536; on the contrary, the inference is a fair one, from the very language of the court, that if it had been passing upon said section under a strict rule of construction a more limited meaning would have been given to the word 'telegraph,' and telephone companies would have been excluded from the operation of the section."

It is undoubtedly true that the federal courts are not bound by the decisions of the state courts upon questions of "general law." We are, however, unable to agree with the learned judge of the court below in his holding that the construction placed by the Supreme Court of California upon the word "telegraph" in the sections of the state statute referred to, the effect of which was and necessarily is to affect property rights situated within the state, falls within any proper meaning of the term "general law" as above used. That the appellant, in erecting its poles and wires in the streets of the city of Pomona, relied for its authority, at least in part, upon section 536 of the Civil Code of California, is not only shown by the proof on the part of the appellant, but also appears from the affidavit of the city attorney of Pomona filed on behalf of the city, in which that affiant says, among other things:

"That William E. Dunn, of Los Angeles, one of the attorneys of said complainant company, has several times appeared before the board of trustees of said city in behalf of said complainant company; that he has also called at my office and consulted with me in reference to the matter; that at the beginning of our endeavor to place Sunset on an equal basis with other citizens and corporations said William E. Dunn relied principally upon section 536 of the Civil Code of the state of California as the source of authority for his said company; and that said section 536 gave his said company rights and privileges to operate within said city of Pomona independent of, separate from, and without regard to the rights or wishes of said city of Pomona or its board of trustees."

That a construction of a state statute by the highest court of the state, which establishes a rule of property within the state, will be adopted by the federal courts, is well-established law. In such cases even the Supreme Court of the United States will change its own ruling to conform to the decision of the highest court of a state. In *Green v. Lessees of Henry Neal*, 6 Pet. 289, 297, 8 L. Ed. 402, the Supreme Court said:

"It is admitted in the argument that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but it is contended that, when such a construction shall be given in conformity to those decisions, it must be considered final—that, if the state shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications; that the federal court, when sitting within a state, is the court of that state, being so constituted by the Constitution and laws of the Union, and as such has an equal right with the state courts to fix the construction of the local law. On all questions arising under

the Constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions, and to determine them; but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because, in the language of the court, in the case of *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495, 'a fixed and received construction by a state in its own courts makes a part of the statute law.' The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it, in the second, if the state tribunals should change the construction."

Nor is it accurate to say, as did the court below in its opinion, that, because a federal question is involved in this case, the construction of the state statute by the highest court of California was not binding upon the federal court, which was therefore at liberty to exercise its own independent judgment in respect to the meaning of the state statute. The rule is that the federal courts will not depart from, but, on the contrary, will follow, the construction of a state statute by the highest court of the state, when such construction is in favor of the contract relied on, and not against it. That rule is thus stated by the Supreme Court of the United States in the recent case of *Powers v. Detroit & Grand Haven Railway Company*, 201 U. S. 543, 556, 26 Sup. Ct. 556, 557, 50 L. Ed. 860, where it is said:

"It has been often decided by this court, so often that a citation of authorities is unnecessary, that the Legislature of a state may, in the absence of special restrictions in its Constitution, make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the state at the instance of the corporation. It is said that we are not concluded by a decision of the Supreme Court of a state in reference to the matter of contract; that, while the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts; and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 533. It is in order to uphold the provision of the federal Constitution that no state shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. But here the Supreme Court of the state has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when upon the face of such statutes a valid contract appears we accept the ruling that the statutes are valid and applicable enactments. In other words, the Supreme Court of the state having sustained the validity of a statute from which a contract is claimed, this court follows that decision, and starts with the question: What contract is shown by statute?"

See, also, *Minnesota Iron Company v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322; *Armour Packing Company v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; *N. Y. Cent. R. R. Co. v. Miller*, 202 U. S. 584, 595, 26 Sup. Ct. 714, 50 L. Ed. 1155; *Jefferson Branch Bank v. Skelly*, 66 U. S. 436, 443, 17 L. Ed. 173, in which last case, in answer to an insistent and persistent claim that it was bound by the construction placed by the Supreme Court of Ohio upon statutory and constitutional provisions of that state, the Supreme Court of the United States said:

"We answer to this, as this court has repeatedly said, whenever occasion has been presented for its expression, that its rule of interpretation has invariably been that the constructions given by the courts of the states to state legislation and to state Constitutions have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts."

Taking section 536 of the Civil Code of California as originally enacted as including telephone as well as telegraph companies, as we think must be done in view of the decisions of the Supreme Court of the state to which reference has been made, it cannot be doubted that the erection by the appellant of its poles and wires in Pomona in the year 1889, and their maintenance and operation, was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation. Specific reference need not, therefore, be made to the franchise acts of the state, the first of which was passed in 1893 (St. Cal. 1893, p. 288, c. 204), further than to say that by those of March 11, 1901 (St. Cal. 1901, p. 265, c. 103), and March 20, 1905 (St. Cal. 1905, pp. 491, 492, c. 385), both telegraph and telephone lines doing an interstate business are expressly excepted from their provisions requiring a franchise from a municipality.

We have not overlooked the contention on the part of the appellees that section 536 of the Civil Code of California violates certain provisions of the state Constitution, and is, therefore, void. In considering such a question Mr. Justice Harlan, while sitting in the Circuit Court in the case of *Smith v. Fond du Lac*, 8 Fed. 289, said:

"I have not forgotten what was said by the Supreme Court of the United States, when required in *Fletcher v. Peck*, 6 Cranch, 128, 3 L. Ed. 162, to determine whether the Legislature of Georgia had in a particular enactment violated the Constitution of that state. The court there said, speaking by Chief Justice Marshall, that 'the question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, be decided in the affirmative in a doubtful case.' The more recent decisions of the same court justify me, I think, in saying that a federal court, in determining the rights of parties under a state law, will never, in a doubtful case, adjudge such law to be in conflict with the state Constitution, unless sustained in so doing by some distinct adjudication of the highest court of the state."

Certainly, in view of the decision of the Supreme Court of California in the *Davis Case*, and especially the more recent decision of the same court in *Western Union Telegraph Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023, where the court expressly recognized the validity of that section by holding that the Western Union Telegraph Company had the right to have its telegraph lines in the streets of the city of Visalia not only by the act of Congress of July 24, 1866, "but also from section 536 of our Civil Code," no federal court would be justi-

fied in holding that that section violates any provision of the Constitution of California.

The conclusion to which we have come is, we think, sustained by the cases of *Abbott et al. v. City of Duluth* (C. C.) 104 Fed. 833; *City of Duluth v. Abbott et al.*, 117 Fed. 137, 55 C. C. A. 153; *City of Wichita v. Old Colony Trust Co.*, 132 Fed. 641, 66 C. C. A. 19; *Northwestern Exchange Telephone Co. v. City of Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *City of Duluth v. Duluth Telephone Co.*, 84 Minn. 486, 87 N. W. 1127; *State ex rel. Wisconsin Telephone Co. v. City of Sheboygan et al.*, 114 Wis. 505, 90 N. W. 441, 442; *Farmer & Getz v. Columbiana Co. Telephone Co.*, 72 Ohio St. 526, 74 N. E. 1078, 1080; *State ex rel. Rocky Mountain Bell Telephone Co. v. Mayor, etc., of City of Red Lodge*, 30 Mont. 338, 76 Pac. 758; *Chamberlain et al. v. Iowa Telephone Co.*, 119 Iowa, 619, 93 N. W. 596; *State v. Nebraska Telephone Co.*, 127 Iowa, 194, 103 N. W. 120; *Wisconsin Telegraph Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828—and by the decision of Judge Beatty in the case of *Sunset Telephone & Telegraph Co. v. City of Eureka et al.* (C. C. N. D. Cal.) 172 Fed. 755.

For the reasons stated, the judgment is reversed, with directions to the court below to enter judgment for the complainant.

GILBERT, Circuit Judge (dissenting). By the opinion of the majority of the court it is held that the appellant has acquired a franchise for the use of the appellee's streets under and by virtue of section 536 of the Civil Code of California, enacted March 21, 1872, which provided that:

"Telegraph corporations may construct lines of telegraph along and upon any public road or highway along or across any of the waters or lands within this state," etc.

It is matter of common knowledge that, at the time of the adoption of the statute, telephones for public use were unknown. The opinion does not attempt to construe the statute, or to say that it authorizes the construction and maintenance of telephone lines; nor does it deny the doctrine that in construing a statute that meaning must be given to its words which they had at the date of the act, a doctrine which is well established by the authorities. 26 Am. and Eng. Enc. of Law, 611, and cases there cited. In *Wadsworth Board of Works v. United Telephone Co.*, 13 Q. B. D. 914, it was said that a word used in a statute must receive the popular meaning existing at the time when the act of Parliament was passed. In *Sharpe v. Wakefield*, 22 Q. B. D. 242, Lord Esher said:

"Words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted, or has altered the previous statute."

Nor is it denied that in *Richmond v. Southern Bell Telephone Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162, the Supreme Court, in construing a statute similar to section 536, held that its provisions had no application to telephone companies. Said the court in that case:

"In common and technical language alike telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies, therefore, are not within the category of the grantees of the privileges conferred by the statute."

But the opinion of the majority of this court assumes that all of these considerations are to be disregarded, and that section 536 of the Civil Code of California must be held to include telephone companies, under the doctrine that a federal court is bound to follow the construction placed upon a state statute by the highest judicial tribunal of the state. It is not to be doubted that, if the Supreme Court of California has placed a construction upon this precise statute, that construction must be adopted by a federal court. It is not asserted that this statute has ever been construed by the Supreme Court of California; but it is said that, because that court has held in *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 313, 57 Pac. 764, 59 Pac. 698, that the word "telegraph" as used in another statute, a section of the Criminal Code of that state, should be construed to include "telephone," a construction has been placed upon the word "telegraph" as used in section 536 which this court is bound to follow. This proposition, I confidently assert, is unsupported by reason or authority. While there is a *prima facie* presumption that the meaning of a word repeatedly used in the same statute is identical in all cases, unless there is something to show a different intention, the presumption is at best a weak one, or, as *Endlich* says (section 387), "it is not of much weight." But such a *prima facie* presumption has not been held to apply to words used in different statutes. On the contrary, the doctrine is well sustained that there is no presumption that a word is used in the same sense in different statutes. In *L. & N. R. Co. v. Gaines* (C. C.) 3 Fed. 266, it was held that the fact that the Constitution of a state uses a word in one sense in one clause is no evidence that it is used in the same sense in every other clause, and that even in the same statute a word is often used with distinctly different meanings; the court giving to it in each instance the meaning which the Legislature intended it to have in that particular connection. In *State v. Knowles*, 90 Md. 654, 45 Atl. 878, 49 L. R. A. 695, the court said:

"It may, indeed, well be conceded that, where a word susceptible of more than one meaning is repeated in the same act or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense; but where the subject-matter to which the word refers is not the same in both clauses, or where the surrounding circumstances are different, this presumption must yield to an adverse presumption, furnished by an analysis of the various purposes of the law and of the language in which those purposes are expressed."

See, also, *Henry v. Trustees*, 48 Ohio St. 676, 30 N. E. 1122, and cases there cited.

Section 536 of the Civil Code and section 591 of the Penal Code are subject to different rules of construction. The latter was, in the *Davis* Case, construed under the authority of section 4 of the Penal Code, which provided that:

"The rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice."

But the construction of section 536 is controlled by the general rule, which is thus expressed in *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353:

"Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication."

The provision of section 4480 of the Political Code that, with relation to time, the provisions of the four Codes must be construed as though all such Codes had been passed at the same moment of time and were parts of the same statute, does not purport to say that a word used in the statutes shall have the same meaning wherever used, and it has no bearing upon the question whether the Supreme Court of California has construed section 536 of the Civil Code; and the decision of that court in *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, that under section 4480 the word "elisor," as used in Code Civ. Proc. § 226, must be deemed to have been used with reference to its definition given in the Political Code, has no application here, for the reason that the word "telegraph" has not been defined in either of the Codes, as was the word "elisor."

In *Wood v. Brady*, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981, it was held that the construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute, although the language of the two may be similar. In *Carroll v. Carroll's Lessee*, 16 How. 275, 14 L. Ed. 936, it was held that the construction placed upon a state statute by the highest court of that state, in a case where the decision did not necessarily involve the construction of the statute, is not binding on the federal courts. In *Caesar v. Capell* (C. C.) 83 Fed. 403, it was held that, while federal courts follow the construction of the state statutes given by the courts of the state, they are not required to adopt a construction based on implications from the language of a judicial opinion. In *Southern Ry. Co. v. Simpson*, 131 Fed. 705, 65 C. C. A. 563, it was held that the opinion of a state court of last resort construing a state statute is conclusive on the federal courts sitting in such state to the extent only of the precise question decided. Said Judge Lurton, for the court:

"The opinion as a construction of the statute is authoritative to the extent of the precise question decided, and no farther."

I submit that not only has section 536 not been construed by the Supreme Court of California, but that we have no means of knowing, from any of the decisions of that court, what construction would be placed upon it in a case involving its meaning. I think that the opinion of the court below (164 Fed. 561) correctly disposes of the questions of law involved in the case, and that the judgment should be affirmed.

MISSOURI PAC. RY. CO. v. CASTLE.

(Circuit Court of Appeals, Eighth Circuit. August 9, 1909.)

No. 2,995.

1. COMMERCE (§ 10*)—INTERSTATE RAILROADS—FELLOW SERVANTS—STATE STATUTES LIMITING DOCTRINE.

Laws Neb. 1907, p. 191, c. 48, § 1, which provides, inter alia, that railroad companies operating trains within the state shall be liable for injuries to employes resulting from the negligence of other employes, is comprehensive in its terms, and applies to railroads doing an interstate business, and governs the liability of such companies to employes operating trains engaged in interstate commerce in the absence of valid legislation by Congress covering such liability.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. CONSTITUTIONAL LAW (§§ 245, 249*)—EQUAL PROTECTION OF LAWS—STATUTES ESTABLISHING DOCTRINE OF COMPARATIVE NEGLIGENCE IN ACTIONS AGAINST RAILROADS.

Laws Neb. 1907, p. 192, c. 48, § 2, which provides for the application of the rule of comparative negligence in actions by employes against railroad companies for personal injuries, and also that "all questions of negligence and contributory negligence shall be for the jury," is within the constitutional power of the Legislature, and does not deprive the defendant in such cases of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702, 710; Dec. Dig. §§ 245, 249.*]

3. COURTS (§ 352*)—RECEPTION OF EVIDENCE—OFFER.

Under the rule of the federal courts, an offer to prove certain facts may be made without first propounding a question to a witness as a basis for such offer, and, if the offer is rejected, error may be assigned thereon where there is nothing to indicate that the offer was not made in good faith, or that the proof would not have been produced if permitted.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 352.*]

4. WITNESSES (§ 211*)—COMPETENCY—PRIVILEGED COMMUNICATIONS.

Where plaintiff's leg was crushed by being run over by a car of one of defendant's railroad trains, which facts were known and not in dispute, a statement made by plaintiff to defendant's physician who came to treat his injury as to the manner in which his foot came to be caught under the wheel was not a privileged communication within Civ. Code Neb. § 333 (Comp. St. Neb. 1901, § 5907), which prohibits a physician from disclosing "any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office," having no relation to the treatment of the injury, and the exclusion of such statement when offered in evidence was error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 773; Dec. Dig. § 211.*]

In Error to the Circuit Court of the United States for the District of Nebraska.

James W. Orr (George G. Orr and B. P. Waggener, on the brief), for plaintiff in error.

T. J. Mahoney (J. A. C. Kennedy, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Ozro Castle brought this suit against the Missouri Pacific Railway Company to recover damages for personal injuries received by him on October 2, 1907, while in the employ of the company at Auburn, Neb. It is alleged in the petition that said injuries resulted from the negligence of fellow servants. The plaintiff recovered a verdict, and the defendant has removed the case to this court by writ of error. It appeared at the trial that the train upon which plaintiff was employed at the time he was injured started October 1, 1907, from St. Joseph, Mo., for Auburn, Neb., via Atchison, Kan., and was engaged in interstate commerce. Plaintiff based his cause of action upon section 1, c. 48, p. 191, Laws Neb. 1907, which was in force on the date of the injury. Said section reads as follows:

"Section 1 (Railway Company's Liability to injured employé). That every railway company operating a railway engine, car, or train, in the state of Nebraska, shall be liable to any of its employés who at the time of the injury are engaged in construction or repair work, or in the use and operation of any engine, car, or train, for said company, or, in case of his death to his personal representatives for the benefit of his widow and children, if any, if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employés, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works."

It is contended that said section does not include a railway company engaged in interstate commerce in the state of Nebraska, but the language of the section clearly includes all railroads operated in the state. It is also contended that the section above quoted is inoperative so far as employés of the defendant engaged in interstate commerce are concerned by reason of the act of Congress approved June 11, 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]). As this last named act was declared to be unconstitutional in *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, it must be considered as never having existed for any purpose. Therefore Congress had not legislated upon the subject contained in section 1 of the Nebraska law above quoted at the time that plaintiff received his injuries. In the absence of legislation by Congress, it was competent for the state to legislate. *Chicago, Milwaukee, etc., Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688.

It is further contended that section 2, c. 48, p. 192, Laws Neb. 1907, is repugnant to article 14 of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of a citizen of the United States, deprives the defendant company of its property without due process of law, and denies to it the equal protection of the laws. The section referred to reads as follows:

"Sec. 2 (Same; contributory negligence). That in all actions hereafter brought against any railway company to recover damages for personal injuries to any employé or when such injuries have resulted in his death, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison but damages shall be diminished by the jury

in proportion to the amount of negligence attributable to such employé, all questions of negligence and contributory negligence shall be for the jury."

Conceding but not deciding that said section would be binding upon the federal courts sitting in Nebraska, it has no such effect as is claimed by defendant. In view of the history of trial by jury and the distribution of governmental powers by the Constitution of Nebraska, we cannot presume for a moment that the Legislature had reference to any questions except those of fact, when it used the language: "All questions of negligence and contributory negligence shall be for the jury." As thus interpreted the language quoted is simply declaratory of existing law. *Kiley v. Chicago, M. & St. P. Ry. Co.* (Wis. 1909) 119 N. W. 309.

It is only when in the opinion of the court there is no question of negligence or contributory negligence as a matter of fact that cases are taken from the jury, under existing practice. In so far as the statute creates the rule of comparative negligence, it in no wise tends to destroy any of the constitutional rights of defendant. The rule of comparative negligence was adopted by some courts of their own motion, and not until it was demonstrated that the rule is impracticable in cases tried to a jury was it discarded, as in theory it is a just rule and is continually enforced by the courts of admiralty, where the trained minds of judges are able to compare the faults of vessels in collision. It is not a question here, however, whether the rule ought to be adopted, but whether the Legislature of Nebraska had the power so to do. Of this we have no question. If the Legislature has the power to take away the defense that the injury sued for was committed by fellow servants, it certainly has the right to modify the rule that any negligence of a plaintiff directly contributing to his injury will defeat his recovery. *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. Louis Railway Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Tullis v. Railway Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; *Kiley v. Chicago, M. & St. P. Railway Co.* (Wis.) 119 N. W. 309.

As the statute only acts prospectively, defendant cannot say that it takes away any vested right. The importance of the question as to whether section 2, above quoted, is binding upon the federal courts sitting in Nebraska, so far as the rule of comparative negligence is concerned, is largely minimized by section 2 of the act of Congress approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65), which establishes practically the same rule. At the trial the defendant called as a witness in its own behalf, Dr. W. H. Ramsey, who being examined in chief testified as follows:

"Q. What is your full name? A. W. H. Ramsey.

"Q. What is your profession? A. Physician and surgeon.

"Q. What position, if any, do you hold with the Missouri Pacific Railway Company? A. I am one of the surgeons.

"Q. Did you hold the same position in October of last year? A. Yes, sir.

"Q. Do you remember of an accident happening to Mr. Castle, the plaintiff in this case? A. Yes, sir.

"Q. Did you examine his injury? A. Yes, sir.

"Q. Describe to the jury in what manner he was injured.

"Mr. Mahoney: Before that question is answered, if your honor please, I desire to ask the witness a question or two in respect to his relation to the case, bearing upon his competency.

"By Mr. Mahoney:

"Q. Doctor, where did you examine him? A. At the hospital.

"Q. In Omaha? A. Yes, sir.

"Q. Did you treat him? A. He arrived in the evening, and, no; I hadn't treated him before that.

"Q. But did you examine him for the purpose of treating him? A. Yes, sir.

"Q. What examination you made was for that purpose? A. Yes, sir.

"Q. The examination you made was for the purpose of diagnosing the case to become informed so you could properly treat him? A. Yes, sir.

"Q. In the discharge of your duties as a surgeon? A. Yes, sir."

Upon objection of Mr. Mahoney, the above question and an offer made thereon was excluded, and, without asking any other question, counsel for defendant then made the following offer:

"Defendant also offers to prove by this witness that he had a conversation with the plaintiff in which the plaintiff told him that the injury was sustained by plaintiff by having his foot slip off the brakebeam and onto the "T" rail of the track and one of the car wheels of the first car passing over his foot.

"Mr. Mahoney: That is objected to for the reason that it is incompetent, and for the reason that the witness is incompetent to testify respecting the information acquired by him under the circumstances which he has disclosed, such testimony being forbidden by statute, and the witness being made incompetent to testify thereto, for the further reason that there has been no foundation laid for the making of such an offer."

This objection was sustained by the court and the ruling excepted to by counsel for defendant. It is claimed that no error can be assigned here upon the above ruling of the court for the reason that no question was propounded by counsel upon which to base the offer and cases are cited in support of this contention, but we think the rule established in the federal courts is as stated by Chief Justice Waite in *Scotland County v. Hill*, 112 U. S. 186, 5 Sup. Ct. 95, 28 L. Ed. 692, as follows:

"It is claimed, however, that error cannot be assigned here on the exception to the exclusion of the oral proof, because the record does not show that any witness was actually called to the stand to give the evidence, or that any one was present who could be called for that purpose, if the court had decided in favor of admitting it, and we are referred to the cases of *Robinson v. State*, 1 Lea (Tenn.) 673, and *Eschbach v. Hurtt*, 47 Md. 61, 66, in support of that proposition. Those cases do undoubtedly hold that error cannot be assigned on such a ruling unless it appears that the offer was made in good faith, and this is in reality all they do decide. If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof before it rejects the offer; but, if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly."

Under the above rule we must treat the offer as made in good faith, and presume that the testimony offered would have been produced if counsel had been permitted to do so. Whether or not counsel for defendant ought to have been permitted to show the facts contained in

his offer depends upon the true construction of section 333 of the Civil Code of Nebraska, which is as follows:

"No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

The above section of the Civil Code of Nebraska was before this court in the case of Union Pacific Railway Co. v. Thomas, 152 Fed. 365, 81 C. C. A. 491. It was there said:

"The essential elements of a privileged or a confidential communication under the Nebraska statute are: (1) The relation of physician and patient; (2) information acquired during this relation; and (3) the necessity and propriety of the information to enable the physician to treat the patient skillfully in his professional capacity."

While the offer itself does not disclose that the statement was made to the witness under the same circumstances as the information sought by the previous question and offer which were excluded, in fairness, it will be so treated. The question then is narrowed down to this. Was the fact that plaintiff told the witness that he was injured by having his foot slip off the brake beam onto the "T" rail of the track and one of the car wheels of the first car passing over his foot a confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

It is obvious that the admissibility of evidence sought to be excluded under the statute, above quoted, must be determined by the facts in each case. In the Thomas Case above referred to the injuries were internal. From what particular disease the plaintiff was suffering, and what was the proximate cause thereof, was in doubt. Under such a state of facts answers to questions as to how the plaintiff was injured, and as to what physical injuries she received were clearly necessary to enable the physician to prescribe and hence, were privileged. In the case at bar there was beyond question a crushed right leg about four inches above the ankle. The injury beyond question was caused by one of the defendant's cars passing over plaintiff's leg. Whether the injury was caused by plaintiff's or defendant's negligence was the pivotal question in the case. It is impossible to imagine anything that Castle, the injured person, could say to the physician in reference to the cause of the injury that would in any way throw any light upon the manner of treating the same. How the leg came to be crushed was for the purpose of treatment absolutely immaterial. What plaintiff told the witness was of no assistance whatever to enable him to discharge the functions of his office.

The statute is in derogation of the common law, and often excludes the best evidence. It should not, therefore, be extended to matters of evidence not coming clearly within its provisions as the object and purpose of all trials is the development of the true facts in each case. We find no cases which under similar circumstances have held testimony such as was offered in the present case inadmissible, but, on the contrary, we find the following decisions which hold such evidence to

be admissible under similar or like statutes. *Smith v. John L. Roper Lumber Co.*, 147 N. C. 62, 60 S. E. 717, 125 Am. St. Rep. 535; *Linz v. Mass. Mut. Life Ins. Co.*, 8 Mo. App. 365; *Green v. Terminal Railroad Association*, 211 Mo. 18, 109 S. W. 715; *Griebel v. Brooklyn Heights Railroad Co.*, 68 App. Div. 204, 74 N. Y. Supp. 126; *Travis v. Hahn*, 119 App. Div. 138, 103 N. Y. Supp. 973; *Brown v. Rome, W. & O. R. Co.*, 45 Hun (N. Y.) 439; *De Jong v. Erie Railroad Co.*, 43 App. Div. 427, 60 N. Y. Supp. 125; *Kansas City, Fort Scott & Memphis Railway v. Murray*, 55 Kan. 336, 40 Pac. 646; *Collins v. Mack*, 31 Ark. 684; *Griffiths v. Metropolitan St. Railway Co.*, 171 N. Y. 106, 63 N. E. 808; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433.

We think the court erred in sustaining the objection to the testimony offered, and for such error we reverse the judgment and grant a new trial; and it is so ordered.

METROPOLITAN TRUST CO. OF NEW YORK v. McKINNON.

(Circuit Court of Appeals, Second Circuit. June 16, 1909.)

No. 285.

1. BANKS AND BANKING (§ 109*)—PURCHASE OF SECURITIES—ACTS OF OFFICER—TITLE.

Where a bank purchased certain securities at the suggestion of its vice president, who announced that he would make the purchase on behalf of the bank, and subsequently informed the directors that he had done so, and still later turned over certain of the securities to the bank with a letter authorizing it to receive the balance, and at the trial of an action for conversion acknowledged that his intention had been to turn over the securities to the bank on payment of a note for which they were pledged, his possession of the securities was the possession of the bank, and title to the securities was in it.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 109.*]

2. SUBROGATION (§ 22*)—REDEMPTION OF PLEDGED SECURITIES.

Where certain stock was purchased by a bank's vice president and another in separate shares, and all of the stock was pledged for a loan to both, the bank, being compelled to pay the whole loan in order to release its share of the stock, was subrogated to the rights of the pledgee as against the balance.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 48; Dec. Dig. § 22.*]

3. BANKS AND BANKING (§ 260*)—ULTRA VIRES ACTS—PURCHASE OF BANK STOCK.

Purchase of national bank stock for speculation by a national bank is ultra vires.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 977; Dec. Dig. § 260.*]

4. CORPORATIONS (§ 385*)—ULTRA VIRES CONTRACT.

The obligation of an ultra vires contract is void, whether executed or executory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1545-1547; Dec. Dig. § 385.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. BANKS AND BANKING (§ 101*)—PURCHASE OF STOCK—ULTRA VIRES ACT.

That a bank's purchase of stock in another bank was ultra vires did not prevent it from getting title to the stock, both because an ultra vires contract is simply unauthorized and not forbidden by law, and because the passing of title depends on the intention of the parties and the performance of the requisite formalities by the parties, regardless of whether they are engaged in an illegal enterprise.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 237, 238; Dec. Dig. § 101.*]

6. ESTOPPEL (§ 56*)—CHANGE OF POSITION.

Where a pledgee of certain bank stock did not act on the owner's repudiation of the pledge, the owner was not estopped to change its position, and by subsequently tendering the amount of the debt acquire a right to the stock.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

This is an action of trover, originally brought by the receiver of the National Bank of North America in New York, for whom the present defendant in error was later substituted as agent for stockholders. For convenience the plaintiff in error will be referred to as the "trust company," and the defendant in error as the "bank." By stipulation it was agreed that, instead of damages, the bank, if successful, should be entitled to 1,000 shares of stock in the Chase National Bank upon the payment of \$150,000, with interest from June 14, 1907, and judgment was entered in accordance with the stipulation. The case was otherwise tried as though it were an ordinary action of trover for the value of the shares of stock.

On January 10th Clinton Gilbert and Charles W. Morse mutually agreed to purchase jointly 5,630 shares of stock in the Chase National Bank at the price of \$1,107,230 from certain third persons. One-quarter of this sum they paid to the sellers at once, of which Gilbert contributed \$50,000 and Morse \$226,807.50, which was the balance. Of the sum paid by Morse, he received one half from the bank, and the other half from the Van Norden Trust Company. The bank received a note of one W. W. Robinson for the half which it paid, and the Van Norden Company the note of Edward B. Wire, for the other half. Robinson was an official in the Van Norden Company, and Wire was an official in the bank.

Gilbert, between January 10, 1907, and June 10, 1907, sold to sundry individuals 130 shares and to Arthur P. Heinze, 2,815 shares, both at a large profit. Heinze obtained part of the purchase price of these shares from the trust company, as follows: He made a note for \$150,000 dated June 12, 1907, to his own order, which he indorsed, and which recited that it was secured by 500 shares of Chase National Bank stock, and 2,000 shares of United Copper Company stock, and this note and collateral he delivered to Morse. Before this, 500 shares of the Chase National Bank stock had come into the possession of Morse, under circumstances which will be stated hereafter. These 500 shares, together with the 500 shares which belonged to Heinze, Morse pledged with the trust company for a loan of \$150,000, for which he gave his own note, and with the proceeds of which he paid part of the purchase price of the Chase National Bank stock to the sellers. On January 3, 1907, at a meeting of the bank's directors, Morse, who was at that time vice president, had informally told the bank's directors at a regular meeting that a handsome profit could be made by speculating in Chase National Bank stock. It was then also informally agreed among the directors that Morse should make the purchase, and that the bank should take a one quarter interest, and the Van Norden Company another quarter interest; Gilbert retaining his half under the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract before alluded to. On January 17, 1907, Morse had also informed the directors, at another regular meeting, that the transaction had been completed.

On June 18, 1907, and after the sellers of the stock had been wholly paid, there remained in the possession of Gilbert and Morse 2,685 shares of the Chase National Bank stock, fully paid. In addition to this, there remained in Morse's hands the sum of \$73,509.45, which was applicable in repayment of the sum that Morse had received from the bank and the Van Norden Company, as stated above. This sum he returned in equal shares to the bank and the Van Norden Company, so that the total sum paid by each of these institutions was \$76,649.02, for 670 shares of the stock. Gilbert, in whose name the certificates of stock were issued, indorsed and at various times before June 18, 1907, turned over to Morse, 1,340 shares of stock, of which Morse gave 670 to the Van Norden Company and 170 to the bank; the remaining 500 shares having been theretofore pledged with the trust company, as has already been shown. In regard to these, Morse wrote a letter on June 14, 1907, directed to the trust company, authorizing the delivery to the bank of all the collateral which they held against Morse's note of \$150,000.

On October 30, 1907, the bank's president advised the trust company that it claimed the right of possession of all this collateral, subject to the pledge; but later, and on November 27, 1907, the president again wrote the trust company, this time advising them that the bank would not pay the loan, and it authorized the trust company, on payment of the loan by Morse, to deliver the collateral to him. On January 30, 1908, by a second change of position, the bank made tender of the full amount of the note and demanded of the trust company the shares in question. Prior to that time, however, Morse had himself made claim for the stock, and has since brought action against the trust company, which, for some reason not disclosed, did not interplead him in this action.

At the close of the evidence, the learned circuit judge directed a verdict for the plaintiff.

Herbert Parsons, for plaintiff in error.

Underwood, Van Vorst & Hoyt (J. Markham Marshall, of counsel), for defendant in error.

Before COXE and NOYES, Circuit Judges, and HAND, District Judge.

HAND, District Judge (after stating the facts as above). Only two questions arise in this case: First, whether the bank had the immediate right of possession to 1,000 shares of stock; and, second, whether it has estopped itself as against the trust company. As the learned judge at trial directed a verdict, the plaintiff in error is entitled to the most favorable construction possible of all the testimony. There appears to be no basis in the bill of exceptions for the statement in the brief of the defendant in error that both sides requested the direction of a verdict.

Of the 1,000 shares pledged with the trust company, Heinze undoubtedly owned one half, subject to the pledge, and either Morse or the bank owned the other half. The question, then, is, in whom legal title to that other half was vested, Morse or the bank? All the purchase price came from the bank's treasury, although it is true that, in order to preserve the color of legality for the transaction, notes of equal amount were exchanged between the Van Norden Company and the bank, which were subsequently canceled without payment; but title at law depends upon intention, not equity and it does not fol-

low that Morse did not hold title to the shares, even if it were subject to a resulting trust.

However, there was no question of fact before the court as to the character of Morse's holding, because, before the purchase, he had announced that he would make it on behalf of the bank, and subsequently he informed the other directors that he had purchased it for the bank. Later he turned over 170 shares to the bank, and gave it a letter authorizing it to receive the rest of the stock, together with Heinze's. Upon the trial he acknowledged that he had meant to turn over the stock to the bank upon the payment of Heinze's note. Morse's possession of the certificates was therefore clearly intended, when he took them, to be as agent for the bank, and the title to the 500 shares of stock vested in the bank, whatever Morse may now claim.

Morse, however, pledged these certificates with the trust company along with Heinze's shares, for \$150,000, and the question then arises whether, upon tender, the bank could demand, not only its own shares, but Heinze's shares. Concededly the bank had no interest in Heinze's shares, except that it would not obtain its own without tender of the principal and interest of the whole loan, since the trust company had the right to retain possession of all the shares until the loan was paid. Must it, then, having paid the loan, leave with the bank Heinze's shares for the bank to turn over to Heinze? Or could it subrogate itself to the pledge of the bank as against Heinze's shares, in order to release its own? I think there can be no doubt that it could. In paying the loan the bank was not a mere intermeddler. It was protecting its own property, and that it could not do, except by releasing Heinze's shares. Being wrongfully put in this position by one of its own agents, it was not a volunteer, and it might demand of the trust company Heinze's shares, and hold them under the same pledge as the trust company itself enjoyed. If this be true, then, upon tender of the full amount it was entitled to the possession of all of the collateral; one half as owner, and the other as substituted pledgee.

The plaintiff in error makes two objections: First, that the purchase of National Bank shares by the bank was *ultra vires*; the second, that the bank is estopped. It is undoubtedly true that the purchase by the bank was *ultra vires* (*California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *Concord First National Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; *First National Bank v. Converse*, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537); and it is also true that the obligation of an *ultra vires* contract is void, whether executed or executory (*De La Vergne v. German Savings Institution*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65). So there is no question but that, if the bank had sued the sellers or Gilbert for the shares of stock, even after the payment by Morse, it could not have recovered on the obligation; but in this case the bank did not need to avail itself of any obligation whatsoever. When Morse got the certificates, he took them as agent only, as I have said, and his intention was that the title pass from Gilbert directly to the bank, for whom he merely received custody. To succeed, the plaintiff in error must assert that, because the bank's title arose from the per-

formance of an ultra vires contract, therefore it never got title. This is wrong, for two reasons: First, because an ultra vires contract is not forbidden by law, but simply not authorized; second, because it makes no difference, anyway, to the passage of title, whether or not the parties are engaged in an illegal enterprise, provided they intend title to pass and perform the requisite formalities. While the law will not compel by its sanctions the performance of acts promised by contract, but forbidden by law, it does not change the effect of the civil acts of persons merely because they are engaged in violating the law. These acts continue to have the usual consequences.

So much for the first objection. As to the second, the trust company does not show that it acted upon the bank's repudiation of the transaction by the letter of November 27, 1907. If so, there was no estoppel in pais, and the bank might repent of its repudiation and subsequently make a tender, which it did.

There was therefore no question for the jury, and the judgment should be affirmed.

LATTA v. CHICAGO, ST. P., M. & O. RY. CO.†

(Circuit Court of Appeals, Eighth Circuit. July 26, 1909.)

No. 2,975.

1. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—CONTRACTS LIMITING LIABILITY—VALIDITY—LAW OF NEBRASKA.

Const. Neb. art. 11, § 4, which provides that "the liability of railroad corporations as common carriers shall never be limited," applies to contracts involving interstate commerce, and under such provision, as construed by the Supreme Court of the state, contracts made in Nebraska for the shipment of horses to another state, in which, in order to obtain the rate of freight named in the tariff schedules of the company, based on such valuation, the shipper is obliged to agree that the liability of the company shall, in case of loss, be limited to \$100 per head, regardless of actual value, are void as to such attempted limitation, and the shipper may recover the actual value.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 218.*]

2. CARRIERS (§ 46*)—INTERSTATE COMMERCE—LIABILITY FOR LOSS OF PROPERTY—LAW GOVERNING.

The Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909]), relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," leaves a shipper free to resort to the laws of a state applicable to his contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 46.*]

In Error to the Circuit Court of the United States for the District of Nebraska.

H. C. Brome (M. R. Hopewell and W. M. Hopewell, on the brief), for plaintiff in error.

Carl C. Wright (B. T. White, on the brief), for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 11, 1909.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Latta brought this suit in a state court in Nebraska against the Chicago, St. Paul, Minneapolis & Omaha Railway Company to recover damages from it as a common carrier for the breach of a contract to transport from Tekamah, Neb., to Waterloo, Iowa, one mare and colt. The petition alleges that, by the negligence of the defendant, said mare and colt were burned while being transported on the line of defendant's railway in the state of Nebraska, and claims damages to the amount of \$3,024.38. The defendant removed the suit into the Circuit Court of the United States for the District of Nebraska, where it was tried by a jury. As a part of the cross-examination of the plaintiff, counsel for defendant offered in evidence the contract under which said property was to be transported, also a paper called a "shipping order." The offering of these instruments was objected to by counsel for plaintiff, but the trial court overruled the objection and admitted them in evidence. The plaintiff gave testimony tending to prove the alleged negligence and how the loss and injury occurred. He then offered evidence tending to show that the value of the mare and colt was \$2,500. Counsel for defendant objected to this testimony in regard to value on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the contract. Counsel for plaintiff then offered to prove by other witnesses the allegations of his petition. Whereupon the trial court ruled that the defendant was liable in any event for the loss of the mare and colt, but that it was only liable for the amount specified in the contract, and, against the objection of counsel for plaintiff, directed the jury to return a verdict in favor of plaintiff in the sum of \$220.09. It was shown at the trial that the rate of \$24.38 charged by the defendant for the transportation of the animals mentioned was its regular tariff based upon the valuation stated in the contract. It was also conceded at the trial that said tariff rate had been filed with the Interstate Commerce Commission, and published as required by law, and that the rules, regulations, and tariffs of the defendant on file with the Interstate Commerce Commission disclosed that the above named rate applied to the limited liability contract in use by the company for the transportation of live stock.

The errors assigned herein are that the court erred in refusing to permit the plaintiff to show the actual damage he had sustained, and in so charging the jury as to restrict their verdict to the sum above stated. The contract between plaintiff and defendant for the transportation of the mare and colt so far as is material to the question now under investigation was in the following language:

"Read this Contract.

"Chicago, St. Paul, Minneapolis & Omaha Railway Co.

"It is the desire of this company that this contract shall be executed on all shipments of live stock in car load lots or less. In case shipper declines to execute this contract, the valuation of the live stock, as stated by the shipper, shall be stated on the shipping bill, and in such case the rates will be 10 per cent. higher than they would be under this contract if he executed it. If the shipper declines either to state the value of the live stock on the shipping bill

or execute this contract, the charges in that case will be 10 per cent. higher than the rates provided in this contract when the owner or shipper declares the value of the stock to be over \$800. per head or declines to declare its value.

Nos. of Way-bills.

Initials and Nos.
of cars

No. and Kind of
animals in each
car. Shipper's Count.

C. G. W.

5721

1 Horse

1 Colt 7501½

S. L. & C.

Live Stock Contract.
Tekamah Station, 5-9'07

"This agreement entered into on the day above stated, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company and B. R. Latta.

"Witnesseth, That the said railway company has this day received from the said B. R. Latta, one horse to be transported from Tekamah, Nebr., station to Waterloo, Ia., station, consigned to Joe McLaughlin, at D. O. at the rate of trf. per cwt. upon the terms and conditions following, that is to say: The said Railway Company shall not be liable for the loss or death of, or any injuries received by, any of such stock, unless the same is immediately caused by the willful misconduct or the actual negligence of the said Company, or its agents, servants or employes.

"The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:

"One hundred dollars per head on each horse or pony (gelding, mare or stallion), mule or jack.

"Fifty dollars per head on each ox or bull.

"Thirty dollars per head on each cow.

"Ten dollars per head on each calf or hog.

"Three dollars per head on each sheep or goat.

"And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.

"If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each horse or pony (gelding, mare or stallion) mule or jack, per head	\$100.00
Each ox or bull.....	\$
Each cow, per head.....	\$
Each calf or hog, per head.....	\$
Each sheep or goat, per head.....	\$

"The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the railway company assumes liability only to the extent of such agreed valuation.

"When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 00 per cent or fraction thereof, additional declared value per head up to \$800.00 per head. When the owner or shipper declares the value to be greater than \$800.00 per head, or declines to declare the value of the stock, charges will be based upon 200 per cent of the rate provided above, based on value of \$800.00."

The shipping order signed by plaintiff was in the following language:

"See Contract on Back of this Shipping Order.

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

"Shipping Order.

Car No. 5721

(To be retained by Agent)

No.

Initials of Car C. G. W.

Tekamah, Station 5-9, 1907

"(The shipper may elect to accept the conditions printed on the back hereof and as contained in the bill of lading of which this shipping order is a part,

or may, as provided below, require the carriage of property at 'Carrier's Risk.')

"Receive, carry and deliver the articles described below in accordance with the tariff and classification in effect at the date of this order and subject to the conditions of the bill of lading of which this shipping order is a part. (For carrier's liability see note below.)

Consignee, Destination, Marks and Routing	Articles	Weight Subject to Cor- rection.
Joe McLaughlin,	1 horse	
Waterloo, Iowa.	1 colt under 1 year	2000
	O Rel to Cont. val.	750
	S. L. & C.	
Charges Advanced.	Paid to Apply,	\$24.38
		B. R. Latta, Shipper.

[In red ink across the face:] Grain subject to Elevator Delivery.

"If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the bill of lading of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States, and of the several states in so far as they apply. Property thus carried will be charged at the higher rating provided in current tariffs and classifications to apply when not shipped subject to the conditions of the bill of lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water."

"No. 16. Owner's Risk. All property received and shipped O. R. (meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of the signing of the shipping bill, and by so doing may have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications."

It appears from the record before us that the tariff rate for the transportation of live stock over defendant's road based upon a valuation of \$100 each for horses is open to all shippers who will sign the contract prepared in such cases by defendant; that no shipper is entitled to the limited live stock rate unless he signs said contract; that the valuation thus fixed by the contract is arbitrarily fixed long prior to any particular shipment and has no reference to the actual value of any particular horse; that the shipper in order to obtain this limited live stock rate must declare the value of his horse to be \$100. The contract in the case at bar said:

"If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows: Each horse or pony (gelding, mare, or stallion) mule or Jack, per head, \$100."

In other words, if the shipper desires to avail himself of the limited valuation tariff rate, he has no option whatever but to declare his horse to be of the value placed on it by the defendant. There is no use of contending that the contract in question was not a limitation

of the defendant's common-law liability as a common carrier. The defendant so names it, and it conclusively appears that the limitation of liability is the primary purpose of the provision in regard to value. The question whether the limitation as to value is valid or not is another proposition. Such a contract was upheld in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; the Supreme Court stating the rule as follows:

"When a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with a rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight it receives and of protecting itself against extravagant and fanciful valuations."

The following cases also are in harmony with the rule above stated: *Scruggs v. Baltimore, etc., Ry. Co.* (C. C.) 5 McCrary, 590, 18 Fed. 318; *Ormsby v. U. P. R. R. Co.* (C. C.) 4 Fed. 706; *Judson v. Western R. R. Corporation*, 6 Allen (Mass.) 486, 83 Am. Dec. 646; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Ga. Pacific Ry. Co. v. Hughart*, 90 Ala. 36, 8 South. 62; *Ullman v. C. & N. W. Ry. Co.*, 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949; *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Rosenfeld v. Peoria, Decatur & Evansville Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *Western Railway Co. v. Harwell*, 91 Ala. 340, 8 South. 649; 4 Elliot on Railroads, 2336; 14 L. R. A. pp. 434, 435, note; 1 Hutchinson, Carriers, § 427, and cases cited. But these cases all deal with the power of common carriers to limit their common-law liability in the absence of a statute restricting such power. The Constitution of Nebraska in article 11, § 4, provides: "The liability of railroad corporations as common carriers shall never be limited." This language by an unbroken line of decisions by the Supreme Court of Nebraska has been construed as avoiding all attempts to limit the common-law liability of railroad corporations as common carriers. *Missouri Pacific R. Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; *St. Joseph & Grand Island R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335; *Union Pacific R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961; *C., B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823. The case of *C., B. & Q. v. Gardiner*, 51 Neb. 70, 70 N. W. 508, involved the shipment of a horse from Peoria, Ill., to Hastings, Neb. The value of the horse was agreed to be \$100 in the contract of shipment, and in connection therewith was the following language:

"And that the above rate of transportation is based upon the agreement that in case of loss or damage, whether resulting from accident or negligence of said railroad company or its servant, said railroad company does not assume a liability for such loss or damage to exceed the valuation of each animal."

The Supreme Court of Nebraska held this provision of the contract void, although it was contended that the contract was good in Illinois, where it was made. The law as stated in the Constitution of Ne-

braska as interpreted by her Supreme Court in the absence of legislation by Congress is clearly applicable to contracts involving interstate commerce. *Chicago, Milwaukee & St. Paul Railway Company v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. The contract in question was a Nebraska contract, and her Constitution as interpreted by her Supreme Court, which interpretation is binding on us, struck down the limitation of the right of recovery in said contract as soon as it was made. *Chicago, Milwaukee & St. Paul Railway Company v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

It is claimed, however, that Congress has legislated upon the very subject now under discussion, and that in consequence thereof the law of Nebraska, so far as it is sought to enforce the same against the provisions of a contract in relation to Interstate Commerce, is inoperative. In this connection our attention is called to Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909). In the section referred to is found the following language:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common-law liability by contract, receipt, rule, or regulation. It therefore was aware that the Constitution of Nebraska as interpreted by her Supreme Court was in conflict with the rule established by the United States Supreme Court in *Hart v. Railway Company*, *supra*; and was also aware that the Supreme Court of Pennsylvania in *Grogan v. Adams Express Company*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, refused to follow the rule established by said case of *Hart v. Railway Company*, *supra*; and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive "any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

We are therefore of the opinion that the right which the plaintiff

in this case had under the law of Nebraska to sue for the full value of his property was not taken away by the legislation of Congress herein referred to, but was preserved to him, and that he may now enforce that right as he has attempted to do.

It results that the judgment of the trial court must be reversed and a new trial granted, and it is so ordered.

UNITED STATES v. FOO DUCK.

(Circuit Court of Appeals, Ninth Circuit. September 13, 1909.)

No. 1,681.

ALIENS (§ 24*) — EXCLUSION — CHINESE PERSON—MINOR SON OF CHINESE MERCHANT.

The minor son of a Chinese merchant lawfully domiciled in the United States, who immigrated and entered the United States while a minor without trick, deception, or fraud, under a certificate issued by the Registrar General at Hongkong and vised by the acting United States Consul General at the same place, and who during the remainder of his minority labored and studied in the United States, is entitled to remain after attaining his majority, though he has since worked as a laborer.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Appeal from the District Court of the United States for the District of Montana.

Proceeding by the United States for the exclusion of Foo Duck, a Chinese person, alleged to be unlawfully within the United States. From a decree discharging defendant from custody (163 Fed. 440), the United States appeals. Affirmed.

James W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty. Thomas C. Marshall, A. L. Duncan, and Woody & Woody, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an order of discharge entered by the judge of the district court for the district of Montana in the proceedings instituted by Howard D. Ebey, Chinese Inspector, charging that the appellee, Foo Duck, had on or about the 26th day of September, 1907, been found unlawfully within the United States.

The facts agreed upon by the United States attorney and counsel representing the defendant, and stated in the opinion of the district judge, are as follows: The father of the defendant is a Chinaman, a merchant, in Missoula, Mont., and has been engaged in the mercantile business in that city for over 15 years. The defendant is over 23 years old. He arrived in the United States in May, 1901, when he was over 16 years old. He had a certificate issued under the treaty between the United States and China, and in apparent conformity with section 6 of the act of Congress approved July 5, 1884 (chap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ter 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307]). In this certificate he gave his former and present occupation as student. After the defendant arrived in Missoula, he worked as a cook and waiter at different times for several years. Part of the time he was helping the matron at the University of Montana, which is situated in Missoula, and while in this position, with the aid of the matron, he studied the English language, and learned to speak and read and write the same. He speaks English quite well, wears short hair, dresses as an American, and has evidently studied considerably. The appellant was admitted into the United States as a student in May, 1901, in accordance with the permission granted and the identification made by a certificate issued by the Registrar General at Hongkong and vised by the acting United States Consul General at the same place. This certificate was issued under the provision of article 2 of the treaty between the United States and China concerning immigration, dated November 17, 1880 (22 Stat. 827), article 3 of the Convention of December 8, 1894 (28 Stat. 1211), and section 6 of the act approved May 6, 1882 (Act May 6, 1882, c. 126, 22 Stat. 60), as amended by the act approved July 5, 1884 (Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307]), continued in force by act of May 5, 1892 (chapter 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]) and with all laws on the subject re-enacted, extended, and continued without modification, limitation, or condition by the act of April 29, 1902 (chapter 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1907, p. 414]), as amended by the act of April 27, 1904 (chapter 1630, 33 Stat. 428).

In addition to this certificate, the appellant was at the time of his arrival a minor child of a merchant residing at Missoula, Mont., in the United States. In that relation he would have been admitted into the United States without a certificate. *United States v. Mrs. Gue Lim*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544. In that case Gue Lim was the wife of Fook Kee, a Chinese merchant engaged in buying and selling merchandise in the city of Seattle, in the state of Washington. She arrived and was admitted into the United States without the production of the certificate mentioned in section 6 of the act of July 5, 1884. The court held that such a certificate was not required of the wife of a merchant domiciled in this country. Under the title of this case, there were also appeals from the United States District Court for the District of Washington discharging certain minor children from arrest upon the charge of being unlawfully within the United States. These appellants were the minor children of a Chinese merchant lawfully residing and doing business in the city of Walla Walla, in the state of Washington. They had also been admitted into the United States without having produced the certificate required by the act of July 5, 1884. They relied entirely upon the status of their father as a merchant residing in this country. With respect to the minor children, the court said:

"In the case of minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father,

and, whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

There is no fraud charged against the appellant in obtaining the certificate under which he was admitted into the United States; nor is there any question raised as to his having been a student both before and after his arrival in the United States. It is not questioned that he is and was at the time of his arrival in this country a son of a merchant domiciled in this country. He was, therefore, lawfully admitted into the United States.

The contention of the government is that, notwithstanding these facts, the appellant should be deported because after he arrived in this country "he worked as a cook and waiter at different times for several years." Part of the time his work consisted in helping the matron of the University of Montana, and while in this position, with the aid of the matron, he studied the English language, and learned to speak and read and write the same. His labor was therefore in part at least closely related to his work as a student. When he came to this country, he was 16 years of age. He is now over 23 years old. He has been here over seven years, five of these years he was a minor, and all of these years he was a son of a merchant residing and doing business in this country. Do these facts place the appellant in the excluded class and subject him to deportation?

Where a Chinese person secures admission into the United States as a merchant and immediately becomes and continues as a laborer, this latter fact is evidence that he came into the United States as a laborer, and the court is justified in holding that his coming was in violation of the statute, and that he is unlawfully within the United States and cannot remain. But, when the Chinese person has obtained admission lawfully under the statute, and without any trick, deception, or fraud has become domiciled in the United States for a period of seven years, we do not see how he can be deported if during that time he has been found temporarily performing acts of labor. In the general immigration laws Congress has provided a probationary period of three years for the purpose of determining whether certain immigrants should be deported by reason of immoral practice during that period. Section 3, Act Feb. 20, 1907, c. 1134, 34 Stat. 899 (U. S. Comp. St. Supp. 1907, p. 392). But no probationary period has been provided in the laws relating to Chinese immigration, and, aside from the presumptions arising from the employment of such an immigrant after his arrival in this country as evidence of what it was when he came into the country, we know of no law providing for the deportation of a Chinese person who has lawfully obtained admission into the United States, and has not become subject to deportation under the general immigration laws.

The judgment of the District Court is affirmed.

HOLEPROOF HOSIERY CO. V. WALLACH BROS.

(Circuit Court of Appeals, Second Circuit. July 31, 1909.)

No. 287.

1. TRADE-MARKS AND TRADE-NAMES (§ 85*)—RIGHT TO PROTECTION—MISLEADING NAME.

Manufacturers of hosiery under the name "Holeproof" are not precluded from an injunction protecting the use of such name by the fact that it is false and misleading; it being merely a boastful and fanciful word not intended as a representation that the hose manufactured and sold by complainant thereunder would never wear out.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

Misleading or false labels, see note to Raymond v. Royal Baking Powder Co., 29 C. C. A. 250.]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—DESCRIPTIVE NAME.

A trade-mark "Holeproof" used in the manufacture and sale of hosiery is not objectionable as descriptive.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. § 3.*]

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth v. Warner, 50 C. C. A. 323.]

3. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—INJUNCTION.

The word "Knotair" is not an infringement of the word "Holeproof" as applied to the manufacture and sale of hosiery.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68, 72; Dec. Dig. § 59.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 95*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where, in a suit to restrain the infringement of plaintiff's trade-mark and for unlawful competition, there was some evidence that defendants had sold hose of other manufacture for "Holeproof" hose of complainant's manufacture, a preliminary injunction restraining sales of such goods unless the customer is informed that the goods offered are not complainant's was properly granted.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Bill by the Holeproof Hosiery Company against Wallach Bros. From an order (167 Fed. 373) granting a preliminary injunction, defendant appeals. Modified and affirmed.

This cause comes here upon appeal from an order of the Circuit Court, Southern District of New York enjoining defendant:

(1) From "using and employing in connection with the manufacture, advertising or sale of hosiery, not the product of complainant, the word 'holeproof' or any like word."

(2) From "supplying in response to requests for 'Holeproof Socks,' or 'Holeproof Hosiery' any socks or hosiery not the product of complainant."

(3) From "using or employing in connection with the manufacture or sale of hosiery not the product of complainant the words 'Guarantee,' 'Guaranteed Hose' or 'Guaranteed Hosiery' or like words, provided and when such expressions are contained, printed, set forth or advertised in words, letters or figures or used or employed upon or in connection with style of package, labeling,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dressing, use of colors and arrangement of type calculated to induce the belief that defendant's guaranteed 'Knotair' hosiery is complainant's guaranteed 'Holeproof' hosiery."

(4) From "using or employing in connection with the manufacture, advertisement or sale of hosiery, not complainant's product boxes, labels, guarantee tickets, bands or devices identical with or like those shown in and by Exhibit A or Exhibit B."

(5) From "doing any act or thing in the manufacture, advertisement or sale of hosiery calculated to induce the belief, that any such product, not complainant's, is the product of complainant."

With the proviso that nothing in the order contained, "shall enjoin or restrain defendant from using the word 'Knotair' as applied to hosiery, when such use is not accompanied or induced by deceptive or imitative methods in the packing, labeling, dressing, use of colors and arrangement of type."

The opinion of the Circuit Court is reported in 167 Fed. 373.

A. P. Jetmore, for appellant.

Walter C. Booth (Frank F. Reed and Edward S. Rogers, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Inasmuch as this is an appeal from a preliminary order, and it is quite possible that in some respects the record made at final hearing may differ from that which is now before us, it seems wise carefully to restrict the discussion of the questions presented on the argument, and briefly to indicate our conclusions as to the merits of the precise case here presented.

Defendant contends that complainant has no standing in a court of equity because the name it has applied to its hosiery "Holeproof" is false and misleading. We are not impressed by this argument. No one surely could be misled into the belief that holes will not appear in complainant's socks if they are worn long enough, and it is difficult to conceive that any one could be fatuous enough to suppose that by the use of such a word he could deceive people by inducing a belief that the goods to which it was applied would never wear out. It is a boastful and fanciful word, easily to be distinguished from the "Syrup of Figs" and similar cases where the name or description involved misstatements as to the manufacture of the advertised product.

Nor do we find any particular force in the objection that the word is descriptive. The record, as it now stands, sufficiently indicates that by expensive advertising and large sales during several years the word "Holeproof" has acquired a secondary meaning, indicating to the prospective purchaser, not that socks sold under it are indestructible, but that they are those which complainant has been making and supplying to consumers, apparently to their entire satisfaction.

The injunction, however, is too broad, and should be modified in these respects.

(1) There is no evidence whatever in the record that defendant has ever used the word "Holeproof" or any other word than "Knotair" in connection with the manufacture, advertisement or sale of its goods. Indeed, since "Knotair" is its own distinctive trade-name there seems no likelihood of its doing so. Therefore, as we concur with the court below in the conclusion that, standing alone, the word "Knotair" is

not an infringement of "Holeproof," we find no warrant in the testimony for the first clause of the injunction.

(2) As to sales of defendant's product in response to a request for "Holeproof" hosiery, the testimony is conflicting. In the case of two sales the assertions of complainant's witnesses are squarely denied by defendant's. In two other cases the denial is not so positive; the witness not recollecting the precise transaction. Upon the record as it stands complainant is entitled to the security of an injunction, until final hearing, when the facts may be more fully shown. Such an injunction can work no prejudice to defendant, if it is truthful in the assertion that its sole object is to sell its own goods under their own name and on their own merits. The second clause of the order appealed from is, however, too broadly phrased. It would prevent selling to a customer, who asked for "Holeproof socks," any goods made by defendant, even after it was fully explained to such customer that they were not what he came to buy, but another and different brand made by defendant. It should be modified.

(3) Taking into consideration resemblances in shape and character of package which result from conformity to custom of the trade, we are unable to concur in the conclusion that there is sufficient similarity as to packages, labeling, etc., to warrant preliminary injunction, in the absence of proof that any one has been deceived by defendant's acts in that regard. This disposes of the third and fourth clauses of the injunction, which as thus modified is affirmed, with half costs of this appeal to defendant.

CHICAGO, I. & L. RY. CO. v. DAVIS.

(Circuit Court of Appeals, Seventh Circuit. June 23, 1909.)

No. 1,568.

MASTER AND SERVANT (§ 265*) — ACTION FOR DEATH OF SERVANT — BURDEN OF PROOF.

In an action against a railroad company for the death of a brakeman, alleged to have resulted from a defective hand hold on a car, where the right of recovery depended upon whether the defect existed when the car was inspected on the evening before, and was of such nature that it should have been disclosed by a careful inspection, or whether it was caused by the subsequent handling of the car, an instruction that the burden rested upon the defendant to prove a proper inspection by a preponderance of the evidence was erroneous and prejudicial to defendant, since, while it was its duty to produce evidence of the inspection, the burden of proof to establish its negligence remained on the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 902; Dec. Dig. § 265.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

George W. Kretzinger, for plaintiff in error.

George H. Peaks and Charles G. Neely, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GROSSCUP, Circuit Judge. This case was here once before on a writ of error brought by the then plaintiff in error (the plaintiff in the action below) and the judgment reversed for error in instructing the jury to find a verdict in favor of the now plaintiff in error (the defendant in the action below). *Davis v. Chicago, I. & L. Ry. Co.*, 151 Fed. 1008, 81 C. C. A. 286, where the facts will be found fully stated.

The case then turned, as the case now turns, upon a single question of fact, to-wit, whether the defect in the hand hold, from the giving away of which the deceased, Herbert A. Davis, received his injuries, was a defect that was in existence the evening before the accident and when the car was inspected, and was such a defect as a careful inspection would have disclosed, or whether such defect was the result of a handling of the car on the side track between such inspection and the next morning (due to what is technically called "a cornering of the cars"), in that way intervening between the inspection and the time of injury.

On that issue—evidence, circumstantial and direct, being offered pro and con—the Court below instructed the jury as follows (the whole colloquy is given to bring out the full effect of the instruction):

"Mr. Peaks: I have no exception, but I want to suggest to the Court to charge the jury that the burden is upon the company to prove the inspection and to prove contributory negligence.

The Court: I think I should do that.

Mr. Peaks: Now, there is nothing to do as to the burden of proof.

The Court: Yes, I see.

Mr. Peaks: And if they are in doubt as to any of these matters of defense, the company having failed to sustain the burden, then the presumption will be in favor of the plaintiff.

Mr. Smith: Well, I except to that.

The Court: I will state it in a little different way.

Mr. Peaks: But cover the subject.

The Court: I will do that now. Counsel calls my attention to the fact that I have not said anything about the burden of proof, and that is true, I did not.

Now in these cases, in a case like this where the evidence as to the condition of the car is mainly in the possession and control of the defendant company, the burden is upon it to prove that it made an inspection, a fair, reasonable inspection of the car. That is to say, you should be able to find from the more convincing testimony, the greater weight of the evidence, that the inspection was made. Of course, the testimony all comes from the defendant's side. You have what Mr. Johnson said and what Mr. Husband said and the book here which went in evidence on that subject.

Now you should be able to find from the more convincing testimony, that which more reasonably satisfies your judgment than the inference the other way, that the inspection was made.

So, in regard to the question of contributory negligence. You may be in doubt on that question. If you are, you should remember that the burden there also is on the defendant, on the company to show you by the more convincing testimony (not beyond any reasonable doubt at all) but by the more convincing probability of the testimony and evidence in the case that Mr. Davis was guilty of a slight want of ordinary care. That is what is meant by the burden of proof being on the defendant on both of these issues.

(Addressing Counsel) Now, if you want to except, or have any further suggestions to make you will come up here."

and the Court refused the following instruction:

"That, if the jury believe from the evidence that the car was cornered after a proper inspection, then notice of the defect which was caused from the

cornering must be brought to the defendant or must have existed for such a length of time as to charge the defendant with notice of it, before it can be held liable."

asked by plaintiff in error, to the giving and refusing of which instructions, exceptions were duly taken and error is duly assigned.

We are of opinion that in the instructions given, error was committed—not merely a technical mis-direction upon the law of the burden of proof, but a mis-direction that, in the balanced state of the evidence pro and con, may have determined the verdict of the jury. True, when the plaintiff below had proved the condition of the hand hold and the injury resulting therefrom, the duty, or in that sense the "burden," rested upon the defendant below to show that a fair and careful inspection had been made that did not reveal the defect, but this shifting of the source simply from which testimony is to come, is not a shifting of the burden of proof in the sense that upon the contested issue the evidence of the defendant must be more convincing than the evidence of the plaintiff. The jury must consider all of the evidence, with the burden remaining just where it was from the beginning, to wit, that to establish his case, the plaintiff must make out by a preponderance of proof, the negligence set up as the ground of his action. In other words, compliance on the part of the defendant below with its obligation to place before the Court and jury evidence peculiarly within its own knowledge, possession and control, does not devolve on it the duty of persuading the Court and jury that such evidence is more convincing than the evidence that comes from other sources.

The instruction rejected is technically defective—that is to say, it does not submit to the jury the question whether the defect was caused by the cornering, but assumes that as established—but its purpose, doubtless, was to have the jury instructed that if they believed from the evidence that the car was cornered between the time when the inspection took place and when the injury occurred, and that the defect was due to such cornering, notice of such cornering must have been shown to have been brought to defendant before the jury could find that a defect due to such cornering was negligence within the declaration, and thus stated, the instruction ought to have been given. Whether in its defective form, the instruction would be sufficient error to reverse this case, it is not now necessary to decide. We make the foregoing observation in this connection simply as a suggestion to the trial court on a future trial.

The judgment will be reversed and the cause remanded, with instructions to grant the motion for a new trial and to proceed further in accordance with this opinion.

WABASH R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. June 23, 1909.)

No. 1,463.

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—COUPLERS ON ENGINES.

A locomotive engine used in interstate commerce need not necessarily have automatic couplers at both ends to comply with Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), where one end only is coupled and intended to be coupled to other cars.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—DILIGENCE TO COMPLY WITH ACT.

The requirement of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), that all cars used in moving interstate traffic shall be equipped with automatic couplers coupling by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is absolute; and it is no defense to an action against a railroad company for its violation by using cars on which the couplers were so out of repair as to necessitate men going between the cars to operate the same that the company used due diligence to keep the couplers in good repair.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

In Error to the District Court of the United States for the Eastern District of Illinois.

The writ of error is to reverse a judgment entered in favor of the United States for one hundred dollars upon each of four counts of a declaration charging violations of section 2 of the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]). The specific act of violation charged in the first count is that the coupling and uncoupling apparatus on the "B" end of a certain locomotive engine, and in the second, third and fourth counts respectively, that the coupling and uncoupling apparatus on the "B" end of each of three certain freight cars, all used by plaintiff in error on its line of railroad in the movement of interstate traffic, were out of repair and inoperative to an extent that necessitated men engaged in the coupling and uncoupling of these cars, going between the respective ends of the locomotive and cars in question and those to which they were attached in performance of their duty. The further facts are stated in the opinion.

Edward C. Kramer, for plaintiff in error.

W. E. Trautman and George A. Crow, for the United States.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Two questions are raised by the assignments of error that we deem it necessary to dispose of; first, and relating to the conviction on the first count only, was the plaintiff in error entitled to show that the coupling on the B end of the engine was not intended to be used, and, secondly, whether in complying with the provisions of the Safety Appliance Act, proof of a high degree of care and diligence to keep its coupling apparatus in good repair, as required by the Act, would relieve it from liability under the Act as against mere proof by the Government that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the couplers were not in fact in good working order at a given time during the course of an interstate journey.

(1) The first question is raised by the following instruction, offered and refused:

"That if the jury believe from the evidence that the engine No. 516 had originally been equipped with automatic couplers at both the A end and the B end, but that at the time alleged in the first count of the plaintiff's declaration, the lock chain had been disconnected, and the knuckle removed from the coupler at the B end and that thereby the said coupler at the B end of said engine was placed in such a condition that no other car could be coupled to the engine at such B end or uncoupled therefrom either by going between the cars or not, and that the coupler at the A end of such engine was in good condition and that the said coupler at the A end of said engine was the only one used by defendant at the time in question in moving interstate traffic, then the defendant is not liable for the condition of the said coupler at the B end of said engine and you should find the defendant not guilty as to the first count of plaintiff's declaration,"

—and by evidence, excluded by the Court, tending to prove that the coupling on the B end of the engine was not intended to be used—that such coupler had been disconnected and the knuckle taken out, in pursuance of a purpose that it should not be used.

The argument of the Government may be reduced to this syllogism: The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] amended by Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]) requires that every "car" used in moving interstate traffic shall be equipped with "couplers" coupling automatically with impact; the Supreme Court has held in *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that a locomotive engine is a car within the meaning of the statute; therefore, locomotive engines must be equipped with "couplers," and inasmuch as "couplers" means more than one coupler, and if more than a coupler on the tender is used the other must be used on the B end of the engine, therefore, an engine unequipped with a coupler at its B end, in accordance with the requirements of the Act, is a violation of the Act.

The difficulty with this reasoning is, first, in the assumption that under the doctrine of the *Johnson Case* a locomotive and a car are synonymous terms in every respect and for every purpose—a rigidity of construction that the Supreme Court never intended; and the second difficulty is in the assumption that, because couplers, in the statute, is in the plural, there can be no car without a coupler at each end, irrespective of the use to which such car is put. As was said by the Supreme Court in the *Johnson Case*, the primary object of the act was to promote the public welfare by securing the safety of employees and travelers. Its design to give relief was more dominant than to inflict punishment—a view of the statute that is wholly irreconcilable with a construction that would require the designated couplers to be placed where they were never used or intended to be used.

(2) The second question is raised by the following instruction to the jury, to which exception was duly entered:

"The testimony of the defendant's witnesses was admitted here as to the inspection of those cars, for the purpose of tending to show as far as in your

judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep those cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This Statute is commanding, and requires the defendant at its peril to keep these couplers in such condition so that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find."

—supported by evidence tending to show that the plaintiff in error had used diligence and care to keep the cars in a reasonably safe condition.

Since this case was brought here and the briefs filed, this question has been disposed of against the contentions of the plaintiff in error in the case of *St. Louis, Iron Mountain & Southern Ry. v. Taylor, Administratrix*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

The judgment entered upon the first count of the declaration is hereby reversed. The judgment entered upon the remaining counts is affirmed, and the case is remanded to the District Court with instructions to modify accordingly.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. STEVENSON.

(Circuit Court of Appeals, Eighth Circuit. August 9, 1909.)

No. 2,976.

1. RAILROADS (§ 303*) — CONTRACT FOR PRIVATE CROSSING — DEFECTIVE CONSTRUCTION.

Where a railroad company contracted with a landowner in securing right of way to build and maintain a safe and adequate crossing on the land for the owner's use, and thereafter made a crossing which remained for a year without alteration, such facts are sufficient to establish that the crossing made was intended as the one required by the contract, and the company is liable for an injury to the landowner resulting from its failure to comply with such contract by making it reasonably safe and adequate.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 959-963; Dec. Dig. § 303.*]

2. RAILROADS (§ 350*) — ACTION FOR NEGLIGENT CONSTRUCTION OF PRIVATE CROSSING—QUESTIONS FOR JURY.

In an action against a railroad company to recover for an injury to plaintiff by reason of the alleged negligence of defendant in constructing a private crossing, the question of defendant's negligence and of plaintiff's contributory negligence held properly submitted to the jury under the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1154, 1168; Dec. Dig. § 350.*]

In Error to the Circuit Court of the United States for the District of North Dakota.

Alfred H. Bright (Ball, Watson, Young & Lawrence, on the brief), for plaintiff in error.

P. J. McClory (Houska & McFarlane, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Thomas Stevenson is the owner of the N. E. $\frac{1}{4}$ of section 4, township 159, range 69, county of Rolette, N. D. The Minneapolis, St. Paul & Sault Ste. Marie Railway Company built its line of railroad across said land in the year 1905. This suit was brought by Stevenson against the railway company to recover damages for personal injuries received by him by reason of a breach of a certain contract, theretofore entered into between Stevenson and the railway company, in regard to the construction and keeping in repair of a private crossing over said railroad on the land above described. The complaint alleged that the railway company had through carelessness and negligence failed to construct and keep in repair a reasonably safe crossing in accordance with its contract; that Stevenson, in attempting to use said crossing on October 23, 1906, received personal injuries which are described in the complaint. The following allegations of the complaint are admitted by the answer of the railway company:

"That the right of way of said defendant's railway over and across said northeast quarter of section four, township one hundred and fifty-nine, range sixty-nine, was granted by said plaintiff to said defendant under a special agreement by said defendant that it would make and keep in good repair one causeway or other safe and adequate means of crossing the same on the northeast quarter of section four, township one hundred fifty-nine, range sixty-nine."

"That during the spring of 1906 the said defendant railway company constructed a crossing over its railway grade and tracks, which said crossing was constructed on the said northeast quarter of section four, township one hundred fifty-nine, range sixty-nine, as a roadway for the use and benefit of said plaintiff and the public under the agreement set forth in paragraph four of this complaint."

At the trial plaintiff recovered a verdict, and the railway company has brought the case here by writ of error.

The only error assigned is that the court erred in overruling the motion made by the defendant at the conclusion of all the evidence in the case for an instruction to the jury to return their verdict in favor of the defendant. The motion referred to simply renewed the motion made by defendant at the close of plaintiff's evidence. The motion made at the close of plaintiff's evidence specified two grounds as a basis for the motion:

First. That the evidence wholly failed to show any negligence on the part of the defendant causing or contributing to plaintiff's injuries.

Second. That the undisputed evidence showed that the plaintiff's injuries resulted wholly, or in part, at least, from his own negligence.

The evidence shows without contradiction that all the railway company did in the construction of a crossing in accordance with its agreement prior to October 23, 1906, was to place planks between the rails of its track on one plank on the outer side of each rail; that on the north side of the track, where said planks were laid, a borrow pit or ditch had been allowed to remain without any filling, except some stone which had been thrown therein by Stevenson. In fact, counsel

for the railway company seek to maintain the position that the railway company had never constructed a crossing, and was therefore not liable for not maintaining it, or that it had constructed it so negligently that a man of ordinary care and prudence would not have used it. We think, however, that the admissions in the pleadings, taken in connection with the fact that this crossing remained in the same condition from November, 1905, to October 23, 1906, so far as anything being done to the same by the company is concerned, establishes the fact that the railway company had constructed all the crossing it intended to. There was abundant evidence to go to the jury on the question of whether the railway company was negligent in the construction or in keeping in repair the crossing in question.

There is evidence in the record that the plaintiff had used this crossing in the fall of 1905, and also during the farming and threshing season of 1906. In 1906 he hauled between 1,400 and 1,500 bushels of wheat over it. The trial court submitted the question to the jury under proper instructions as to whether the crossing was so defective that a man of ordinary care and prudence would not have used the same, and the jury upon that issue found that it was not. There was beyond question sufficient evidence to sustain their finding. The plaintiff brought his action squarely upon his contract, which imposed the same duty upon the railway company, so far as plaintiff is concerned, as if a statute had required the railway company to do the same thing. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286 (Court of Appeals, 8th Circuit).

There being no merit in the errors assigned, the judgment is affirmed.

HOWE v. MERIWETHER.†

(Circuit Court of Appeals, Eighth Circuit. August 9, 1909.)

No. 2,978.

EJECTMENT (§ 50*)—INTERVENTION—PLEADING.

Under Gen. St. Kan. 1905, § 4909, providing that, "when in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it done," it is incumbent on one applying to be made a party to an action of ejectment to plead facts showing that he has a direct and immediate interest in the property, which will be affected by the judgment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 145; Dec. Dig. § 50.*]

In Error to the Circuit Court of the United States for the District of Kansas.

L. W. Keplinger, for plaintiff in error.

R. E. Ball, for defendant in error.

Before ADAMS, Circuit Judge, and CARLAND, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 7, 1909.

CARLAND, District Judge. On September 23, 1907, Meriwether commenced an action in ejectment against Henry Black, James Black, Wilda Black, Joseph Turner, and Frances Robinson, in the United States Circuit Court for the District of Kansas, to recover the possession of a certain piece of land located in Wyandotte county, in said state. December 14, 1907, said defendants filed an answer in said cause. June 9, 1908, judgment for the plaintiff was rendered in said action upon stipulation. At the time the motion for judgment was made one S. K. Howe made an application to the court to be substituted as defendant in said action. The motion was denied, and Howe sued out a writ of error.

Section 4909, Gen. St. Kan. 1905, provides as follows:

"When in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it done."

The ruling of the trial court was right. The moving papers disclosed no interest whatever in Howe to the land in dispute. Under the statute quoted, it was not sufficient for Howe to merely allege that he had an interest in the land in controversy; but he was bound to make that interest appear by proper allegations in his petition, so that the court could see that, if the facts stated were true, he had such a direct and immediate interest in the matter in litigation that he would either gain or lose by the direct legal operation and effect of the judgment. *Smith v. Gale*, 144 U. S. 517, 12 Sup. Ct. 674, 36 L. Ed. 521; *Horn v. Water Co.*, 13 Cal. 69, 73 Am. Dec. 569; *Lewis v. Harwood*, 28 Minn. 428, 10 N. W. 586; *Coffey v. Greenfield*, 62 Cal. 602.

Judgment affirmed.

HENNEBIQUE CONST. CO. v. MYERS et al.

(Circuit Court of Appeals, Third Circuit. August 19, 1909.)

No. 46.

1. PATENTS (§ 132*)—TERM—LIMITATION BY TERM OF PRIOR FOREIGN PATENT.

The provisions of Rev. St. § 4887, before its amendment in 1897 (U. S. Comp. St. 1901, p. 2382), that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," related to matters of substance and not of form merely, applying only where there is a valid foreign patent, and a United States patent for an alleged invention which was covered by a prior certificate of addition to a French patent is not limited to the term of the French patent, where the same was adjudged null and void by the French courts on the ground of anticipation; the effect of such judgment under the law of France being to render the patent, with any certificates of addition thereto, a nullity from the beginning. *Buffington*, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 132.*]

2. TREATIES (§ 11*)—STATUTES—EFFECT OF TREATY.

By the convention concluded at Brussels December 14, 1900, by the International Conference for the Protection of Industrial Property, at which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the United States was represented, it was among other things ordained: "Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states, adherents or nonadherents to the Union. This provision shall apply to patents existing at the time of its going into effect. The same rule applies in the case of adhesion of new states to patents already existing on both sides at the time of the adhesion." This convention was ratified by the Senate March 7, 1901, and proclaimed by the President to go into effect September 14, 1902. 32 Stat. 1936. *Held*, that such treaty was self-executing, and the effect of its ratification was a complete doing away with the interdependence of foreign and domestic patents, and of the limitation imposed on the term of domestic patents for inventions previously patented in foreign countries by Rev. St. § 4887, prior to its amendment in 1897 (U. S. Comp. St. 1901 p. 3382). Per Archbald, District Judge, and Gray, Circuit Judge, concurring.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. § 11.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Wm. B. Whitney and John G. Johnson, for appellant.

Arthur Steuart and Drury W. Cooper, for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

GRAY, Circuit Judge. The appellant, as complainant below, on September 16, 1907, filed its bill in the United States Circuit Court for the Eastern District of Pennsylvania, against the defendants, the appellees here, alleging that letters patent of the United States, bearing date the 4th day of October, 1898, and numbered 611,907, had been issued to it for a certain invention, particularly mentioned and described in the specifications attached thereto, which letters patent granted to the complainant the exclusive right to make, use, and vend the same for the term of 17 years from the said 4th day of October, 1898. The bill then charges defendant with infringement of said letters patent, and prays for the usual injunctions, preliminary and final, restraining the said defendants, their agents, servants, etc., from further infringement or violation thereof, and for an accounting.

The defendants, after having filed an answer to the bill, by consent withdrew the same and filed a so-called plea to the jurisdiction of the court, alleging that under the provisions of section 4887 of the Revised Statutes, before its amendment by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3382), and as applicable thereto, the patent in suit expired August 8, 1907, prior to the filing of the bill of complaint, by reason of the expiration on that date of a French certificate of addition to a French patent, wherein and whereby the invention of the patent in suit had been previously patented by Hennebique in France.

The replication by complainant to the defendants' answer, was allowed to stand as a replication to the plea. The case was heard upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an agreed statement of facts, which presented two points of law for decision, viz.:

First, whether a certificate of addition to what was in form a regularly issued French patent, but which has been authoritatively and finally adjudged by the French courts to be a nullity and of no effect in law, can limit the term of a later United States patent for the same invention, under section 4887 of the Revised Statutes, before its amendment by the act of March 3, 1897?

Second, whether the said section 4887 has been abrogated by the treaty known as "An Additional Act for the International Protection of Industrial Property" (32 Stat. 1936), in so far as it provided for the limitation by prior foreign patents of the term of a United States patent which was existing at the time the said treaty went into effect?

The court below sustained defendants' plea and directed the dismissal of complainant's bill, without filing an opinion, or otherwise stating the ground of its action.

The agreed statement above referred to brings into the record, by stipulation, all the facts necessary to the determination of the points of law above stated, including the pertinent provisions of the French law and the decisions of the French courts interpreting the same, and applicable to the French patent, and the addition thereto, referred to in the plea, the effect of which plea was to admit also the allegations of the bill of complaint. From the facts thus fully stated, it appears that the patent in suit was issued to Hennebique, October 4, 1898, upon an application filed December 29, 1897, for the full term of 17 years. It also appears that a French patent, No. 223,546, was issued to Hennebique, in 1892, for a term of 15 years from August 8, 1892, and therefore limited to expire on August 8, 1907. The first certificate of addition thereto was issued to said Hennebique in 1893, and a second certificate of addition on April 6, 1898, upon an application therefor filed December 18, 1897. It is also admitted that, by French law, certificates of additions expire with the expiration of the original patent. It also appears that the invention which is the subject of the patent in suit—

"is the same invention which the same inventor, Hennebique, attempted to patent in France, by filing on December 18, 1897, in full compliance with the law of France then in force, the second certificate of addition to his prior French patent, No. 223,546, which said second certificate of addition was issued April 6, 1898, and granted to him such right as could legally result from such patent and certificate."

It is also established, in the stipulated record, that the original French patent and the first certificate of addition have been declared null and void by the French courts. This was first done on March 4, 1903, in an action brought by said Francois Hennebique against certain persons, for the infringement of said French patent, No. 223,546, by the Civil Tribunal of First Instance for the Department of the Seine; then, on an appeal taken by the said Hennebique from the said judgment of March 4, 1903, by the French Court of Appeals, on December 14, 1906, a duly certified copy of the decree of the latter court being embraced as an exhibit in the stipulated record. And again, on July 20, 1905, in an action brought by certain complainants against

said Hennebique, under the provisions of article 34 of the French law of July 5, 1844, for the annulment of said French patent, No. 223,546, and said first certificate of addition of August 7, 1893, the Civil Tribunal of First Instance for the Department of the Seine rendered a judgment referring the cause to a board of experts, to examine and report as to the validity of the said French patent, in view of certain prior French patents, and on appeal taken by the complainants from the said judgment, and on cross-appeal taken by said Hennebique, the French Court of Appeals, on December 14, 1906, rendered a decree, in which they held that the reference to a board of experts was unnecessary, reversed the judgment of the Tribunal of First Instance, and held and adjudged that said French patent, No. 223,546, was null and void, in view of a certain prior French patent, and that said first certificate of addition, of August 7, 1893, was also null and void, since, being only an accessory, it could not exist independently of the principal patent. A duly certified copy of said decree is embraced as an exhibit in the stipulated record. Appeals to the Court of Cassation, taken by the said Hennebique, from the said decree of December 14, 1906, were dismissed in February, 1908.

It further appears, by the stipulated record, that the effect in law of the above judgments and decrees, adjudging the nullity of said French patent, No. 223,546, was to render said certificate of addition thereto, of December 18, 1897, equally null and void, and that, by the French law, there is always this difference between the nullity and the forfeiture of a patent, that the forfeiture only affects the future of the patent, while the nullity affects it in the past as well, and that a patent which is null is a patent which is found never to have had any existence, one which in law never had any reason for existing, while, a patent which has become forfeited, on the other hand, is a patent which had a legal existence up to the time when the cause of forfeiture became a fact.

It follows, then, from the agreed statement of facts, that the French patent of 1892, as thus authoritatively and finally adjudged, is and always a nullity, and the certificate of addition thereto, of December 18, 1897, as well as that of 1893, never existed in legal effect, because it could receive no life from the dead patent, upon which it was ingrafted. The question then recurs, can the delivery of such certificate of addition, which was a patent in form only, but which granted no monopoly whatever, because it was null and of no effect in law, be regarded as such a prior patenting of the invention of the patent in suit, as will limit the term of that patent under the provisions of section 4887 of the Revised Statutes? That section reads as follows:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent," etc.

The French patent law confers exclusive rights, under the conditions set forth, for the invention or discovery of a new industrial prod-

uct, or of a new means or new application of old means for obtaining an industrial result or product. It also provides that patents demanded in due form shall be delivered, without previous examination, at the applicant's own risk, and without guaranty as to either the reality, novelty, or merit of the invention; and it also declares that patents delivered shall be null and void whenever the discovery, invention, or application is not new. And it also gives to all parties having an interest therein, a right of action in civil tribunals of first instance, for the annulment thereof.

It was on the express ground that the alleged invention or device of the French patent here in question was not new that said patent was declared by the French courts to be null and void, and that the letters patent were a nullity. The exclusive privilege which purported to be conveyed by the French patent, and the certificates of addition thereto, never legally existed in contemplation of the French law. There was no monopoly, substantial or otherwise, that could withstand challenge; none that could successfully be asserted against the use by the public of the invention purporting to be patented. The words "foreign patent" and "patented in a foreign country," in section 4887, must be taken to connote matters of substance, and not of mere form, and the French patent and the addition thereto, though regular in form, conferred no such privilege or monopoly as would bring them within the purview of the section referred to. They conveyed to the patentee no substantial rights, and secured to him no valuable monopoly which he could enforce in the courts. *Société Anonyme v. Gen. Elec. Co.* (C. C.) 97 Fed. 604.

There is nothing on the face of the letters patent to show that it is limited to expire at the same time with a foreign patent which limits its life. All letters patent are issued to a qualified inventor for the full term of 17 years, pursuant to the provisions of section 23 of the patent act of 1870 (Act July 8, 1870, c. 230, 16 Stat. 201). Further provisions of the act, as embodied in section 4887 of the Revised Statutes, providing in effect that, when the patentee has been granted in a foreign country such a valid and substantial exclusive privilege or patent as we have above described, the life of a United States patent will expire with the expiration of such foreign patent. No such condition is shown to exist in relation to the patent in suit. The second certificate of addition, of December 18, 1897, covering the same invention as the patent in suit, is shown to have been, by the French law, as set forth in the stipulated record and as adjudged and decreed by the French court, prior to the filing of this bill, a nullity, and void *ab initio*. It is impossible to hold, therefore, that the term of the patent in suit is limited by the said second addition to the French patent, and the plea to that effect is without merit.

The view we have thus taken makes it unnecessary to consider the second point of law raised by the appellant, viz., whether the said section 4887 had been abrogated by the treaty known as "an additional act for the international protection of industrial property." But, if it is called for in order to support our judgment, I may say that I

agree with the views on the subject expressed in the concurring opinion of Judge Archbald.

The decree of the court below, therefore, sustaining the defendant's plea and dismissing the bill of complaint, is hereby reversed.

BUFFINGTON, Circuit Judge (dissenting). I cannot concur in the opinion of the court. On August 8, 1892, a French patent No. 223,546, for concrete construction, was granted to Francois Hennebique for 15 years. Five years later Hennebique made another and distinct invention, but of the same general character as his above original patent. Under the French law this second invention could be patented either independently or as a certificate of addition to the original patent. This latter course Hennebique followed, and on April 6, 1898, was granted a certificate of addition (numbered 2) for this new invention, to expire August 8, 1907. Under the French law:

"The certificate of addition has no existence of its own, and follows, in all its vicissitudes, the fate of the principal patent. If, then, the patent becomes forfeited, the certificate falls with it as a matter of law, even though the subject-matter of the certificate was itself both new and patentable."

On December 29, 1897, Hennebique applied for an American patent on the invention covered by his second certificate of addition above described, and on October 4, 1898, the patent in suit, No. 611,907, for this invention, a "construction of joists, girders, and the like," was granted to him. Now, it will be observed this patent was not for the invention covered by Hennebique's original French patent, No. 223,546, granted in 1892, but, as stipulated in the record (clause 5), for the same invention involved in his second addition granted in 1898. Hennebique's invention having thus, as stipulated, been previously patented abroad, the application became subject to, and the term of his patent fixed by, Rev. St. § 4887, which as then in force had this proviso:

"But every patent granted for an invention which has been previously granted in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

Now, clearly, this statute contemplated that the term for which a patent granted under it ran should be fixed by years when it was issued. The use of the word "term"—"at the same time with the one having the shortest term"—shows that and manifests an intent to fix, by reference to the existing term of the foreign patent, the term granted of the American one. "*Id certum est quod certum reddi potest.*" And the statute has been uniformly construed as granting a predetermined, and not a post-determinable, term. In *Henry v. Providence Tool Co.*, Fed. Cas. No. 6,384, 3 Ban. & A. 501, Mr. Justice Clifford, sitting at circuit, had occasion to consider this act with reference to the question whether the term of the American patent was conclusively fixed when the patent issued. He there said:

"What is the true construction of the act of Congress under which the patent in suit is granted? * * * Congress employs the words 'the foreign patent,' evidently referring to the term of the foreign patent, to define the term of the domestic patent. Had Congress intended to grant a patent for

an indefinite term, or for an uncertain and undefined duration, they would have employed suitable words to express such an intent."

After stating the purposes of the patent law and that the requirements of the specification were meant to fulfill them, he says:

"Adopt the theory of the complainant, and none of these requirements would be of any avail, as none could foreknow whether the term of the patent was for three and not for seven years, or for some indeterminate term of duration, the effect of which would be to make the rights of property in this country depend upon the discretion exercised by a foreign sovereign. Support to that view is derived from the words of the section, which refer not only to the foreign patent, but, if there be more than one, to the one having the shortest term, which, in effect, excludes the theory that the provision in any view can be held to include any subsequent prolongation or extension of the monopoly beyond what was then vested in the foreign patentee. If Congress has intended otherwise, the language would have been different, and words would have been employed to signify that the domestic patent should continue as long as the same invention was protected by the foreign government."

Mr. Justice Clifford's construction of the statute was cited and followed by Mr. Justice Blatchford (then Circuit Judge) in *Reissner v. Sharp*, Fed. Cas. No. 11,689, 4 Ban. & A. 366, saying:

"But Mr. Justice Clifford held that Congress never intended to extend the term of the United States patent beyond the legal term secured to the foreign patentee when the United States patent was granted, and that no act of a foreign sovereign, nor any act of a foreign legislature, could have the effect to prolong the term of a patent granted here beyond the term prescribed by the act of Congress. Mr. Justice Clifford refers, with force, to the considerations that, as the statute refers not only to the foreign patent, but, if there be more than one, to the one having the shortest term, it cannot be held to include any subsequent prolongation or extension of the monopoly beyond that vested in the foreign patentee at the time of the granting of the United States patent; that, if Congress had intended otherwise, the language would have been different, and words would have been employed to signify that the domestic patent should continue as long as the same invention was protected by the foreign government; and that, under the opposite rule, neither the authorities of the United States, nor inventors, nor the public would ever be able to know what the patentee acquired under a patent granted by the United States, in a case where the invention had been previously patented in a foreign country."

That Rev. St. § 4887, fixed unchangeably the term of the American patent was the view of Mr. Justice Bradley, who in *Bate Refrigerating Co. v. Gillett* (C. C.) 31 Fed. 815, says:

"The term of the English patent fixed the term of the American patent, nothing more, nothing less. The subsequent fate of the English patent had no effect upon the American. The life of each after its inception proceeded independently of the life of the other. See *Protective Co. v. Burglar Alarm Co.* (C. C.) 21 Fed. 458; *Paillard v. Bruno* (C. C.) 29 Fed. 864."

In the case cited from 21 Fed. 458, Judge Wheeler said:

"The statute merely required that in such case [that is, where there is a prior foreign patent] the patent shall be so limited as to expire at the same time with the foreign patent. Rev. St. § 4887. This seems to mean that the term of the patent shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. *Henry v. Providence Tool Co.*, Fed. Cas. No. 6,384, 3 Ban. & A. 501; *Reissner v. Sharp*, 16 Blatchf. 383, Fed. Cas. No. 11,689. It refers to fixing the term, not to keeping the foreign patent in force."

And in *Paillard v. Bruno*, supra, Judge Wallace held:

"According to the construction thus placed upon the section, it should be read as though it declared that the United States patent is to expire at the same time with the term of the foreign patent previously obtained for the same invention, or, if there be more than one, at the same time with the one having the shortest term. Upon this construction the duration of the term of the United States patent fixed when the patent issues, according to the maxim, 'Id certum est quod certum reddi potest.' Under any other construction, neither the Commissioner of Patents, nor the patentee, nor the public would know the duration of the grant. The term of a patent is the period of duration expressed in the grant. It may be terminated by operation of law, or by the act of the parties, at an earlier time; and consequently it might happen that of two patents the one having the shortest term may have the longest life."

So, also, Judge Simonton, in *Bonsack v. Smith* (C. C.) 70 Fed. 392, held:

"In construing this section, the meaning of the words 'expire' and 'term' is controlling. Section 4887 makes the American patent 'expire' at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest 'term.' The Supreme Court of the United States, in one of the few cases on this point, construe this word 'expire' to mean cease to exist because of the termination of the duration of the original grant, and not to mean cease or determine by reason of some penalty or forfeiture for the nonperformance of some condition subsequent. *Pohl v. Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953."

To me it is clear that, as said above, the words "expire" and "term" are the controlling words of the statute, and that the word "expire" means an expiration by lapse of the time of the term. The words "so limited as to expire at the same time with the foreign patent" are equivalent to reading "so limited as to expire at the same time with [the expiration of the term of] the foreign patent"; or, in other words, "expire" refers solely to an ending at the end of the term by the passage of time. And that this is the proper construction of the section is apparent from what was said in *Pohl v. Brewing Company*, supra. It is true the question there before the court was the alleged lapsing of the domestic patent by the subsequent forfeiture of the limiting foreign one. But in deciding that question it was held that no such lapse took place, because there was nothing in the statute to limit the duration of the domestic patent, save the duration of the legal term of the foreign patent in force at the time. Thus it is said:

"There is nothing in the statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of the issuing of the United States patent, or that it is limited by any lapsing or forfeiture of any portion of the term of such foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. In saying that 'every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent,' the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent. * * * In the view that section 4887 is to be read as if it said that the United States patent is to be so limited as to expire at the same time with the expiration of the term of the foreign patent, or, if there be more than one, at the same time with the expira-

tion of the term of the one having the shortest term, the interpretation we have given to it is in harmony with the interpretation of the words 'expiration of term' in analogous cases. *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226; *Beach v. Nixon*, 9 N. Y. 35; *Farnum v. Platt*, 8 Pick. (Mass.) 339, 19 Am. Dec. 330. In those cases it was held that the words 'expiration of term' do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by lapse of time."

And the case of *Oakley v. Schoonmaker*, *supra*, which is thus approved, brings out very clearly that the expiration of the term is an expiration at its time limit, saying:

"The landlord cannot avail himself of the tenant's violation of his agreement as to cutting wood, if that were an act which would work a forfeiture. That is not the expiration of the time referred to in the 1st subdivision of the twenty-eighth section. The statute means expiration by lapse of time."

These cases constrain us to hold that when the American patent was granted to Hennebique, there then being a prior French patent to him which expired on August 8, 1907, the American patent was unchangeably fixed to expire on that day. Such became the contract between him and the government, and thereby the latter contracted to give Hennebique a monopoly of his invention until August 8, 1907. Such were the terms of the grant, and under all the foregoing cases such would have been the construction placed by them on that contract. Now, as the stipulation concedes the identity of the two inventions, Rev. St. § 4887, applies, and it necessarily follows that, if that contract is to be reformed or modified, it must be so because the statute so provides. But the statute nowhere so provides.

It is said, however, in the majority opinion, that when the words "foreign patent" were used in the statute Congress in effect meant a valid foreign patent and one that on legal test should be adjudged valid. The simple answer to such a contention is that the act nowhere so says. By its silence it made no criterion of the void, voidable, or forfeiture character of the foreign patent, and the only feature thereof it does, by reference, adopt is its length of term, and where there is more than one patent it takes the shortest as embodying the contract it makes with the foreign inventor. The intent of the statute is manifest. Finding an outstanding monopoly granted by a foreign government for the same invention, it contracted to grant a domestic monopoly for that term. It simply inquired whether this invention "has been previously granted in a foreign country." Whether the patent was void or voidable, forfeitable or not, was not provided for by the statute. Length of term was the only test, or, as Justice Bradley put it in his direct, forcible words:

"The term of the English (foreign) patent fixes the term of the American patent, nothing more, nothing less."

That is the plain meaning of the words. There is no ground for construction or the interjection of supposed intent. By the use of apt words of reference to the term of the foreign patent as a measure of time, and by its omission to refer to the terminable character of such foreign patent, Congress has made the then existing foreign time term the sole pertinent factor to fix the future time of the domestic

patent. This, I submit, is in view with what was said in *Bate v. Sulzberger*, 157 U. S. 37, 15 Sup. Ct. 516, 39 L. Ed. 601:

"Congress, in effect, by the existing law, says to an inventor seeking to enjoy the exclusive use in this country of his invention for the full term prescribed by law: 'If your invention has not been introduced into public use in the United States for more than two years, you may, upon complying with the conditions prescribed, obtain an American patent, and you may, if you can, obtain a foreign patent. But the American patent will be granted on the condition that, if you obtain the foreign patent first, your invention shall be free to the American people whenever, by reason of the expiration of the foreign patent, it becomes free to people abroad; but in no case shall the term of the American patent exceed seventeen years.' This we deem to be a sound interpretation of the statute, giving to the words used the meaning required by their ordinary signification. In our judgment the language used is so plain and unambiguous that refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress."

On March 4, 1903, the original patent of Hennebique was, in a suit in the French courts, adjudged to have been anticipated by an earlier patent to Monier, and was therefore null and void, and in appeals to higher courts that decision was finally affirmed in February, 1908. In this litigation the Hennebique second addition was neither mentioned nor made the subject of decree; but under the French law quoted such second addition fell, not because it did not involve invention, but because the original patent on which it was ingrafted had been annulled. The opinion of this court now holds that the effect of this annulment of the French patent in a proceeding begun after the American patent had issued was the same as if no foreign patent existed when Hennebique's American patent was granted, and therefore Rev. St. § 4887 does not apply. The practical effect of this construction is that a statute which was intended (see *Mushet's Case*, Commissioner of Patents' Decisions, p. 105, approved in *Huber v. Nelson*, 148 U. S. 275, 13 Sup. Ct. 603, 37 L. Ed. 447) to place the American public on a parity with foreign countries with relation to foreign inventions by releasing the American monopoly as soon as it was released abroad is made to so operate that the release of the monopoly abroad, instead of releasing it here, actually extends it eight years longer than would have been the case had no steps been taken to release it abroad. And that this radical change in his patent was brought about in a suit honestly instituted by Hennebique himself still shows the grave dangers to which the patent system is subject, when the future of an American patent is not a matter of contract right, but one dependent upon the action of one of the parties to it. A result so at variance with the reason and spirit of the law is not to be imputed to Congress. It tends to unsettle rights, for when this patent was issued the public had a right to assume that 1907 was the limit of Hennebique's American patent. His French patent was then in force. The French law provided with reference to such patent:

"This right is established by deeds delivered by the government under the name of patents of invention."

No step has been taken to annul it. It was on this status in France that Hennebique's American patent was granted in 1898, to expire in

1907. That the annulment of that French patent, begun three years later, should in any way affect the American patent, much less that it should extend its monopoly eight years, is a proposition whose statement seems to me its answer.

ARCHBALD, District Judge (concurring). I concur in the view that the act of Congress, in limiting a patent in this country by the term of one previously granted for the same invention abroad (Rev. St. § 4887), presupposes that the foreign patent is valid, and, where this proves not to be the case, that the patent here continues for the full term of 17 years which it would otherwise enjoy. I do not agree that the term of the patent abroad is written into and becomes the term of the patent here, regardless of whether such foreign patent is inherently good or bad. The purpose of the law is manifestly to limit the monopoly secured by the patenting of the invention, so that it shall come to an end, and the invention be free for the benefit of citizens of this country, when it becomes free in the country where it was first patented and protected. But where there never was a valid patent there, and except in name the invention was not thus in fact protected, the reason for the law disappears, and with it the application. *Société Anonyme v. General Electric Company* (C. C.) 97 Fed. 604. The case is not to be identified or confused with that of a foreign patent, which, after having been granted for a definite term, lapses or becomes forfeited by force of a condition subsequent, as for nonworking, or the failure to pay a renewal fee. *Pohl v. Anchor Brewing Company*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953; *Leeds & Catlin v. Victor Talking Machine*, 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805. The foreign patent, in a case of that kind, having issued for a definite term, and the domestic patent being limited by it, the term so fixed at the beginning is held to continue, without regard to what may so subsequently happen; the life of each, after its inception, proceeding independently of the other. *Bate Refrigerating Company v. Gillett* (C. C.) 31 Fed. 809. But the lapse or forfeiture of a foreign patent short of the term for which it was originally granted is quite different from its being judicially determined never to have had any validity or life at all. And the effect of getting rid of it in this way, by which a domestic patent for the same invention is left free to enjoy to the full the term to which under our laws it would normally be entitled, is not to be likened to the cutting down or shortening of the term of the patent abroad, by what has incidentally come about with regard to it afterwards. The one is an attempt to reduce or abridge the original grant. The other merely clears the way for the assertion of that which, rightly considered, the patent is to be regarded as having possessed from the beginning. It is true that it is all one if, good or bad, and for all purposes, the term of the foreign patent is the term of the domestic one. But that is not the logic of the situation. It cannot be that Congress intended to limit the patent here by a patent abroad that was absolutely good for nothing. As declared by this court in *Atlas Glass Company v. Simonds Manufacturing Company*, 102 Fed. 647, 42 C. C. A. 558, the words "previously patented in a foreign country," as found in the section of the Revised Statutes referred to, must be taken to mean "patented

according to the laws and usages of such foreign country, provided a substantial monopoly is thereby granted." And this cannot be affirmed where for any reason such patent, as here, is inherently invalid.

In view, however, of the differences between the members of the court over this question, the effect of the treaty of Brussels, in my judgment, requires attention. The decree below certainly cannot be affirmed without first considering it. By the convention concluded at Brussels December 14, 1900, by the International Conference for the Protection of Industrial Property, at which the United States was represented, it was, among other things, ordained;

"Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states, adherents or nonadherents to the union. This provision shall apply to patents existing at the time of its going into effect. The same rule applies in the case of adhesion of new states to patents already existing on both sides at the time of the adhesion."

This convention was additional to that similarly concluded at Paris March 20, 1883, to which the United States was not originally a party, but subsequently gave its adherence, and was ratified by the Senate March 7, 1901, and proclaimed by the President, August 25, 1902, to go into effect September 14 following. 32 Stat. 1936. Taken as it reads, it provides for the absolute independence of previously interdependent domestic and foreign patents; and if self-executing, and not otherwise controlled, it relieves the patent in suit from the effect of the French patent to which reference has been made, whether valid or invalid.

It appears, however, that, at the first session of the same conference, in December, 1897, after the article in question had been formulated, Mr. Forbes, one of the delegates on the part of the United States, pointed out that, as it stood, it would apparently apply to patents existing at the time it was put in force, and that this would be contrary to [the spirit of] our laws, which do not permit of a retroactive effect being given them. He explained that the law in the United States with regard to the interdependence of domestic and foreign patents had been modified (evidently referring to Act March 3, 1897, amending Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382]), whereby the provision had been eliminated that the term of a patent here for an invention previously patented abroad should be limited to expire at the same time with it, but that this interdependence was retained as to patents delivered prior to January 1, 1898, their terms being fixed at the time of their issue, and that if article 4 bis was interpreted as extending to patents already issued, as it possibly might be, it would run counter to the principle of nonretroactivity with which our laws are inspired. To avoid the objection which might be raised by the United States upon this score, he inquired whether article 4 bis could not be made the subject of a special protocol. After a discussion of the subject by several delegates, in the course of which it was suggested by Mr. Morel, director of the International Bureau, that the article, while made to apply to existing patents, should be expressly limited in its effects to nullities and lapses subsequently occurring, it was propos-

ed by Mr. Bellamy Storer, another of our representatives, that a proviso should be added: "However, the term fixed by the internal law of each country remains intact;" it being explained by him that this would only apply to patents in existence at the time the article went into force, the effect of which would be that patents delivered in the United States up to December 31, 1897 (the date to which the interdependence of foreign and domestic patents was preserved by the act of March 3, 1897), would be limited by the normal term of patents previously issued for the same invention, the same as they were by the existing law. It was not deemed advisable by the conference, however, to make any changes in the text of the article, either that submitted by Mr. Storer or that suggested by Mr. Morel, but that it should receive, instead, the interpretation which the American delegation desired, and, with this understanding entered on the minutes, the article was finally adopted. That there may be no question as to this being a correct summary of the proceedings, they are produced in full in the margin.¹

If this were all, it might perhaps be a question whether the construction so impressed on the article by common consent at the time of its adoption would not have to be respected, in accordance with which it would be restricted, so as not to interfere with or disturb the terms of patents issued or applied for in the United States up to December 31, 1897, which would be left as they stood by the existing law. And, in conformity with this, the patent in suit, having been applied

¹ December 13, 1897.

The new article relative to the reciprocal independence of patents is unanimously agreed to. This article which bears No. 4 bis, is expressed in the following terms:

"Art. 4 bis: Patents applied for in the various contracting states by persons admitted to the benefits of the convention under the terms of articles 2 and 3 shall be independent of patents obtained for the same invention in the other states, whether adhering to the union or not.

"This provision shall apply to patents in existence at the time of its being put in force.

"The same thing shall apply in the event of the accession of new states, to patents existing on either side at the time of accession."

* * * * *

December, 14, 1897.

In regard to article 4 bis relating to the reciprocal independence of patents, Mr. Francis Forbes, delegate from the United States, makes the following remarks:

"According to the second paragraph the new order would apply 'to patents existing at the time of its being put into force.' Now, in the United States the law cannot have a retroactive effect. The stipulation in question would therefore receive objections on the part of the American government, objections of such a nature as to retard the signing of the additional act."

Desiring to avoid this eventuality, Mr. Forbes inquires if article 4 bis could not be made the subject of a special protocol. The president consulted the conference on this question, in order to learn if it was agreeable to the conference to modify the text submitted for the signature of the delegates, or whether it would be sufficient to mention in the minutes the reservation made by the delegate from the United States.

Mr. Francis Forbes would readily accept the arrangement if it be clearly understood that it should not have a retroactive effect in his country. He explains that the law of the United States has been modified in relation to reciprocal independence. Patents delivered prior to January 1, 1898, however,

for two days before the change, introduced by the act of March 3, 1897, went into force, would be excepted out of the effect of the article, being limited by the French patent previously granted which is now brought forward, provided, of course, that that is the effect of it, valid or invalid.

It is to be noted, however, that, although a report of the work of the conference was made by our delegates, it was not ratified. But a second session having been held in December, 1900, and the subject having again come up, article 4 bis was adopted, with others, in the exact form in which it had before been agreed to; and the treaty, of which it was a part, having been submitted to our government, was ratified by the Senate and proclaimed by the President, as already stated. The question now is whether it is to be taken as it reads, or

remain dependent, so far as their term is concerned, upon the corresponding foreign patent taken out for the same invention; their term being fixed at the time of their deliverance. Now, it might happen that article 4 bis would be interpreted as meaning that all patents issued before the coming into force of the new law should extend during their entire term of 17 years, while from the moment of their issuance these patents ought to be considered as limited in duration by the patents delivered at an anterior date. This interpretation could only be admitted in the United States by means of a special law, which would be contrary to the principle of nonretroactivity with which all American legislation is inspired.

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Mr. Dubois, delegate from Belgium, is of the opinion that article 4 bis is designed only to produce effects after the patent has been issued, and consequently it is not contrary to the American law. It is really not the purpose to retroactively modify the normal term of the patent, which remains such as it was fixed by the law in force at the time of its issuance.

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Mr. Francis Forbes insists on the necessity of stating this point very precisely, in order to avoid errors of interpretation, which would have very regrettable consequences, in case of the acceptance of the additional act by the United States.

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Mr. Morel, director of the International Bureau, calls attention to the object aimed at by the conference in voting article 4 bis. He believes that satisfaction might be given to Mr. Forbes by introducing a condition in the second paragraph of this article, excepting very explicitly incidents which are anterior to its being put into force. He suggests for this paragraph the following amendment:

"This provision shall apply to patents in existence at the time of its being put into force. Its effects are, however, limited to nullities and lapses which would affect anterior patents."

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Mr. Michel Pelletier, delegate from France, remarks that, the reciprocal principle of independence being admitted, it is not advisable to restrict same by new provisions.

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Mr. Dubois gives his opinion as to the situation which will result from the article 4 bis. This establishes the principle of independence as to incidents, notably lapses and nullities, which may occur after the issuance of the patents; but the internal law can freely fix the normal duration of the patent taken out in the country.

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Mr. Michel Pelletier also expresses the opinion that the independence has the precise effect of suppressing all relations between the various patents,

whether it is to be qualified by the understanding at the time it was adopted at the first session of the conference.

There is no better example of the uncertainty introduced, when parol evidence is resorted to, to control the effect of a written instrument, than is afforded in the present instance. By the plain terms of the article foreign and domestic patents are rendered independent, and this provision is expressly made to apply to existing patents without any apparent restriction or qualification; complete independence being substituted for the previous interdependence by which up to that time they had been hampered. The objection raised to this by the delegates from the United States, as we have seen, was that it might be held to operate retroactively, and in that way enlarge the term of existing patents, which would otherwise be restricted by the limitations

and leaves to each national law the care of regulating all matters pertaining to patents taken out in the country.

His Excellency, Mr. Bellamy Storer, delegate from the United States, asks if the following words could not be added:

"However, the term fixed by the internal law of each country remains intact."

This addition would, of course, only apply to such patents as exist at the time of the coming into force of the additional act. Its bearing in the United States would be: The patents delivered under the rules of the existing law—that is, until December 31, 1897—would be limited by the normal duration of foreign patents of an anterior date, issued to the same inventor for the same invention. Their duration would then remain as it was at the moment of the coming into effect of the existing law.

The president proposes to leave the text of article 4 bis without any change, and to state in the minutes of the meeting that this article should receive the interpretation which has just been indicated. The American delegation would thus obtain complete satisfaction.

His Excellency, Mr. Bellamy Storer, declares this combination acceptable, if it meets with the unanimous adhesion of the conference.

Count Hamilton, delegate from Sweden, pronounces himself in favor of an addition to article 4 bis in the sense as indicated by Mr. Morel.

The Very Honorable C. B. Stuart Wortley, delegate from Great Britain, remarks that it is important, in the examination of the question, to take into consideration article 2 of the general convention, which guarantees to those under the jurisdiction of the contracting states, the benefit granted in each country to natives thereof. The subjects of Great Britain have then for their patents in the United States a right of protection for a period of 17 years according to the American law.

Mr. De Ro, delegate from Belgium, supports the proposition of the president, to record in the minutes the harmony existing in the convention as to the effect of article 4 bis, to which proposition His Excellency, Mr. Storer, has kindly acceded.

The president puts to a vote the adoption of the text previously adopted for article 4 bis, with the interpretation which the American delegation desire to specifically point out by proposing to complete the second paragraph by supplementing this explanatory clause:

"However, the term fixed by the internal law of each country remains intact."

Article 4 bis is definitely adopted with these conditions.

imposed by the law as it stood at the time they were granted. In the course of the discussion which followed it was suggested by other delegates that this could be met and disposed of by confining the effect of the provision to nullities and lapses, establishing the principle, as it was said, of independence as to incidents occurring afterwards. But this did not meet with favor. And it was finally agreed that the article should be adopted as it had been formulated, with the interpretation desired by the United States delegates, entered on the minutes, to qualify it, that "the term fixed by the internal law of each country remains intact"—meaning, in the light of the context, that the article was not to be retroactive, but that existing patents were to continue to have the limited term imposed upon them at the time they were granted by the term of a foreign patent previously obtained for the same invention. And yet we have the delegates from this country, when they came to make their report, stating that:

"It was the unanimous sense of the conference that the paragraph was not applicable to existing United States patents, but only to those patents whose terms might be shortened by the laws of those states of the union in which provision is made for a shortening of the term on the lapsing of patents for the same inventions in other states."

Or, as it is further explained, that the duration of a patent here, being determined by the state of the law at the time it was granted, "is unaffected by the subsequent expiration of a foreign patent for the same invention by reason of nonpayment of taxes or nonworking." But this is exactly what the conference did not agree to, if I understand the proceedings. Indeed, if the only independence proposed by the article was as to lapses and forfeitures of previous patents for the same invention in other countries, the objection made by our delegates, as well as the resulting discussion and the amendments proposed to overcome it, were without point and meaningless; it being well settled, as must have been known to them, that, under section 4887, patents in the United States are only limited by the normal term of foreign patents, and that the lapsing or falling in of the latter for nonpayment of renewal fees or similar incidents have no effect on the term of a subsequent patent for the same invention here. *Pohl v. Anchor Brewing Company*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953. *Bate Refrigerating Company v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601.

Assuming, then, that we were at liberty to go outside of the article as it stands, which interpretation of it is to be taken—that reported by our delegates (which is the only one, by the way, that was likely to have been brought to the Senate, so as to influence it in ratifying, if that is of any consequence), as to the incorrectness of which there can be no question, or that derived from the minutes of the proceedings, as they appear in the journal of the conference, which alone can be regarded as having been carried forward into the result of the succeeding session, which is insisted on? It may be that either view favors the defendant. But that is not the question. The article must not be open by parol to a double construction, and that one must be adopted which will apply to all cases, not only in this country, but elsewhere. While the action of the conference was taken at the instance of the

delegates from the United States to answer the objection that, contrary to the spirit of our laws, the article might be held to be retroactive, the explanation accompanying its adoption was not limited to patents here, but was of general application affecting all the states represented at the conference who might ratify it; and this dilemma might arise in consequence: That other states, relying on the minutes of the proceedings, would interpret the article one way, while the United States, under the lead of our delegates, would take it another, resulting in serious confusion and conflict. And that this is by no means an impossible situation, we find it declared by the French government, as the reason for ratifying it, that all the inconveniences, arising from the reciprocal dependence of patents taken out in different countries, are made to disappear by the article in question, the effect of it being to suppress all connection between such patents, leaving to the law of each state the regulation of the terms of patents taken out in that country; a view, quite aside, as it will be noted, from that suggested in the report of our delegation. And the Italian Ministry of Agriculture, Industry, and Commerce, in May, 1903, being called on to make a deliverance upon the subject, while conceding that it was for the judiciary to determine the subject finally, as a matter of executive guidance in case of the demand for the patenting of an imported invention patented abroad, or of a claim of priority based on the filing there of an earlier application, also recognized that article 4 bis was in derogation of the existing statute law of Italy, which, the same as in the United States, limited the term of a domestic patent by the term of a patent for the same invention taken out before that in a foreign country; and that patents, thereafter applied for, should therefore be allowed the full term of 15 years, provided by law, notwithstanding that the invention had been made public by the previous granting of a foreign patent for it, although applications for a patent of importation, resting on other principles and not being provided for by the conference, were in a different position.

But we are relieved from the necessity of going into this subject further. As already stated, there was no ratification of the action of the 1897 conference, and it cannot be successfully maintained that, without any mention of, or reference to, it, what occurred at it was carried forward into the session of 1900 and written into article 4 bis as there adopted without qualification or objection. Upon being ratified by the states participating in the conference, in the form in which it was so cast, it became the treaty law between them, mutually governing their citizens and subjects, to be interpreted according to the terms in which it was couched, unaffected by any reservation or explanatory restriction not expressed in it. A treaty is a contract, and is to be so construed as to carry out the apparent intention of the parties as disclosed by its terms. *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. Where the words convey a definite meaning, and there is no contradiction between the different parts of it, the meaning deduced from the face of the instrument is the one to be taken, and courts are not at liberty to add to or detract from it. Or, in other words, the meaning is to be ascertained by the same rules of construction and course of reasoning as are applied to the interpretation of

private contracts. 28 Am. & Eng. Ency. Law (2d Ed.) 488; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 22 Sup. Ct. 195, 46 L. Ed. 264. With due deference, therefore, to the apparent position to the contrary taken at the first session of the Brussels Conference, it is not to be thought of that a treaty ratified and confirmed by the participating powers in a definite and unambiguous form can be limited or qualified by a resolution passed at a preliminary conference, which is not by reference or otherwise incorporated into or made a part of its terms, so as to be submitted to the different countries called upon to consider and ratify it. Where qualifications are found necessary, after a treaty has been formulated, if the text is not changed, they are brought in by way of explanatory protocols at the end, as is shown by the treaty of 1883 in question, where a number of them will be found. And this may have been what Mr. Forbes had in mind, when he proposed a special protocol against article 4 bis being given a retroactive effect. And, had this course been pursued, it would have removed all difficulty. But unfortunately it was not. And a mere resolution on the minutes of the conference cannot be held to take its place.

There is nothing in *Doe v. Braden*, 16 How. 635, 14 L. Ed. 1090, which is counter to this. In that case the treaty with Spain, by which Florida was ceded to the United States, was under consideration; and it appeared that, subsequent to its negotiation and after the terms had been agreed on, the Secretary of State requested and received an admission from the Spanish Minister that certain grants of land by Spain in Florida should be annulled, and this was annexed to the treaty at the time of its ratification and promulgated with it, and it was held that it was as obligatory as if inserted in the treaty itself. "It is too plain for argument," as it is said, "that when one of the parties to a treaty, at the time of its ratification, annexes a written declaration, explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and a treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if inserted in the body of the instrument." But there is nothing of that kind here. So in *Kinthead v. United States*, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152, the correspondence between the Secretary of State and the Russian Minister, with respect to the terms of the sixth article of the treaty by which Alaska was taken over was accepted as explaining the meaning of certain expressions in that article, but not, however, to control the scope of it. The case of *New York Indians v. United States*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927, is much more in point; it being there held that a qualifying provision, passed by the Senate at the time of the confirming of a treaty with certain Indian tribes, compliance with which was made an express condition of the treaty going into force, was of no effect to modify it, as it was promulgated by the President, in which no allusion to the provision was made.

Without further discussion, therefore, it is clear that article 4 bis, having been duly ratified by the different states represented in the conference in the form in which it now appears, must be taken as it reads, according to which the dependence of domestic on foreign patents for

the same invention, previously granted abroad, is entirely removed and done away with. And this is to be interpreted liberally. As resolved by the Convention of Turin, in September, 1902, a few days after the treaty went into effect in the United States:

"The independence of patents proclaimed by the additional act of Brussels ought to be construed in the broadest terms, and particularly in such manner that the term of a patent shall not in any case be dependent upon the term of another patent."

Nor is this to be confined, as conceived by our delegates, to such subsequent incidents as nullities and lapses by reason of the nonpayment of renewal fees or nonworking; an attempt to so limit it having been expressly disapproved by the conference. And, it having been in terms provided that the article should "apply to patents in existence at the time of its being put in force," subsisting patents, including the one in suit, were freed from their previous dependency, equally with those granted afterwards; no saving distinction being made between them.

The article must also be regarded as self-executing. A contrary opinion was given by the Attorney General as to the treaty of 1883. 19 Opinions, 275. And this was followed by the Patent Office, as the correct construction, afterwards. *Ex parte Zwack & Co.*, 76 O. G. 1855; *Butterworth v. Boral*, 97 O. G. 1596. It was accepted, also, by the Court of Appeals of the District of Columbia in interference proceedings, carried up from the Commissioner of Patents. *Parker v. Appert*, 75 O. G. 1201; *Rousseau v. Brown*, 104 O. G. 1120. In *United Shoe Company v. Duplessis Shoe Company*, 155 Fed. 842, 84 C. C. A. 76, also, it was held by the Court of Appeals of the First Circuit, that, although article 4 bis on its face was self-executing, it was controlled by implication by the passage by Congress of Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003), to give effect to it. But neither of these views in my judgment can be sustained. Having respect to their terms, it cannot be said that either the treaty of 1883 or the additional act of 1900 required legislation here to make it effective. They both undertake in the most direct and positive way to say what shall and what shall not be as to the matters with which they deal, and, being ratified in that form, nothing further, by our laws, was necessary to put them into operation. They cannot be treated as mere agreements by the high contracting parties to bring the domestic laws of each into conformity with them by subsequent action. That resulted by virtue of their own force and vigor.

A treaty is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798. By article 2 of the treaty of 1883, the subjects or citizens of each of the contracting states shall enjoy, in all other states of the union, so far as concerns patents for inventions, etc., the advantages that the respective laws thereof then or shall afterwards accord to their own citizens or subjects, in consequence of which they shall have the same protection as the latter and the same legal recourse against all infringements of their rights, upon condition of complying with the formalities imposed upon citizens or subjects. And by article 3 subjects or citizens of states not forming

part of the union, who are domiciled or have [bona fide, according to the additional act of 1900] industrial or commercial establishments in the territory of one of the states of the union, are assimilated in this respect to actual subjects or citizens. By article 4 any one who shall have regularly deposited an application for a patent of invention, etc., in one of the contracting states shall enjoy, for the purpose of making a deposit in other states and under reserve of the rights of third parties, a right of priority during the periods thereafter mentioned; that is to say, four months in case of designs, and six months (made twelve by article 4 of the additional act) for general inventions. By article 5 the introduction by the patentee into countries where the patent has been granted of articles manufactured in any other of the states of the union shall not entail a forfeiture; subject, however, to the obligation of the patentee to work his patent, conformably to the laws of the country. And so on, in practically every article; the same being true, also, of the different articles of the additional act, including article 4 bis, by which the independence of foreign and domestic patents is declared and made to apply to those in existence.

It is idle to suggest, in the face of these provisions and others of like character that could be quoted, that the treaty, as well as the additional act by which it was supplemented, was inoperative and lay fallow until Congress, by statute, was moved to give life to it. There is nothing to the contrary in article 17, as argued, which merely refers to the formalities required to ratify, peculiar to each country, such as a confirmation in the United States by the President and Senate. And if there was any doubt therefrom, as to the intention that it should be self-executing, it is disposed of by article 18, immediately following, where it is provided that the treaty shall go into effect within a month after the exchange of ratifications, and remain in force as to each country until a year after it shall be there denounced. It is to be remembered, also, that the patentee here was a French subject, whose property rights were being thus protected and provided for. It is not as though he were a citizen of the United States, dependent on the domestic law, if that makes any difference. And if the contemporaneous construction given to the treaty by the executive branch of the government, following the opinion of the Attorney General, is insisted on, what is to be said of the contrary view taken by the French and the Italian governments, which is entitled to equal respect—this being a treaty?

While, then, it would be our duty, if it were possible, having regard to the terms of the treaty, to abstain from giving retroactive effect to it, there is nothing by which it can be so limited; and existing patents must therefore be held to have been unfettered, and enlarged accordingly. The authority to so extend the terms of such patents cannot well be doubted. It could have been done by special act of Congress as to any specific invention, a course that was not infrequently indulged in formerly. 22 Am. & Eng. Ency. Law (2d Ed.) 285; 30 Cyc. 918. There was also at one time a general statute by which, upon a proper showing, it could be allowed by the Commissioner. And there was nothing, therefore, to prevent it from being similarly accomplished by an enactment which should apply impartially to all in the same situa-

tion, as provided by the treaty. The construction, that the public had a right to have the monopoly brought to an end, in the case of this or any other invention, according to the terms imposed on the patent by the state of the law at the time it was granted, has nothing to stand upon. Congress has the power to revise and extend a patent, even after it has expired and the invention gone into public use. 22 Am. & Eng. Ency. Law (2d Ed.) 385. And much more is this admissible as to patents still existing. The policy of the law at present is against the extension of patents, which Act March 2, 1861, c. 88, 12 Stat. 246, expressly prohibited. But that is not controlling; the lawmaking powers having authority to change their mind upon the subject, if they see fit to do so.

It is said that, if article 4 bis is held to be retroactive and self-executing, it revives and reinstates every patent which previous to that time had expired by reason of the limitation imposed by the term of a foreign patent. But that does not necessarily follow. It was only existing patents that were affected by article 4 bis, and not those which had already terminated. Besides that, if this was the purpose, there was nothing, as we have just seen, but the wish of Congress to stand in the way of it.

It is further said, however, that Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003), having been passed for the avowed object of effectuating the provisions of the treaty, Congress, in so undertaking to act, in effect declared against the self-executing character of the treaty, and that the construction so put upon it is to be respected, if, indeed, it is not controlling. This is the view taken in *United Shoe Company v. Duplessis Shoe Company*, 155 Fed. 842, 84 C. C. A. 76, referred to above. But it was recognized in that case that article 4 bis, and, if so, the whole treaty, was self-executing on its face, and it is giving altogether too much force to the action of Congress to have it do away with this simply by implication. If the engagement between the high contracting parties, who entered into the treaty, was, by its terms, immediate and unqualified, which is not only demonstrated above, but is there conceded, no legislative declaration afterwards, on the part of one of them, is competent to qualify it. No doubt the treaty could be denounced or superseded by appropriate action; but it is not to be set aside or deprived of its inherent force because of acts based upon the assumed necessity for bringing the statute law into harmony with its provisions.

But it is further said that, the act of 1903 coming after the treaty and being confined to giving effect to a part only of its provisions, Congress having deemed it advisable to go no further in that direction, the treaty is to that extent abrogated; the act as so passed being inconsistent with it. There can be no question that, as declared in the *Cherokee Tobacco Case*, 11 Wall. 616, 621 (20 L. Ed. 227), "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a treaty." And so far as this is the necessary result of the act in the present instance, being later than the treaty, this effect must be given to it. The act of 1903, however, is somewhat peculiar. It is not confined to the purpose expressed in the title, but undertakes to amend, not only section 4887, but sections 4892, 4896, and 4902, also,

only the first of which has anything to do with the present subject. And as to section 4887 it simply re-enacts it as amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692, except that it enlarges the time after which an application for a patent filed abroad shall debar the obtaining of a patent here for the same invention from 7 months to 12 months, this period in the case of designs being fixed at 4 months; and except, also, that it provides in a new and distinct paragraph that an application filed here within the period so limited, after an application for the same invention filed abroad, shall have the same force and effect as if filed here at the time it was filed there, provided similar privileges are afforded by such foreign country to citizens of the United States by law or treaty; and provided, further, that no patent shall be granted for an invention patented or described in a printed publication in this or any foreign country more than two years before the filing in this country, or which had been in public use or on sale in this country for a like previous period.

But it is difficult to see, upon the most liberal construction, how, as so enacted, it can be given the restrictive effect that is now claimed for it. It is true that it provides for but a small part of that which is covered by the treaty, and if legislation was necessary to give effect to the treaty there would not be much left to it. But that, as we have seen, is not the case. The treaty, if uncontrolled, is self-executing. It is only as Congress in this abbreviated fashion has apparently seen fit to proceed upon a different assumption that any doubt is cast upon it. A repeal by implication is never favored, even between statute and statute; and much more is not a treaty, which has been mutually agreed to, to be overturned by a later statute, which is the individual act of one of the parties. To sustain that view in any case there must be such a clear repugnancy that treaty and statute cannot stand together, which, in the present instance, will hardly be contended for. The only inconsistency, as just stated, is that, where one deals with the subject comprehensively, the other does so restrictedly, which is not sufficient; there being nothing to convince that this was the purpose.

It is said that this is shown by the title, which commits the act to the carrying out of the treaty, which must thus be regarded as the only means appropriate for doing so. *Dallemagne v. Moisan*, 197 U. S. 169, 25 Sup. Ct. 422, 49 L. Ed. 709. The title of an act may no doubt be resorted to, under proper circumstances, to explain or give character to the body of it. But that it should be allowed controlling force, under the showing that is made here, is entirely unwarranted. Only about one-tenth of the act in question has anything to do with the title; the rest of it, as we have seen, being entirely unrelated, except as it deals with the general subject of patents. And with the little heed that is so paid to it in the body, it would be straining a point to accord to the title the predominant part that is now urged for it. The title being disposed of, there is nothing in the act itself to in any way disturb us. It did not undertake to undo what had been done by the treaty. At most it merely neglected to take such steps as would have brought the statute law into complete conformity with its provisions. But the treaty was not dependent upon this. It went into effect of its own force some six months before. And it is not to be set aside in any such

indirect and inconclusive manner after that. It is also further to be observed that, even if the act of 1903 is held to have superseded or abrogated the treaty, the treaty having gone into effect in this way meantime, the patent in suit and others similarly situated were thereby freed from their dependency upon corresponding foreign patents, and they could not be put back by the act into their former position, which would offend against the principle of nonretroactivity contended for, even more seriously than anything which is now complained of.

Taking treaty and acts of Congress together, therefore, the case stands this way: By section 4887, Rev. St., a domestic patent for the same invention previously patented abroad was made dependent on the term of such foreign patent, by which it was limited. The act of March 3, 1897, removed this restriction, but provided (section 8) that it should not apply to patents granted prior to January 1, 1898, nor to applications filed before that on which patents were subsequently granted. This prevented the patent in suit, for the time, from having the benefit of this legislation, having been applied for December 29, 1897, two days within the period fixed by the proviso. Then the additional act of Brussels of 1900 was ratified, by which, according to article 4 bis, there was a complete unfettering of foreign and domestic patents for the same invention; and this by express terms was made to apply to existing patents. Such was the state of the law, and such the position of the patent in suit, when the act of March 3, 1903, came into existence. As just stated, this could not undo what had already been done, nor put back the patent into its former dependent condition. Having become entitled to the full term of 17 years accorded to patents generally, it could not thereafter be again restricted. Nor did the act of 1903 indeed, undertake to do so. It simply re-enacted section 4887, as amended by the act of 1897, leaving out the limitation which time and treaty had doubly disposed of, and introducing certain provisions in conformity with the treaty. It is only by reading into this record that which is not to be found there, and has no rightful place in it—that the treaty was not retroactive, and was not self-executing, contrary to the plain effect of it—that the patent can be cut down or made dependent again upon the terms of the French patent.

For both reasons, therefore, which were discussed at the argument, the plea interposed in the court below, in my judgment, was bad, and should have been overruled; and the decree sustaining it must be reversed in consequence.

BATES MFG. CO. v. BATES NUMBERING MACH. CO.,

(Circuit Court, D. New Jersey. September 25, 1909.)

1. TRADE-MARKS AND TRADE-NAMES (§ 75*)—UNLAWFUL COMPETITION—FRAUD—DECEPTION OF PUBLIC.

In a suit to restrain unlawful competition, equity does not concern itself with the means. If the result is fraudulent, and the public are induced thereby to purchase the goods of one under the belief that they are those of another, the means will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*

Misleading or false labels, see note to *Raymond v. Royal Baking Powder Co.*, 29 C. C. A. 250.]

2. TRADE-MARKS AND TRADE-NAMES (§ 68*)—"UNFAIR COMPETITION"—ELEMENTS.

Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol as it may arise from the use of words, etc., which everybody may use; the test being whether what has been done tends to pass off the goods of one for those of another, or to deprive such other of his rights.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7174, 7824.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

3. TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNLAWFUL COMPETITION—USE OF CORPORATE NAME.

From 1891 to 1902 complainant alone made and sold a "Bates Automatic Hand Numbering Machine," having a consecutive duplicate and repeat movement, during all of which time and for several years thereafter it extensively and exclusively advertised the machine as "The Bates Numbering Machine," so that the purchasing public understood such name to exclusively designate complainant's machines. Bates, the patentee, under whose patents the machine was manufactured, severed his connection with complainant in 1895, afterwards organizing a corporation under the name "Bates Machine Company." In 1902 defendant under that name began manufacturing computing machines then designated as "Model No. 49" and "Model No. 50." In 1908 complainant obtained an injunction restraining defendant from putting out hand numbering machines in boxes bearing labels in imitation of those appearing on complainant's machine, whereupon defendant in 1909 changed its name to the "Bates Numbering Machine Company," and referred to its competing machines not by model numbers, but as "Bates Numbering Machines," in its advertising, etc. *Held*, that such use of the word "Bates" in connection with numbering machines constituted unlawful competition, and that complainant was entitled to injunction restraining defendant's use of the words "Bates Numbering Machine Company" as its corporate name, and from using any other words resembling "Bates Numbering Machine," the effect of which would be to mislead the public to believe that defendant's machines were those manufactured by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*

Use of corporate and firm names, see notes to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 79; *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. C. A. 357.]

In Equity. Suit by the Bates Manufacturing Company against the Bates Numbering Machine Company to restrain an alleged unfair com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petition in trade. On motion for preliminary injunction. Heard on bill, with supporting and opposing affidavits. Granted.

See, also, 141 Fed. 213.

The complainant seeks to enjoin the defendant from the use of its corporate name, "Bates Numbering Machine Company," and from using the expression "Bates Numbering Machine," in connection with the sale of automatic hand numbering machines not of the complainant's make, and from filling orders calling for a "Bates Numbering Machine" with a machine other than that of the complainant, and from seeking to induce prospective purchasers to change orders, proposals, and awards calling for a "Bates Numbering Machine" so as to describe or specify a machine other than that of the complainant. The bill charges that the defendant changed its name from the "Bates Machine Company" to the "Bates Numbering Machine Company" fraudulently for the purpose of deceiving the public, and to obtain the benefit of complainant's advertisement and business reputation, and to identify itself and its business with that of complainant, and to palm off its goods as that of the complainant; that the defendant has ever since such change of name been offering and advertising for sale its automatic hand numbering machines under the trade-name and designation "Bates Numbering Machines," and has used and is using its corporate name "Bates Numbering Machine Company," and has and is wording its advertisements in such a way as to make it deceptively appear that the defendant is selling and offering for sale complainant's genuine "Bates Numbering Machines," and has sold and is selling its said numbering machines as those of complainant's manufacture, and that it has by the use of its corporate name and the said trade-name "Bates Numbering Machine" in its advertisements, etc., induced such purchasers to purchase defendant's automatic hand numbering machines as and for the machines of the complainant's manufacture, which such purchasers desired, and would have purchased from complainant had they not been deceived by the defendant's said fraudulent acts, with the result that the public has been deceived and complainant injured in its business. The bill thereupon prays that the defendant be perpetually enjoined from any further use of the word "Bates Numbering Machine Company" as its corporate name, or of any other words of such corporate name as would sufficiently resemble complainant's trade-name "Bates Numbering Machine," as to be likely to deceive or mislead the public into believing that the defendant's automatic hand numbering machine was complainant's product, and from employing or using the expression "Bates Numbering Machine" in connection with its sales of any automatic hand numbering machines not of complainant's make, or in connection with the offering or advertising the sale thereof, and from filling any orders for "Bates Numbering Machines" with any other than complainant's machines, and from seeking to induce prospective purchasers to change orders, proposals, and awards calling for "Bates Numbering Machines" so as to describe or specify a machine other than that of the complainant, and for a provisional injunction to like effect during the pendency of the suit.

The following statement of facts found from such affidavits is necessary for a proper understanding of the questions raised:

Both complainant and defendant are corporations. The former was organized in 1890 under the laws of the state of New York, the latter in 1893 under the laws of the state of New Jersey. Both parties have from the time of their respective incorporations been engaged in the manufacture of various kinds of numbering machines designed by Edwin G. Bates, whose surname was used in the corporate title of each of these corporations. He was the patentee of these numbering devices, and an incorporator and stockholder of each of said corporations, but not at the same time. He severed his connection with the complainant about the year 1895, selling his stock holdings in that company, and began the business of manufacturing and selling hand numbering machines on his own account, carrying on the business for a short time in his own name, then using the name "Bates Machine Company." Subsequently the corporation of that name was organized, and the business enlarged and continued in that name until the change of name hereafter referred to. The complainant, about the year 1891, began the manufacture and

sale of an automatic hand numbering machine, capable of printing in consecutive order from one to any number having no more than seven digits, and of duplicating, triplicating, and quadruplicating any particular number, before advancing automatically to the next higher number, and, by the use of an adjustment, of repeating any of such numbers as many times as desired. That to each of such machines a name plate was affixed, bearing complainant's name and the words "Bates Automatic Numbering Machine" as a trade-mark. That in the year 1891 or 1892 complainant began, and ever since has continued, to advertise said machines in various publications and trade journals published in the United States, designating said machines as "Bates Numbering Machines," and has at all times in selling said machines applied thereto the words "Bates Automatic Numbering Machines," and designated the same in its advertisements by the trade-name "Bates Numbering Machine." That as a result of complainant's skill and enterprise in advertising said machines, and their satisfactory character, it obtained an extensive and lucrative business in said machines, and the name "Bates Numbering Machine" became widely and favorably known in connection therewith throughout the United States, and became associated and identified with the automatic hand numbering machine of complainant's manufacture, and with such machines only, in the minds of the public and the trade generally. That from the defendant's incorporation until 1902 or 1904 (the exact year being in dispute) numbering machines manufactured and sold by it were of a different character and served a different use from those manufactured by complainant. That about 1902 the defendant for the first time manufactured and sold an automatic hand numbering machine having consecutive, duplicate, and repeat movement, which came into direct competition with the complainant's said machine, and which the defendant catalogued as its model No. 49. That in the year following it placed another similar machine on the market, cataloguing it as Model No. 50. That each of said type of machine had a plate affixed thereto, describing it by model number and name and address of defendant. That on the 31st of July, 1905, complainant filed its bill in this court against the defendant "The Bates Machine Company," praying that it be enjoined from using the name "Bates" on any hand numbering machine or on the packages containing the same, or in any way connected with the sale or offering for sale thereof, or in any way whatsoever calculated to deceive the public, and from imitating the labels appearing on the boxes in which the complainant's numbering machines were packed. That as a result of the proceedings had in such cause said defendant by a decree of this court dated September 28, 1908, was enjoined from putting out automatic hand numbering machines in boxes bearing labels in imitation of the labels appearing on the boxes in which complainant's machines were packed.

That subsequently, to wit, on or about the 15th day of January, 1909, defendant changed its name to the "Bates Numbering Machine Company." That prior to this change of name the automatic hand numbering machines manufactured by defendants, which came in competition with complainant's machines, were known by the trade as Model No. 49 and No. 50, and not as "Bates Numbering Machines," and were not described as "Bates Numbering Machines" in defendant's advertisements, but as models No. — (the appropriate letter or number following), but that subsequently thereto they were referred to as the "Bates Numbering Machines." That since, and by reason of such change of name, and the advertising of the defendant's machines as "Bates Numbering Machines," confusion has arisen in the trade as to the identity of these corporations; some of the trade addressing the one to the other's place of business under the impression that they were one and the same party. Several customers of the complainant gave orders to the defendant for its machines under the belief that they were giving such orders to the complainant for its machines.

Delos Holden (Melville Church, of counsel), for complainant.
John W. Queen, for defendant.

RELLSTAB, District Judge (after stating the facts as above).
Without attempting to define what under the adjudicated cases will be

enjoined as unfair in business competition, some of which will presently be cited, it may be said for present purposes that equity does not concern itself as to what the means, how, or with what intent they are used, if the result is fraud, and, if the public are induced thereby to purchase the goods of one under the belief that they are those of another, such means will be enjoined.

In *Ludlow Valve Mfg. Co. v. Pittsburg Mfg. Co.* (C. C. A.) 166 Fed. 26-29, it was said:

"No arbitrary rules have ever been, nor ever can be, laid down by which courts of equity will furnish this protection. To establish such rules would, like definitions in the law, furnish the means by which fraud could successfully accomplish its ends."

In *Howe Scale Co. v. Wyckoff et al.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, it was held that:

"The essence of the wrong in unfair competition consists in the sale of the goods of one person for that of another, and, if defendant is not attempting to palm off its goods as those of complainant, the action fails."

"Every man has a right to use his name reasonably and honestly in every way, whether in a firm or corporation. * * * It is not the use, but dishonesty in the use of the name, that is condemned."

The following from Nims on Unfair Business Competition, supported by the cases cited by him, are helpful in deciding this case:

Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol. It may arise from the use of words, etc., which everybody may use. The question is whether what was done in a special case tends to pass off the goods of one for those of another, or tends to deprive such other of his rights. If a name purely generic or descriptive or indicative of general qualities such as any one may use has by long association with goods of one person come to mean to the public his goods alone, and not such goods in general, other persons will be prohibited from using it. Pages 8 and 9.

"A trade-name may be either the name of the manufacturer of goods, or some name by which the manufactured goods have become generally known. There is a kind of property in such a name, and interference with it will be restrained by the court if there is a prospect of injury to the owner of it." Pages 22 and 23.

Rival manufacturers have no right by imitative devices to beguile the public into buying their wares under the impression that they are buying those of their rivals. Page 25.

A name may be so appropriated by user as to come to mean the goods of the plaintiff. Where such is the case, "the use of that name or one so nearly resembling it as to be likely to deceive as applicable to goods not plaintiff's may be the means of passing off those goods as and for the plaintiff's just as much as the use of a trade-mark." Pages 27 and 28.

"When one has established a trade or business in which he has used a particular name so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof." Page 34.

Out of this difficulty which the courts have found in preserving this right which every man has to use his own name, and at the same time preventing injury and fraud arising from the exercise of that right, the doctrine of secondary meaning has been evolved. Words which form a part of the common stock of the language may become so thoroughly identified with some one person's business or goods that it is quite possible that the use of them alone without any qualifying words or other explanation by another manufacturer would deceive buyers into believing that there was but one concern or one brand of goods instead of two. Page 138.

On the same principle that one must not pass off his goods as those of another, he must not use his trade-name in such a way as to give the impression that it is the trade-name of another. Page 164.

A corporate name is chosen by the incorporators themselves, and, as they can make it what they will, their rights arising from its possession are less important and their responsibility for its use is greater than in the case of their own personal name. Page 197.

"No name may be chosen in naming a corporation which will cause the new corporation to be passed off as some other company already in existence, or that will, when attached to the goods made by the new company, pass those goods off as the goods of some other company." Page 206.

Applying the foregoing principles of law to the facts in this case, the solution is not difficult. From 1891 to 1902 or 1904 (the year being in dispute) complainant alone made and sold a "Bates Automatic Hand Numbering Machine," having a consecutive, duplicate, and repeat movement. During all this time, and for several years after, it extensively and exclusively advertised this machine as the "Bates Numbering Machine," and the purchasing public understood that such trade-name exclusively designated complainant's machine. This machine distinctly filling a trade want, the complainant obtained a large and lucrative business in dealing therein. About the year 1902 defendant, then named "Bates Machine Company," began the manufacture and sale of an automatic hand numbering machine, with like movements, and accomplishing the same purpose as that of the complainant. At first it made but one kind of such machine, which it designated as Model No. 49, soon following it, however, with another which it designated as Model No. 50. In cataloguing, marking, and advertising such machines they were not designated as "Bates Numbering Machines," but as "Automatic Hand Numbering Machines Model No. 49 or 50." The name of the defendant "Bates Machine Company" as the manufacturer of such machines appeared with such marking, publication, and advertising. This designation in marking and advertising defendant's machines continued until after it changed its name, which took place on January 15, 1909. The course of the defendant up to this date was perfectly proper and legal. It had a right to put upon the market an automatic hand numbering machine in direct competition with the complainant, even to an exact duplication of its mechanism, if it did not infringe upon its patent rights. No such infringement is alleged. Its method and character of advertisement were unobjectionable. Nothing therein would suggest an attempt to trade on the reputation of an older competitor. Every ordinary intelligent person would see at once that a new competitor had entered the market.

A new condition of things took place, however, with the change of name and the change in the wording of the advertisement of such machines. Neither the "Bates Machine Company" as the name of the defendant, nor the advertisement of its machines as "Model No. 49 or 50," as manufactured by it, could be confused with the name of the complainant or the trade-name of its product, viz., "Bates Numbering Machine." But not so when it changed its name to the "Bates Numbering Machine Company," and began to advertise its machines by the same name as theretofore exclusively used to designate and advertise the machines of the complainant, and which name had then become firmly fix-

ed in the mind of the trade and purchasing public as associated with the complainant's product. Not only confusion, but deception, was the necessary result of such conduct. A trade-name is usually more striking than the name of its user. It is likely to give more information about the product and calculated to make a more lasting impression on the mind than a mere trade-mark. Where such trade-name of the product is dissimilar to that of the manufacturer, it is likely to be remembered, even though the name of the person entitled thereto is overlooked or forgotten. *Faulder & Co., Ltd., v. O. & G. Rushton, Ltd.*, 20 R. P. C. 477. In such a case such trade-name obtains a secondary meaning, even though in its primary sense it is not subject to the exclusive ownership of the trader.

In the recent case of *Lowe Bros. Co. v. Toledo Varnish Co.* (C. C. A.) 168 Fed. 627, it was held:

"The words 'High Standard' as applied to paints or varnishes are in themselves descriptive of quality, and cannot be monopolized as a trade-mark, but, where they have been used for a number of years by one manufacturer exclusively for a trade-mark, and have thereby acquired a secondary meaning with the trade and public as designating and identifying the products of such maker, their use by another in connection with similar goods in a way which may probably deceive purchasers will be enjoined as unfair and fraudulent competition."

The instances of confusion and deception shown in complainant's affidavits are but the natural consequences of the change of defendant's name and the changed wording of its advertisements. A glance at defendant's advertisements appearing in the April (1909) numbers of the magazines "System" and "Office Appliances" will convince of this. The headlines to both of these advertisements, "23 Cents Puts a Bates Numbering Machine on Your Desk," is the most prominent part thereof. It is not only displayed in larger and heavier type, but so blocked out as to make it the most striking to the eye. Without the advertiser's name and address, the trade would accept the whole as describing and advertising the complainant's machine. If the defendant's name were not so completely identified with the trade-name of the goods advertised, both a deception of the public and the diversion of the complainant's business would be the likely consequences; but with the changed name of the defendant nothing else could reasonably be looked for. The street or factory address added to defendant's name would not be likely to change such result. The reason for this is obvious, as between the flaring headlines proclaiming the trade-name and the name and address of the advertiser, the latter plays a minor part in the impression made on the mind of the reader. The jobber, because of his more frequent purchases, might readily see that a different concern was advertising, but not so the ultimate purchaser. To the latter the trade-name is associated with the reputation of the product rather than the name of the manufacturer. Lured by the advertisement of this old trade-name he would be as likely to send the order to the advertiser as to the rightful owner of such trade-name under the belief that he was dealing with the latter. The reprehensible purpose evidenced by this method of advertising is at least as striking

as that condemned in *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.* (C. C. A.) 166 Fed. 30.

The logical, and perhaps desired, result of such conduct on the part of the defendant is, first, a deceiving of purchasers into giving it their custom under the belief that they were dealing with the same parties whose goods had become favorably known under such trade term; and, second, the gradual appropriation to itself of the favorable reputation which the complainant had built up for its own goods through years of toil and at considerable expense. In this case the facts in the particulars that control the decision are similar to those in *Wm. Rogers Mfg. Co. v. R. W. Rogers Co.* (C. C.) 66 Fed. 56, affirmed *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576; *Garrett et al. v. T. H. Garrett & Co.*, 78 Fed. 472, 24 C. C. A. 173; *J. & P. Coates, Ltd., v. John Coates Thread Co.* (C. C.) 135 Fed. 177; *Charles S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *F. E. De Long v. De Long Hook & Eye Co.*, 89 Hun, 399, 35 N. Y. Supp. 509; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 121 Fed. 357; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; *International Silver Co. v. Wm. H. Rogers Corp.*, 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506; *North Cheshire & Manchester Brewing Co. v. Manchester Brewing Co.* (1899) App. Cases, 83, in which the use of the corporate title was enjoined. To the same effect, see, also, *Clark Thread Co. v. Armitage*, 74 Fed. 936, 21 C. C. A. 178.

In my opinion the complainant has shown a clear case of unfair competition; and, in view of the former finding by this court that the defendant was guilty of unfair competition towards this complainant in imitating its labels, immediate, even though drastic, relief should be afforded. A preliminary injunction is granted restraining the defendant from any further use of the words "Bates Numbering Machine Company" as its corporate name, or as such corporate name any other words which sufficiently resemble the said trade-name of the complainant's product, to wit, "Bates Numbering Machine," as to be likely to mislead or deceive the public into thinking or believing that the automatic hand numbering machines put out by the defendant are the product of the complainant, and from employing or using the expression "Bates Numbering Machine" in connection with the sales of any automatic hand numbering machines not of the complainant's make, or in connection with the offering or advertising for sale thereof, and further restraining the defendant from filling any orders or awards calling for a "Bates Numbering Machine" with a machine or machines of other make than that of complainant, or from seeking to induce prospective purchasers to change orders, proposals, and awards calling for a "Bates Numbering Machine," so as to describe or specify a machine or machines of other make than that of the complainant, without at the same time clearly and unmistakably informing such purchaser that the machines made by the defendant are not those made by the

"Bates Manufacturing Company," and that such company and not the defendant began to advertise, and for many years exclusively advertised, said machines by the trade-name "Bates Numbering Machine."

HARTFORD FIRE INS. CO. v. ERIE R. CO.

(Circuit Court, S. D. New York. May 26, 1909.)

1. COURTS (§ 414*)—JURISDICTION OF FEDERAL COURTS—CIRCUIT COURT FOR SOUTHERN DISTRICT OF NEW YORK—CONSTRUCTION OF STATUTE.

Rev. St. § 657 (U. S. Comp. St. 1901, p. 529), which provides that "the original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed to extend to causes of action arising within the Northern district of said state," must be construed as meaning by the words "Northern district of said state" the territory comprised within said district when the section was enacted; and the division of said district into the Northern and Western districts by Act May 12, 1900, c. 391, 31 Stat. 175, amending Rev. St. § 541 (U. S. Comp. St. 1901, p. 394), did not have the effect of enlarging the jurisdiction of the Circuit Court for the Southern District to include causes of action arising in the Western district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1108; Dec. Dig. § 414.*]

2. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—ACTION BY ASSIGNEE.

An assignment of a cause of action, although without consideration and for the purpose of suit in a federal court, is not collusive, so as to deprive that court of jurisdiction, where it exceeds the jurisdictional amount, and the assignor might have brought suit in that court thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 892; Dec. Dig. § 328.*]

Jurisdiction of Circuit Court as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

3. ACTION (§ 38*)—SINGLE CAUSES OF ACTION—CLAIMS UNITED BY ASSIGNMENTS.

Claims against a railroad company for the alleged negligent burning of a building, although originally existing in favor of different persons, when united in one by assignment, constitute a single cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.*]

4. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—ACTIONS BY ASSIGNEES.

A person holding claims, each below the jurisdictional amount, but together aggregating more than \$2,000, and constituting, when so united, a single cause of action, may, if permitted by the local rules of joinder, bring them all together for determination into a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 891; Dec. Dig. § 328.*]

5. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—ACTION BY ASSIGNEE.

Plaintiff and other insurance companies paid losses on buildings destroyed by fire alleged to have been negligently caused by defendant railroad company. One was a foreign corporation, which paid losses on three buildings; one being more than \$2,000 and the others less. Others paid losses on the same buildings and others, each less than \$2,000 but aggregating more than that amount as to each building. All of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claims were united by assignments in plaintiff, a corporation of another state, which brought suit thereon in a federal court, joining in separate counts the claims relating to each building. *Held* that, as to the three counts containing the claims of the foreign company on which it might have brought suit in that court by reason of its large claim, the court had jurisdiction, but that it did not have jurisdiction of the other counts, none of the claims in which could have been sued therein by the assignor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 892; Dec. Dig. § 328.*]

6. COURTS (§ 363*)—RIGHTS ASSIGNABLE—RIGHT OF ACTION FOR TORT.

The statute of New York permitting the assignment of rights of action for torts is applicable to causes of action in a federal court arising in that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 363.*]

At Law. On motion to dismiss.

This is an action to recover damages for the destruction by fire of certain houses in the village of South Lima, Livingston county, N. Y., by sparks projected from the defendant's engines. At the close of the plaintiff's opening the defendant moved to dismiss the action upon three separate grounds: First, under section 657 of the Revised Statutes (U. S. Comp. St. 1901, p. 529), for want of jurisdiction, because the causes of action arose in territory formerly included in the Northern district of New York; second, because the jurisdiction of this court had been procured through collusion, under Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 507); and, third, because the causes of action were not assignable at common law.

The complaint sets up seven causes of action. In the second cause of action the complaint alleges that the defendant, by its negligent emission of sparks and fire from its locomotive, set fire to the house of one Tamar Y. Ryers, and that the house burned down, causing her a loss of \$4,423.67; that for this loss she was partly insured by two insurance companies; that the two insurers have paid a part of the loss upon the policies; and that both insured and insurers have assigned their claims to the plaintiff. In each of the other six causes of action the plaintiff alleges that the defendant set fire negligently to the house of Tamar Y. Ryers, and that the fire, on account of a high wind blowing at the time, spread itself to the dwelling, near by, of the plaintiff's assignor. The plaintiff alleges in each case the payment to the insured of the whole or a part of the loss by insurance companies, among which, in two instances, the plaintiff was itself one to an aggregate sum of \$1,750. In each cause of action the pleader alleges that the insured and insurers assigned all claims against the defendant to the plaintiff. The total aggregate of claims for damages done by the defendant to all the buildings amounts to \$36,561.16.

The plaintiff is a foreign insurance company, but the only individual or corporation assignors which are nonresidents of the state of New York are the Aetna Fire Insurance Company, which has paid losses aggregating \$3,793.75, and the London Assurance Company, which has paid a loss of \$923.67. The defendant is a New York corporation. The assigned claims of the Aetna Fire Insurance Company are divided up between the third, fourth, and seventh causes of action, being \$717.75 on the third, \$2,376 on the fourth, and \$700 on the seventh. The plaintiff itself paid \$150 upon the loss set forth in the third cause of action and \$1,600 upon that in the fifth. The claim of the London Assurance Company is in the second cause of action.

McGuire & Wood, for plaintiff.

Stetson, Jennings & Russell, for defendant.

HAND, District Judge (after stating the facts as above). Three questions are presented: First, the jurisdiction of this court under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

section 657 (U. S. Comp. St. 1901, p. 529); second, the jurisdiction under Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 507); third, whether the complaint sets up a good cause of action. The last is not a jurisdictional question.

I understand the plaintiff concedes that, if the former Northern district of New York had not been subdivided, this action could not be entertained by the Circuit Court for the Southern district of New York, for it is a case of original jurisdiction; and no one contends, I think, that the cause of action did not arise in the territory comprised within the old limits of the Northern district of New York. If so, the case would have been strictly within the prohibition of the statute, and the defendant could not confer jurisdiction on this court by waiver. The plaintiff, therefore, bases, or must base, its claim entirely upon the theory that the division of the former Northern district of New York under Act May 12, 1900, c. 391, 31 Stat. 175 (U. S. Comp. St. 1901, p. 394), into two districts, changed the meaning of section 657, so that it applied only to that territory which has since 1900 been comprised within the new Northern district of New York.

Congress intended, by dividing the districts, to create new facilities for the dispatch of judicial business in the territory comprised within the old district, and it cannot have intended to throw some of the litigation which formerly belonged in the Northern district of New York upon the Southern district of New York. This necessarily results, if the plaintiff is right, and if actions arising within a part of the former Northern district can now be tried in the southern district, though formerly they could not. Certainly nothing has arisen since the year 1818 which made it desirable to increase the jurisdiction of the Southern district of New York, whose proper work has so greatly increased since that time. Least of all was that desirable at the very moment when the capacity of the former Northern district was doubled by the addition of a new District Judge. So far as the reasonable purpose of an enactment guides its interpretation, this act will not bear the plaintiff's construction.

Aside from the purpose of the act, it is quite clear to me that the words "Northern district of New York" must be read as though they meant "territorial limits of the present district." It is the locality of the cause of action which is to determine jurisdiction, and it is fair to construe the limits as only a convenient mode of designating a fixed territory. No doubt the significance of general terms in an act will change, as those terms may themselves be varyingly described by other acts from time to time. The punishment for larceny means the punishment for what the Legislature may from time to time make larceny. The phrase "Northern district of New York" is not a general term. It described, when it was used, a definite territory, as though it had used metes and bounds. It is quite true that the descriptive term has since been given another meaning; but that does not change the particular legislative intent to include just the territory, properly described in 1818 by that description, for, as I have said, it was the locus of origin of the wrong that excluded it from the jurisdiction of this court. It cannot be assumed that this intention changed when the old district

was divided. Although the statute has never been construed in this respect, I think the Circuit Court is without jurisdiction of any of the causes of action, and I will dismiss the complaint as to all upon the first ground raised.

Upon the second ground I will deny the motion as to the third, fourth, and seventh causes of action, and grant it as to the rest. Upon the plaintiff's opening he frankly stated that all the assignments had been obtained without consideration and were held practically in trust for the assignors; that is to say, the proceeds, or some portion of them, were to be turned back to the assignors in the event of success. This would very clearly constitute a collusive assignment, under *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114, *Lehigh Mining Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, *Lake County Commissioners v. Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684, and *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; and if all the claims were obtained in this way it would be my duty to dismiss the complaint as to all seven causes of action. But there are other considerations which apply to this case, which do not seem to have occurred in any of the authorities I have examined. The *Ætna Insurance Company*, having paid a loss of \$2,376, as stated in the fourth cause of action, would have been entitled to bring a suit for that sum in the United States Circuit Court. So far as the assignment of that claim by the *Ætna Company* to the plaintiff is concerned, it cannot, therefore, be collusive, for the plaintiff got no greater rights of jurisdiction under it than the assignor had itself. It does not appear in *Lake County Commissioners v. Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684, that *Dudley* had procured enough coupons from any one of the nonresident assignors to bring the case as to him up to the jurisdictional amount.

As to the fourth cause of action, in which the *Ætna Company* had the claim of over \$2,000, the jurisdiction of this court is not, therefore, collusive. I cannot, however, on this motion, determine whether the recovery in this cause of action must be limited to the *Ætna* claim, or may include the other elements of damage which go to make it up. Even if these several claims were susceptible each of independent suit when separated, they were none the less, when united, all items of damage in one action on the case, and constituted, when united, a single cause of action. *Jacobs v. N. Y. Central R. R.*, 107 App. Div. 134, 94 N. Y. Supp. 954, affirmed on opinion below 186 N. Y. 586, 79 N. E. 1108. The motion to dismiss cannot be directed, therefore, at the several items of this cause of action seriatim; for the court had jurisdiction at least as to a part, and the question of jurisdiction alone is raised at this time.

In the third and seventh causes of action, the *Ætna* claims were below the jurisdictional amount; but, when united by collusive assignment to the other items of damage, the amount in each case became above \$2,000. I regard the collusive obtaining of additional items of damage to raise above \$2,000 these *Ætna* claims, and the plaintiff's own claim in the fifth cause of action, as precisely similar to obtaining the collusive assignment of independent and separable claims. It seems to me to make no difference whatever that the items of damage

may be subsequently united into a single "cause of action." It is perhaps true that by the same reasoning it would follow that similar items of damage in the fourth cause of action should be disallowed; but, as I have said, that question is not up here. The act of 1875 clearly aimed at an evil which exactly included the summation of items of damage like those here separated, and I should nullify its obvious purpose if I distinguished because the items made up a single "cause of action."

The question as to the third and seventh causes of action must therefore be decided in the same way as though the *Ætna* Company had tried under the New York Code to sue in this court upon the third, fourth, and seventh causes of action, seeking to carry along into the jurisdiction of this court the third and seventh, because it could properly claim jurisdiction in the fourth. I have not found any case in the Supreme Court controlling this question; but it has been decided in the Circuit Courts, by authority which I am bound to follow, that when one plaintiff in good faith procures assignments of several claims each below the jurisdictional amount, but together aggregating over \$2,000, this court has jurisdiction. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, decided in the Circuit Court of Appeals for the Eighth Circuit, and four other cases in the Circuit Court cited in that case on page 755 of 59 Fed. and page 252 of 8 C. C. A. I confess that as an original question I should have thought otherwise; but I am not free to disregard so much authority, and it follows from that authority that any person, himself holding claims below the jurisdictional amount, may, if permitted by the local rules of joinder, bring them all together for determination into this court. The result is to bring into this court separate actions of less than the proper amount; but that appears to be the necessary result of the decisions I have cited. This would, therefore, result in dismissing the motion in respect of the third and seventh causes of action, in which there were *Ætna* claims below \$2,000, as well as in respect of the fourth.

There remain the first, second, fifth, and sixth causes of action. On one of these, the second, the London Assurance Company paid a loss of less than \$2,000; but the fact that the assignor is a foreign corporation has no bearing, if it could not have sued independently, as was the fact. Nor, in my judgment, could the London Assurance Company have bettered its position by taking colorable assignments of the other items of damage, even though at the end there resulted a cause of action of over \$2,000. As to the remaining causes of action, the assignors could by no possibility have come to this court; nor could the *Ætna* Company, by procuring colorable assignments of them, have joined them to the third, fourth, and seventh causes of action, if I am right. If so, the plaintiff is in no better position, and they must be dismissed upon the second ground.

I conclude, therefore, that the motion is good upon the second ground as against all the causes of action except the third, fourth, and seventh, but that whether those causes of action can be pressed for more than the *Ætna* claim cannot be decided upon this motion, and must be reserved till the trial.

The third objection was based upon the theory that the liability arising from a tortious act was not assignable at common law; that the

New York statute permitting such assignments would apply only to causes of action which had their existence under the law of the State of New York; that a cause of action brought in this court was under the law as administered by this court, and not under the law of New York; and that, therefore, an action on the case brought in the United States Circuit Court is not assignable, because the New York statute could not apply to it. This objection is ingenious, but erroneous. It presupposes that there are two jurisdictions under the laws of which the acts of the defendant constituted a tort—one the common law of the state of New York, and the other the common law of the United States. In other words, it seems to presuppose the existence of a federal common law which is administered by this court, but which is something other than the law of the state of New York. In this case in particular the idea is plausible, since by the decisions of the Supreme Court the first, third, fourth, fifth, sixth, and seventh causes of action are not demurrable, though under the decisions of the New York Court of Appeals they probably are—a consideration which accounts for the attempt to come into this court. There is no doubt a theoretical embarrassment about presupposing that there is but one common law in cases in which several courts, having independent jurisdiction, make opposite rulings in regard to it. Still it is laid down that there is no independent federal common law (*Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181); and this must be taken as true, certainly in so far as the argument of the defendant is concerned, that a statute of the state of New York has no applicability to such law. It is not, therefore, important to the decision in this case whether, under the principles of a strictly logical jurisprudence, it be possible that there may exist one common law which is subject to opposite, but equally correct, interpretation by two courts of independent and final jurisdiction. That question does not come up in this case, because, whatever be the solution of such an anomaly in theoretic jurisprudence, there can be no doubt that the statute of the state of New York equally affects the common law, whether it be that construed by the state or federal decisions. If the doctrine were applicable, it would likewise apply to the assignment of choses in action, which are only assignable under the state statute.

Besides, an assignment, even of a chose in action, is no more than a power of attorney to sue in the assignor's name. A right of action on the case was no more difficult of assignment than a chose in action. The trouble was the same in each case, i. e., merely that the obligor could not be called on to perform except *secundum tenorem*, and hence no one could ask him to pay a substituted party when his obligation ran only to the original party. This formal difficulty was avoided by the fiction of a power of attorney, and the statute giving the power to sue in the assignee's name was merely a regulation of procedure, which must be followed here, as has been often decided. A power of attorney at common law was as good in an action on the case as in an action in special assumpsit.

I therefore conclude that the third objection to all the causes of action is without basis; but because this objection is not to the jurisdic-

tion of the court, but to the sufficiency of the complaint, I do not certify it to the Supreme Court.

Let judgment be entered dismissing the complaint as to all the causes of action for lack of jurisdiction. If the counsel for the plaintiff will prepare a certificate stating that the dismissal was for lack of jurisdiction upon the first two grounds mentioned, I will certify these questions to the Supreme Court.

STEWART et al. v. MITCHELL et al.

ROSS v. HURST.

(Circuit Court, W. D. Tennessee, E. D. May 24, 1909.)

Nos. 241, 243.

COURTS (§ 317*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

A controversy between two factions in a local church, each having a pastor and a governing board of elders all of whom are citizens of the same state, and each claiming the exclusive right to control and use the church building and property, cannot be brought by members of one faction who are citizens of other states against the pastor and elders of both factions but asking relief against one side only by injunction to restrain them from interfering with their codefendants in the use and occupation of the property. In such case, the defendants who belong to the same faction as complainants are not merely formal parties but the real controversy is between them and their codefendants and requires that they be considered as complainants for the purpose of determining the court's jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 317.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

In Equity. On plea in abatement.

The bill in this case is filed by Robert P. Stewart and Mrs. Etta Stone, by her husband and next friend, Lowry Stone, citizens of the state of Kentucky, and Roy Adcock, a citizen of the state of Alabama, against O. E. Gardner, H. C. Ward, N. C. Swearingen, J. L. McAdams, J. B. McAdams, A. C. Aiken, J. B. Reed, H. F. Hudson, Joe Hatcher, J. L. Shannon, R. D. Jones, W. M. Capps, and W. W. Mitchell, J. W. Dudley, F. M. Jackson, Nathan Mitchell, George Mitchell, Will Womble, Cullie Foust, John Foust, M. A. Wilson, and P. F. Johnson, all of whom are citizens of Tennessee.

H. H. Barr, R. A. Elkins, and John M. Gaut, for complainants;
W. C. Caldwell, for defendants.

McCALL, District Judge. The complainants are nonresidents, and allege in the bill that they are members in good and regular standing in a religious society at the town of Greenfield, Tenn., known as the Greenfield Presbyterian Church (sometimes called the First Cumberland Presbyterian Church), and that they have a lot and a house of worship located in said town, which is described in the bill. It is alleged also that a certain other lot described in the deed (which is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made an exhibit to the bill), was conveyed to the elders of the Cumberland Presbyterian Church and their successors at Greenfield, Tenn., August 18, 1903, by Mrs. T. T. Perry, on which has been erected a manse.

The relief sought by the complainants, as stated in the prayer of the bill, is that the court decree that said church, meaning the Presbyterian Church in the United States of America, and the elders thereof, named as defendants in the bill, and their successors and associates in office, hold the said title to said properties in trust for the exclusive use and benefit of the Greenfield Presbyterian Church, the congregation, of which Rev. O. E. Gardner, one of the defendants, is the pastor, and who adheres to the Presbyterian Church in the United States of America, and that the session of said church have the exclusive right to control the possession and use of the said properties, and the pastor employed by it have the sole right to occupy its pulpit and conduct its services. They pray that the other defendants to the bill, and all whom they represent, and all who are combined or associated with them, be restrained by injunction from taking or attempting to take possession of the house of worship and manse described therein, or from interfering with the pastor of said church, or his successor, or successors, in the conduct of the religious exercises or other functions as pastor, and from in any manner, by suit or otherwise, disturbing or interfering with complainants, said congregation, its pastor, officers, or members in the possession, use, or enjoyment of said property, or properties, and for general relief. No injunctive relief is prayed for against the defendants, O. E. Gardner, pastor, and the elders of the Greenfield Presbyterian Church in the United States of America.

This litigation grows out of the uniting, or the attempt to unite, the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church.

The jurisdiction of this court is challenged by a plea in abatement, filed by the defendants W. W. Mitchell, J. W. Dudley, F. M. Jackson, Nathan Mitchell, William Womble, Cullie Foust, John Foust, M. A. Wilson, elders, and P. F. Johnson, pastor, of the Cumberland Presbyterian Church at Greenfield, Tenn. Without setting out in extenso the plea in abatement, it may be stated that the grounds relied upon in the plea are:

- (1) That the complainants have no actionable interest.
- (2) That the amount involved in controversy is less than \$2,000.
- (3) That the elders and trustees of the Presbyterian Church in the United States of America were made defendants by collusion for the purpose of giving this court jurisdiction of this case, in that said elders and trustees have a common interest in the controversy with complainants. That said elders and trustees should have been joined with complainants. That their interest and that of their codefendants are antagonistic. That the rearrangement of the parties would oust this court of jurisdiction for lack of diversity of citizenship.
- (4) That the questions involved have been determined adversely to complainants' contention by the Supreme Court of Tennessee in the case of *Landrith v. Hudgins*, and that this is an action brought

to escape the jurisdiction of the state courts and the effect of that decision.

There has been no issue joined on the plea in abatement, but it has been set down for argument for insufficiency. Under the practice in Tennessee, it will be assumed that the allegations in the plea in abatement are true, and the only question we have for consideration now is whether they are sufficient. From the plea in abatement we learn that certain of the defendants are elders and pastor of the Cumberland Presbyterian Church of Greenfield, Tenn., and certain other defendants are the elders and pastor of the Presbyterian Church in the United States of America at Greenfield, Tenn. It is alleged and admitted that all of the defendants are citizens of Tennessee. The complainants, as is alleged, are citizens of Kentucky and Alabama. This diverse citizenship of the complainants and the defendants, as it appears on the face of the bill, would give this court jurisdiction of this case, provided the amount involved exceeds the sum of \$2,000, exclusive of interest and costs. The statutes defining the jurisdiction of the Circuit Court confer it, among other cases, where there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum and value of \$2,000. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

It is alleged in the plea in abatement that this arrangement of the parties to the suit by the pleader is improperly and collusively made for the purpose of showing a diversity of citizenship and of creating a case cognizable in this court, in that the interest of the defendants, O. E. Gardner, pastor, and the elders of the Presbyterian Church in the United States of America, is the same as that of the complainants, and they should, in fact, have been joined as parties complainant. It is argued by counsel for the Cumberland defendants that, notwithstanding this arrangement of the parties to the suit by the pleader in placing all of the complainants as nonresidents, and all of the defendants as residents of Tennessee, so as to show the diversity of citizenship required by law, necessary to confer jurisdiction on this court, the court will look beyond this arrangement of the parties by the pleader, and arrange them according to their actual interest in the dispute in determining whether or not it has jurisdiction.

Where the jurisdiction of the United States Circuit Court depends on diversity of citizenship, the parties may be rearranged by the court according to their real interest, in determining whether there is a diversity of citizenship such as would confer jurisdiction upon it. *Steele v. Culver*, 211 U. S. 26, 29 Sup. Ct. 9, 53 L. Ed. 74; *Venner v. Great Northern Railroad*, 209 U. S. 25, 28 Sup. Ct. 328, 52 L. Ed. 666, and cases there cited; *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; *Removal Cases*, 100 U. S. 468, 25 L. Ed. 593. Hence it is the duty of this court, in determining the sufficiency of this ground in the plea of abatement, to examine the pleadings and arrange the parties according to their respective interests, and, when so rearranged, to determine if it has jurisdiction.

From an examination of the bill, it is clearly deducible that the Union defendants, consisting of the Rev. Mr. Gardner, pastor, and

the Union elders, have a common interest with the complainants, since they are the pastor, members, and officers of the Presbyterian Church in the United States of America, and have a common interest in holding and having the use of the church property and the manse described in the bill. Upon the other hand the interest of the defendants, the Cumberland pastor, Rev. P. F. Johnson, and the elders of that church, is antagonistic to their codefendants, the Rev. Mr. Gardner and his elders, in that the former are alleged by the bill to be claiming the right to the possession and use of the church and manse in controversy, while the latter are in possession. So that we find that the interests of these two classes of defendants are antagonistic, and that the interest of one class of defendants and the complainants are identical, while the interest of the other class of defendants is antagonistic to the complainants.

Does that interest of these two classes of defendants, such as it is, make them necessary parties to this suit? Learned counsel for the complainants evidently so understood it, else why should they have made the Union pastor and elders parties at all? If this court is to grant the prayer of the bill and decree which pastor and which set of elders are entitled to hold, use, and control the church property, it would seem that all of them are necessary parties, and I am so inclined to hold. It appears from the bill that the Union elders and their pastor are in possession of the church and manse at present, and all that is asked in their behalf in the bill is that the court decree that they continue to hold the title to said property in trust. There is nothing in the bill showing or tending to show that they have at any time shown any inclination to discontinue to hold the title to said property in trust for the use and benefit of the congregation of the Greenfield Presbyterian Church. Neither is there anything in the bill tending to show that the Rev. O. E. Gardner, the pastor of the United Church in question, has shown any inclination to decline to occupy the pulpit or conduct its services. Why these defendants, the Unionists, should be made parties defendant to this suit, when there is no prayer for relief as against them in any form, is difficult to understand, except upon the ground that they were deemed to be necessary parties and were made codefendants with Rev. P. F. Johnson, pastor of the Cumberland Church, and the elders thereof, for the purpose of conferring jurisdiction upon this court, which would not exist had they been joined with complainants.

The real and only relief that is sought is to restrain the Cumberland pastor and his elders from interfering with their codefendants, Rev. Mr. Gardner and his elders; from attempting to or taking possession of the house of worship and the manse; or from interfering with the pastor, Rev. O. E. Gardner, or his successors, in the conduct of religious exercises or functions as pastor; and from in any manner, by suit or otherwise, disturbing or interfering with complainants, said congregation, its pastor, officers, or members in the possession, use or enjoyment of said property.

From what has been said, it follows that the parties to the suit must be rearranged. Since the interests of O. E. Gardner, pastor of the Union Church, and the elders of said Union Church, are identical with

complainants, they must be considered as complainants for the purpose of the disposition of this question of jurisdiction. To my mind it is clear that they were made defendants for the purpose of presenting a case of diversity of citizenship and thus conferring jurisdiction, and reopening in the United States court a controversy which had been decided in the courts of the state. *Steele v. Culver*, 211 U. S. 26, 29 Sup. Ct. 9, 53 L. Ed. 74; *Venner v. Great Northern Railway*, 209 U. S. 25, 28 Sup. Ct. 328, 52 L. Ed. 666; *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713.

Complainants rely upon the case of *Watson v. Jones*, 13 Wall. 723, 20 L. Ed. 666. The question of want of jurisdiction upon grounds of diverse citizenship was not raised in that case, and therefore it cannot be taken as authority in determining that question before this court in this case. It appears that prior to the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), in determining the question of jurisdiction, based on a diversity of citizenship, the rights of the parties with respect to jurisdiction based upon a diversity of citizenship were determined solely according to the position they occupied as complainants or defendants on the face of the pleadings. Under the new law, the mere form of the pleadings may be put aside, and the parties placed upon different sides of the matter in dispute, according to the facts. *Removal Cases*, 100 U. S. 469, 25 L. Ed. 593; *Coal Co. v. Blatchford*, 11 Wall. 174, 20 L. Ed. 179. The case of *Watson v. Jones*, supra, was decided prior to the act of 1875, at a time when the arrangement of the parties to the suit as they appeared on the face of the pleadings alone were considered in determining the rights of the parties touching the jurisdiction of the court, when based on diversity of citizenship. The cases relied upon by the complainants to sustain their contention on this question of jurisdiction, based on diverse citizenship, have no application, in my judgment, to the case at bar.

Without discussing or determining the other questions raised by the plea in abatement, I hold that, on a proper rearrangement of the parties to the suit, the diversity of citizenship required by the statute to confer jurisdiction upon this court does not exist. The plea is therefore held to be sufficient in law. Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511).

An order will be entered, denying the injunction applied for, and dismissing the bill for want of jurisdiction, with costs.

A similar order will be entered in No. 243, *C. M. Ross et al. v. Robert Hurst et al.*

UNITED STATES v. SOUTHERN PAC. CO.

(Circuit Court, D. Oregon. September 13, 1909.)

L. PENALTIES (§ 41*)—COSTS—NATURE OF SUBJECT-MATTER—ACTION FOR PENALTY FOR VIOLATION OF TWENTY-EIGHT HOUR LAW.

An action by the United States to recover from a carrier the penalty imposed by Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), for confining live stock more than 28 consecutive hours, is a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

civil action, with all the ordinary incidents of such an action, including liability of the defeated party for costs; but, if regarded as penal, on a recovery by the government, the defendant is subject to the payment of costs by the terms of Rev. St. § 974 (U. S. Comp. St. 1901, p. 703).

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 41.*]

2. COSTS (§ 173*)—ITEMS—ATTORNEY'S FEES—ACTION FOR VIOLATION OF TWENTY-EIGHT HOUR LAW.

On a recovery by the government in an action for violation of Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "Twenty-Eight Hour Law," in the district of Oregon, a docket or attorney's fee of \$40 is taxable against the defendant, under the provisions of Rev. St. §§ 824, 837 (U. S. Comp. St. 1901, pp. 632, 644).

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 688; Dec. Dig. § 173.*]

3. COURTS (§ 357*)—FEDERAL COURTS—COSTS—MILEAGE OF WITNESSES.

The prevailing party in a civil action in a federal court is entitled to tax as a part of his costs mileage for his witnesses for the distance necessarily traveled by them from any point to which a subpoena would run, viz.: From any point within the district, and for not exceeding 100 miles for witnesses coming from without the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

4. COURTS (§ 357*)—FEDERAL COURTS—COSTS—MARSHAL'S FEES.

The prevailing party in a suit in a federal court is not entitled to tax against his opponent as a part of his costs the fees of the marshal for serving subpoenas on witnesses residing without the district and more than 100 miles from the place of trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

5. COURTS (§ 357*)—FEDERAL COURTS—COSTS—ACTION BY UNITED STATES—WITNESS FEES.

Under Rev. St. § 850 (U. S. Comp. St. 1901, p. 655), the United States, when the prevailing party in a suit in a federal court, is entitled to tax as costs the necessary expenses of a salaried employé taken away from his place of business to attend as a witness for the government, regardless of the distance traveled by him.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

On Taxation of Costs.

Walter H. Evans, Asst. U. S. Dist. Atty.

J. E. Fenton, for defendant.

BEAN, District Judge. The plaintiff, having recovered judgment in two civil actions against the defendant for violation of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibiting any railroad company from confining animals, while in transit from one state to another, for more than 28 hours, and which is commonly known as the "Twenty-Eight Hour Law," filed its bill of costs in each of such actions. The defendant objects to the allowance of any costs, on the ground that the proceeding to recover the penalty provided in the act referred to is neither an action at law nor a suit in equity, but is a special proceeding, and since the act itself does not authorize or warrant the imposition of costs, in addition to the penalty therein provided for a violation of its provisions, no costs can be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taxed. The defendant also objects to certain items in the complainant's bill of costs: First, a docket or attorney's fee of \$40; second, for the mileage of certain witnesses on behalf of the plaintiff, who reside in this state and more than 100 miles from the place of trial; third, for the mileage of certain witnesses residing in the state of California; fourth, for the fees of the marshal of the Northern district of California for serving subpoenas on witnesses in that district, and a similar item for the fees of the marshal of the district of Washington for serving a subpoena in that district; fifth, the expenses of one Hanson, an employé of the Reclamation Service, who was sent from Toppenish, in Washington, to testify as a witness in the case.

1. An action to recover the penalty provided in the act of Congress referred to is a civil action with the ordinary incidents of such an action. *Montana Central Railway Co. v. United States*, 164 Fed. 400, 90 C. C. A. 388; *United States v. Southern Pacific Co.* (D. C.) 157 Fed. 459; *United States v. Baltimore Ry. Co.*, 159 Fed. 33, 86 C. C. A. 223; *United States v. Southern Pacific Co.* (D. C.) 162 Fed. 412; *New York Central Railroad Co. v. United States* (C. C. A.) 165 Fed. 833. And therefore the plaintiff, as the prevailing party, is entitled to its costs. *Western Coal & Mining Co. v. Petty*, 132 Fed. 603, 65 C. C. A. 667. Moreover, section 974 of the Revised Statutes (U. S. Comp. St. 1901, p. 703) provides that when judgment is rendered against the defendant in a prosecution, for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs. This section would seem to authorize the taxation of costs in actions of this kind.

2. Sections 824 and 837 of the Revised Statutes (U. S. Comp. St. 1901, pp. 632, 644) authorize the taxation and allowance, on a trial before a jury in a civil or criminal action prosecuted by the government, of a docket or attorney's fee of \$40. These provisions, so far as they may relate to the district attorney, are not repealed or modified by Act May 28, 1896, c. 252, 29 Stat. 179 (U. S. Comp. St. 1901, p. 611), placing district attorneys on salaries, except as to the disposition of such fees. Section 6 of the latter act provides that all fees and emoluments allowed by law to be paid United States attorneys and United States marshals shall be charged as heretofore, and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the treasury; and section 17 declares that sections 6 to 16, inclusive, shall not be construed to prevent or affect the assessment or taxation of costs against the unsuccessful party in a civil proceeding, or against defendants convicted of crimes or misdemeanors.

3. The extent to which the prevailing party in a civil action may charge against his adversary mileage fees of witnesses who attended the trial on his behalf is a subject of much conflict in the federal decisions. The question has not been authoritatively decided by the Supreme Court or the Court of Appeals, so far as I am advised. In some jurisdictions it is held that the successful party is entitled to the mileage of his witnesses, regardless of the place of their residence, or whether they came from or out of the district, and whether they attended in obedience to a subpoena or at the request of the party.

United States v. Sanborn (C. C.) 28 Fed. 299. In others it is held that since section 863, Rev. St. (U. S. Comp. St. 1901, p. 661), provides for taking the deposition of a witness residing more than 100 miles from the place of trial, the clerk has no authority to allow mileage for a witness residing at a greater distance, whether within or without the district. *Smith v. Chicago & Northwestern Ry. Co.* (C. C.) 38 Fed. 321. The rule, however, supported by the great weight of authority is that the prevailing party in a civil action is entitled to charge, as part of his costs, mileage for the distance necessarily traveled by a witness to attend the trial on his behalf from any place to which a subpoena will run; that is, from any point within the district, or from any point out of the district and not exceeding 100 miles from the place of holding court. *The Syracuse* (C. C.) 36 Fed. 830; *Eastman v. Sherry* (C. C.) 37 Fed. 845; *Burrow v. Kansas City R. R. Co.* (C. C.) 54 Fed. 278; *The Vernon* (C. C.) 36 Fed. 113; *Sloss Iron & Steel Co. v. South Carolina Ry. Co.* (C. C.) 75 Fed. 106; *Griggsby Construction Co. v. Louisiana Ry. Co.* (C. C.) 123 Fed. 751; *Buffalo Ins. Co. v. Steamship Co.* (C. C.) 29 Fed. 237. And this seems to be the rule prevailing in this district and circuit. *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221; *Haines v. McLaughlin* (C. C.) 29 Fed. 70; *Hunter v. Russell* (C. C.) 59 Fed. 964; *Hanchett v. Humphrey* (C. C.) 93 Fed. 895. The costs in this case will be taxed in accordance with this rule, and plaintiff will be allowed to include in its judgment the mileage of its witnesses residing in the state, and not to exceed 100 miles for those residing out of the state.

4. A witness residing out of the district and more than 100 miles from a place of trial cannot be compelled to attend in obedience to a subpoena. The service of a subpoena upon him by the marshal amounts to nothing more than a request to attend, and the prevailing party is therefore not entitled to charge against his opponent as a part of the cost the marshal's fees for serving such a subpoena. This is the interpretation given *Parker v. Bamker*, 6 McLean, 631, Fed. Cas. No. 10,725, by Judge Sawyer, in *Spaulding v. Tucker*, supra, and is a reasonable rule.

5. The witness Hanson was a salaried employé of the government in the Reclamation Service, and was sent from his place of business at Toppenish, Wash., as a witness; and therefore the plaintiff is entitled, under section 850, Rev. St. (U. S. Comp. St. 1901, p. 655), to have included in the judgment against the defendant his necessary expenses in going and returning and attendance on the court, regardless of the distance traveled by him. *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112; *United States v. National Security Co.* (D. C.) 168 Fed. 314.

The costs in the two cases referred to will be taxed in accordance with the rules above stated.

UNITED STATES v. STEINMAN.

Circuit Court of Appeals, Third Circuit. October 6, 1909.)

No. 53.

1. BANKS AND BANKING (§ 256*)—FUNDS—"WILLFUL MISAPPLICATION."

"Willful misapplication" of the funds of a national bank, in order to constitute an offense denounced by Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), must be a willful misapplication for the use or benefit of accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body corporate or natural person, being entirely different from acts constituting an official maladministration, subjecting the bank to a forfeiture of its charter, as provided by section 5239 (page 3515).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 964; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7482-7483.]

2. BANKS AND BANKING (§ 256*)—MISAPPLICATION OF FUNDS—OVERDRAFTS.

An unintentional overdraft by a depositor in good standing and possessing ample means to pay, or an overdraft to be paid pursuant to a prior agreement resting on abundant credit, does not constitute a willful misapplication of a national bank's funds, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 964, 965; Dec. Dig. § 256.*]

3. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—MISAPPLICATION OF FUNDS—EVIDENCE.

In a prosecution for aiding and abetting the officers of a national bank to willfully abstract the funds of the bank by means of certain overdrafts, evidence that prior to the making of such overdrafts it was agreed that the bank should furnish funds for the operations of certain corporations in which accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the overdrafts, and that at the time of the advances the value of the corporation's property was more than \$300,000, while the overdrafts aggregated only \$30,872.24, was admissible to show absence of criminal intent.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

4. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—MISAPPLICATION OF FUNDS—INSTRUCTIONS.

In a prosecution for aiding and abetting the willful misapplication of the funds of a national bank by its officers by overdrafts, an instruction that an arrangement by which the cashier and president of a banking institution allows its funds to be taken out is not a justification, since the funds of a national banking institution can only be taken out by the action of its board of directors, and that if by the paying of the checks constituting the overdrafts, or any of them, either the money of the bank was removed from its resources, or its capital reduced, or its charter endangered, any one of such things would be sufficient to warrant the jury in finding a misapplication with intent to injure the bank, was erroneous.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

In Error to the District Court of the United States for the Western District of Pennsylvania.

E. H. Steinman was convicted of aiding and abetting the willful abstraction of the funds of a national bank, and he brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
172 F.—58

George C. Burgwin, Jno. E. Kunkle, and Edward E. Robbins, for plaintiff in error.

R. M. Gibson, Asst. Dist. Atty., for the United States.

Before GRAY and BUFFINGTON, Circuit Judges, and LANING, District Judge.

BUFFINGTON, Circuit Judge. In the court below E. H. Steinman was convicted on an indictment charging him, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), with aiding and abetting Charles E. Mullin, cashier of the Farmers' & Mechanics' National Bank of Mt. Pleasant, Pa., to willfully abstract the funds of said bank. On the imposition of sentence, Steinman sued out this writ of error.

The abstractions charged in the indictment consisted of overdrafts of the Acme Lumber & Supply Company aggregating \$30,782.24. Steinman was not an officer of the bank. He was an officer and stockholder of the Acme Lumber & Supply Company, the Anchor Glass Company, and the Searchlight Manufacturing Company, three corporations engaged in manufacturing, building, and real estate operations at Mt. Pleasant. The proofs show that the alleged value of the properties of said companies was upwards of \$300,000. In order to obtain further means for the operations of these companies, he applied to Hissem, the president, and Mullin, the cashier, of the bank, both of whom had stock in these companies. There were certain transactions in reference to the bonds of these companies which need not be detailed here; but the result of their negotiations, so far as pertinent to the questions raised by the assignments of error, was that the three companies were to be furnished funds as they were needed for their pay rolls and operations, and that, as the particular amounts to be finally apportioned to each company could not be determined at the time, the advances were to be made to the general account of the Acme Lumber & Supply Company, and that, as its account was from time to time overdrawn, notes were to be given by such of the companies as had used the funds to take up these overdrafts. On the trial, Steinman, in common with the other defendants, offered to prove the value of the property of the Acme Lumber & Supply Company, the Anchor Glass Company, and the Searchlight Manufacturing Company, whose notes were given as collateral to secure the payment of said checks according to the arrangement made before the checks were issued, "for the purpose of showing that there was no fraudulent intent to misapply the funds of the bank—a criminal intent being necessary to justify a conviction." This offer was objected to by the government as "incompetent, irrelevant, and immaterial to the issue, and not tending to throw light upon the intent of the defendants in paying out the moneys charged in the indictment as having been wrongfully misapplied by the defendants." To the court's action in sustaining this objection, exception was taken, and the court's ruling is here assigned for error. The substantial character of proof herein offered appears elsewhere in the record, showing that the value of the property of the three companies at the time of these advances was alleged to be more than \$300,000. In its general charge, the court also said:

"An arrangement by which the cashier and the president of a banking institution allow the funds to be taken out is not a justification, either on the part of the president and cashier or on the part of a person dealing with the president and cashier. The funds of a national banking institution can only be taken out by the action of the board of directors."

And this also is assigned for error.

After careful consideration, we are of opinion the defendants were entitled to give in evidence all matters tending to show their good faith in the transaction in question, and that the overdrafts were not willful abstractions and misapplications under section 5209. An overdraft of an account is not per se and necessarily an abstraction of the bank's funds under section 5209 by the drawer of a check who has not funds to meet it, nor is the payment of such overdraft check by an executive officer of the bank, without action by the board, necessarily a misapplication under such section. Indeed, in *Bolles on Modern Banking*, p. 199, it is said:

"Generally, two kinds of overdrafts are as clearly justified as any other kind of a loan: (1) An unintentional overdraft by a depositor in good standing, and possessing ample means to pay; (2) an overdraft to be paid in pursuance of a prior agreement, resting on abundant credit."

It will thus be seen that the facts and circumstances attendant upon an overdraft may affect the character of the overdraft and determine whether it is criminal and within the purview of section 5209, which as we have seen concerns transactions where one "embezzles, abstracts or willfully misapplies." This is clearly shown in the cases involving that section before the Supreme Court. There the distinction is clearly drawn between acts of willful misapplication under section 5209, and those of maladministration in violation of statute section 5200 (page 3494), for example, that "the total liabilities to any association of any person * * * for money borrowed * * * shall at no time exceed one-tenth part of the capital stock of the association actually paid in," and which acts of maladministration shall under section 5239 (page 3515) subject the bank to forfeiture of its charter. Thus, in *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520, the court says:

"We are, therefore, of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person."

And in *United States v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, it is said:

"In the case of the *United States v. Britton*, 107 U. S. 655, 669, 2 Sup. Ct. 512, 27 L. Ed. 520, the offense of willfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a willful and criminal misapplication of the funds, as defined by section 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication, evidently not embraced within the intention of section 5209. For that reason it was held, in that case, that it was necessary to specify the particulars of the application, so as to distin-

gulsh that charged in the indictment as willful and criminal from those others contemplated by the statute which were unlawful, but not criminal."

Now this distinction between an unlawful act of maladministration, which, of course, misapplied the funds of the bank and subjected the bank to forfeiture of its charter, but which were not punishable under section 5209 as a willful misapplication, the court in its charge failed to draw, but, on the contrary, instructed the jury that such an unlawful act of maladministration evidenced an intent which warranted conviction. The language was:

"If by the paying of these checks, or any of them, either the moneys of the bank were removed from the resources of the bank, or its capital reduced, or its charter endangered, any one of these things would be sufficient to warrant you in finding that the misapplication was with intent to injure the banking institution."

Under the facts of the case there was really nothing left for the jury to pass on. Taking these overdrafts under the arrangement alleged, they were loans of more than one-tenth of the capital of the bank. In paying the checks the moneys of the bank were removed from its resources, and that they as excessive loans endangered the charter of the bank were all matters which could not be gainsaid, and from them the jury were in effect directed to infer the intent necessary in a conviction under this indictment.

Such instruction being at variance with the views expressed by the Supreme Court, we are of opinion that in this regard, as well as in ruling out the testimony mentioned, the defendant has just ground to complain, and the judgment imposed must be reversed.

CARTER RICE & CO. v. AUBIN.

(Circuit Court of Appeals, First Circuit. August 17, 1909.)

No. 815.

1. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

In an action by a servant against the master to recover for an injury resulting from the explosion of a can of wood alcohol, which he had set upon a bench on which was also a lighted lamp, contributory negligence as matter of law in setting the can very close to the lamp was not established by the opinion of an expert that there could have been no explosion if the can had been placed at the distance testified by plaintiff, where such opinion was based on the assumption that the vapor from the can would distribute itself evenly in all directions, without allowance for actual conditions, such as drafts or surrounding objects by which it might be affected.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1119, 1120; Dec. Dig. § 289.*]

2. EVIDENCE (§§ 546, 547*)—EXPERTS—EXAMINATION—DISCRETION OF COURT.

The exclusion of a question asked an expert witness, either on the ground that he was not shown to be qualified or because too general, is largely within the discretion of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2363, 2364; Dec. Dig. §§ 546, 547; * Witnesses, Cent. Dig. § 849.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of New Hampshire.

Robert Manning (Burnham, Brown, Jones & Warren, on the brief), for plaintiff in error.

Oliver E. Branch (Branch & Branch and Burns & Burns, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is a suit to recover damages for personal injuries caused by an explosion of wood alcohol. The plaintiff, while in the employ of the defendant, was engaged in soldering a dripping pan. He filled the lamp for heating the soldering iron from a gallon can containing about a quart of wood alcohol. He then set the can down upon the bench where he was working. Some 30 minutes afterwards the alcohol exploded, inflicting the injuries complained of. The room in which the plaintiff was working was 15 degrees warmer than the adjoining room, from which he took the can of alcohol just before beginning this work.

The jury in the court below returned a verdict for the plaintiff, and the case is before this court on writ of error.

The defendant relies upon two rulings of the court below to which exceptions were duly taken:

First. The refusal of the court to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence as a matter of law.

Second. In overruling the following question propounded to Prof. Angell, defendant's expert:

"Whether or not cans such as this can are commonly used in various establishments of various kinds in keeping wood alcohol?"

1. In the trial court the question of the plaintiff's contributory negligence turned upon whether he set the can of alcohol in close proximity to the lamp, or at a reasonably safe distance. Upon this issue the evidence was conflicting. The plaintiff testified that he set the can about three feet away from the lamp. On the other hand, Pine, superintendent of the defendant's mill, testified that after the explosion he found the can from three to six inches from the lamp, which was still burning. Upon this state of proof the court submitted the question of contributory negligence to the jury under instructions to which no objection was taken.

The defendant now contends that the jury should not have believed the plaintiff's evidence that he set the can three feet away from the lamp, since it is contradicted by the scientific facts established by the testimony of defendant's experts, especially Prof. Angell, and that it necessarily follows from this testimony that the plaintiff must have set the "can in close proximity to the flame, which was, as a matter of law, an act of contributory negligence."

This contention of the defendant raises the single question whether the evidence of Prof. Angell and Mr. Robbins, defendant's experts, amounts to a demonstration of the physical fact that it was impossible for this explosion to have occurred by reason of the mixture of alco-

holic vapor with air when the can was three feet away from the lamp. The testimony of Mr. Robbins is of such a general and indefinite character that it calls for no special consideration. The only proof which approaches a scientific demonstration of this fact is found in the following testimony of Prof. Angell, upon which the defendant mainly relies:

"Q. Can you explain why it would be impossible for that lamp to cause an explosion three feet away under these circumstances? A. In order to produce an explosion with gas or vapor and air, there must be what we term an explosive mixture; that is, the gas or vapor must impregnate the air sufficiently so that it will take fire on contact with the flame and burn rapidly, and I should say on the least calculation we should have to allow 3 per cent. of vapor in the air in order to ignite it, and if the vapor was issuing from that can a distance of three feet all around it, it would fill a space six feet in diameter approximately, or about 600 gallons capacity, and 3 per cent. of that would be about 18 gallons or 72 quarts. I should judge the vapor in the can might occupy the space of 3 quarts. If we had a quart of liquid or alcohol in the can, there would be 3 quarts of vapor, and that would have to be augmented to 73 quarts at least to saturate this space sufficiently to cause an explosion—sufficiently to cause it to ignite if brought in contact with the flame three feet away."

In this statement Prof. Angell says that:

"If the vapor was issuing from that can a distance of three feet all around it, it would fill a space six feet in diameter approximately."

And he then proceeds to estimate the quantity of alcoholic vapor it would take to fill this space with an explosive mixture composed of vapor and air. Prof. Angell's calculations are based upon the assumption that the vapor issuing from the can is distributed uniformly in the space surrounding the can, and he does not take into consideration the actual or possible conditions and circumstances existing at the time, which enter into the situation and which may have affected the result. Taking this testimony of Prof. Angell as a whole, it amounts to little more than the theoretical statement by an expert that under certain ideal or perfect conditions, where the alcoholic vapor might be uniformly distributed, it would, according to the laws of physics, take a certain quantity of alcoholic vapor to fill a space around the can six feet in diameter with an explosive mixture of air and vapor.

Prof. Angell's statement is incomplete. It is not a demonstration of the physical fact in question, because it fails to consider all the surrounding conditions and circumstances. For example, this can rested on a bench, and this bench was near the side of the room; and the question arises how far these obstructions might have affected the distribution of the vapor and the direction it would take. Again, the plaintiff stood near the can; and the question arises to what extent his body and his movements during the 25 minutes he was engaged in his work would have affected the distribution and direction of this volatile gas.

Further, it is apparent that the vapor issued from this can under pressure, and therefore with considerable propelling force, like the steam issuing from a kettle of boiling water, and the question arises how far this circumstance would affect the situation, especially if the nozzle of the can was pointed in the direction of the flame of the lamp. Again, it is a well-known fact that atmospheric conditions are disturbed by the

flame of a lamp, and in this case there was a flame from four to five inches high from a lamp located three feet away from the can. Further, Prof. Angell's conclusion rests upon the assumption that during the 25 minutes this gas was escaping from the can there were no draughts or currents of air which would have disturbed the atmospheric conditions and which might have driven this vapor in the direction of the flame of the lamp.

Prof. Angell's conclusion is based upon the absence of all these disturbing elements or forces, and therefore it cannot be said to be a scientific deduction from all the facts and conditions which enter into the problem. It is manifest that a conclusion of this character cannot have the probative force of a demonstration of a physical fact; and hence it follows that this testimony is not sufficient to overcome the plaintiff's *prima facie* case.

Prof. Angell admits that his deductions in this case are founded upon his scientific observations and education rather than upon the specific facts and circumstances of this case:

"Q. Then what you say is the result of your deductions from scientific observations and education? A. Yes, sir.

"Q. Rather than from experience? A. No experience of any explosion similar to this."

For these reasons the first exception must be overruled.

2. With respect to the remaining exception, it is sufficient to observe that the court below excluded this specific question asked Prof. Angell on the ground that it was too general in its character. Before excluding this question, Prof. Angell has testified that he had no knowledge as to how wood alcohol was protected in establishments like the defendant's. Since the qualifications of Prof. Angell to testify as an expert respecting this particular inquiry, as well as the form and scope of the question propounded, were matters resting largely in the discretion of the court, we find no error in this ruling. *Spring Company v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

THE JAMES McWILLIAMS.

(Circuit Court of Appeals, Second Circuit. June 15, 1909.)

No. 266.

COLLISION (§ 66*)—VESSEL AT ANCHOR—DREDGE AT WORK.

A derrick, lawfully anchored about the middle of the East River while engaged in raising a sunken vessel, *held* entitled to recover damages from a tug whose tow came into collision with her, on the ground that it was the duty of the tug to use ordinary care and skill to avoid the derrick and that under the evidence she failed to do so.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*]

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Action by the Merritt & Chapman Derrick & Wrecking Company, as owner of a derrick, against the steam tug James McWilliams for collision. Decree for libelant, and claimant appeals. Affirmed.

The following is the opinion of Adams, District Judge:

ADAMS, District Judge. The law in this case has been laid down in that of *The Chauncey M. Depew*, decided January 23, 1894, and reported in 59 Fed. 791. There it was held as follows (I read from the syllabus):

"1. Collision—Vessels at Anchor—Crowded Channel—Dredge Lawfully Moored. It is obligatory on their owners to raise, when practicable, vessels sunk in collision. Hence, a derrick anchored in the channel of the East River under a permit from the Secretary of the Treasury, occupied in raising a sunken vessel, and, though a partial obstruction to navigation, not such a complete obstruction, as to constitute a nuisance, was *held* not unlawfully anchored, though off the regular anchorage grounds, and not in fault for damage suffered by a vessel which collided with her.

"2. Same—Dredge Anchored in Narrow Channelway—Liability of Colliding Vessels. A derrick anchored in the crowded channelway of the East River engaged in raising a sunken vessel, although not unlawfully in such a position, was *held* not entitled to all the immunities of vessels anchored on anchorage grounds; and certain tugs which collided with her in spite of skill and diligence exercised by their pilots, were *held* not responsible for the damage to the derrick."

I had occasion to consider this method of anchoring vessels of the character involved in this case for the purpose of carrying on their work, in the case of the New England Transportation Company against the tug *C. R. Stone*, tried before me in December, 1906. As I recall the case, the vessels were moored under practically the same permit as that in this case. There the accident occurred in the channel between Blackwell's Island and New York. The tug was held in fault there for not having started soon enough to make the manœuver to cross from the port side of the Montauk to the starboard side, which was the side on which she should have passed, to accomplish the manœuver in safety. She was taking her tow along sidewise and it was because of that the collision happened. I do not think, however, that either of these cases covers this directly.

The facts here seem to be that this derrick took her position in the East River in pursuit of her lawful business and anchored properly at a point about the middle of the river. She was in that same position the morning of the day of the collision, but, as appears from the testimony, could only work during slack water, which varies from three quarters of an hour to an hour and a half. She had worked as long as she could in the morning and, not having finished, had resumed the work in which she was engaged, but was through with the work for that day at the time the collision occurred. While lawfully lying in that position this tug McWilliams with her tow came along and one of the barges ran into the derrick. The question here is whether the tug which was navigating the tow was in fault for the collision.

There have been numerous allegations of fault made here, but I think they can all be boiled right down into what is the substance of them, that is, that the collision occurred because of the tug failing to avoid this anchored vessel, which it was obliged to do if it was practicable.

It is claimed that the tug did everything she could to avoid colliding with the derrick and was unable to do so on account of a schooner which came along behind her and so crowded her as to force her, not only to try to turn away from the derrick, but before she could reach that point in the navigation to turn towards it, to avoid the schooner. If that is so, if a clear case of such navigation has been made out, I think the tug should be exonerated, because she could not know that this sailing vessel was going to come up the river and force her out of her course. She was not obliged to keep a lookout astern. But some of the parties on that tow have said that the schooner was seen at least as far west as the Bridge and perhaps the westerly side of the

Bridge. The question really is whether that schooner was close enough to the tug or tow to require the tug to turn out of her course.

We do not get any aid on this point from the people on the derrick. They did not see the schooner. They say there was a clear course for the tug and tow. There is no doubt, however, in my mind that the schooner was there. The only doubt is whether she was navigating as close to the tug and tow as the claimants here would have the court believe. All those on the tug say explicitly that the schooner passed very close to them, as I remember they said about twenty-five feet.

When the men from the tow are put upon the witness stand we get an entirely different aspect of the case. They impressed me as being desirous of telling the truth. Of course we all understand that men on a tug are naturally interested in their own vessel and look at things in a way which will, if possible, exonerate her, without meaning to tell untruths. But these men from the tow had no such interest. Although their boats were identified in a certain way with the claimant of the tug yet they were free from that bias which our experience tells us always accompanies the crew of a tugboat which is implicated in such an accident as this.

Those two men from the tow say in substance, although not in so many words, that there was room enough for the tug to navigate there without regard to the schooner; in other words, that the schooner did not come so close as those on the tug would have us believe.

It was necessary, of course, to avoid the derrick, and ordinary care and skill were required on the part of the tug to accomplish that, and the absence of such ordinary care and skill would constitute what the law calls negligence in such matters; that is, it is negligence for one vessel to run into another by not observing all the precautions which the necessity of the case would ordinarily require.

It is my impression that the tug unnecessarily turned towards the New York shore; that is, that she turned before there was any real necessity for it, and that in that way she threw her tow somewhat across the channel and subjected it to the strong flood tide which prevailed there, and that when she tried to recover it was too late, she could not pull the tow away from the derrick. The consequence was this collision happened, with some damage to the derrick and no damage to the barge except some marks upon it, at any rate, nothing as far as appears here that required any money expenditure to repair it.

On such a state of facts it seems to me that the tug must be held in fault, because she was bound to keep her tow away from this lawfully anchored vessel, unless something occurred which she could not anticipate and could not avoid, as in the Luzerne Case (D. C.) 148 Fed. 133. There the Luzerne was navigating up the river and a sailing vessel came along and forced her over, not only by probability of collision but, as I remember the case, by actual collision which had the tendency to turn the Luzerne towards the injured tow, which was on the other side of her. I held there that the accident was inevitable. The Circuit Court of Appeals affirmed that decision (157 Fed. 391, 85 C. C. A. 328), although not on the ground of inevitable accident but because they said it should have been seen and avoided; that is, that the schooner should have seen what would happen by her sailing there; that it was a case of carelessness and negligence on her part. In this case I think it was negligence on the part of the tug. I cannot but believe that the tug could have passed that derrick, on the Brooklyn side of her and at the same time have avoided the schooner. That being so there is nothing for me to do but to hold the tug in fault. I therefore order decree against the tug with order of reference.

De Lagnel Berier, for appellant.

W. J. Martin, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

THE WILLIAM TRACY.

(Circuit Court of Appeals, Second Circuit. April 13, 1909.)

Nos. 224, 225.

COLLISION (§ 96*)—COLLISION AT ENTRANCE TO SLIP—NEGLIGENT MANEUVERS.

A collision between a tug coming out from a basin and a carfloat on the side of another tug, which had just passed out, *held* due to the fault of the latter in backing her tow across the narrow entrance in maneuvering to get her direction, without taking any precaution to notify vessels which might be coming out.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203-205; Dec. Dig. § 96.*]

Appeals from the District Court of the United States for the Southern District of New York.

In Admiralty. Action by the Lehigh Valley Transportation Company, as owner of the tug Statington and tow, against the tug William Tracy, for collision; and cross-libel by Thomas Tracy, as owner of the William Tracy, against the Lehigh Valley Transportation Company. Decree in favor of cross-libelant, and libelant appeals. Affirmed.

The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This is one of those collision cases which are difficult to decide, because the movements are in such restricted waters, so to speak; that is, neither vessel has any such defined course as is necessary to aid one to look into the matter very thoroughly. Moreover, this all happened within a very short space of time, which adds to the difficulty of determining how the accident happened.

It appears that the tug Statington had taken one carfloat on her port side and gone out from Morris Canal Basin, intending to take the float to a bridge which is slightly below the entrance to the basin. In coming out she had to go around two carfloats that were lying at Pier A, which was the outermost of three piers, the carfloats lying slightly inclined into the basin. When the tug got around there her Captain says he was backing and filling in order to get into shape to make the bridge. While so doing the tug Tracy, having taken a boat into Morris Canal Basin and landed it, turned around from there and was coming out. As she was coming out another tug, the Quigley, was going into the basin from up the river and interfered somewhat with the Tracy going out.

The testimony on the part of the Tracy, is that after she had got turned around to go out of the basin she blew a long whistle to give warning that she was coming out. If I recollect the testimony correctly it is that the Quigley on coming into the basin gave the Tracy two whistles, intending to pass starboard to starboard, but did not so pass because the Tracy, not hearing the two whistles as the Quigley's Captain thinks, blew a signal of one whistle for him to pass the other way. They were thus passing in a very narrow place—of about 200 feet in width—and the Tracy contends that when in that narrow space the tug Statington appeared above the floats which were lying at Pier A, backing up the river. The testimony on the part of the Statington is, that she was not backing up the river in that position. It seems to me that is really the pivotal point in this case. If the Statington was backing and filling across the mouth of that slip she should then have had a lookout on her stern and should have been giving signals to any vessels that might wish to come out of the slip.

I am rather inclined to believe, from this very conflicting testimony, that it is probable that the Statington did back up across the space which was between the boats that were lying tailing down into the slip and the carfloats which were lying at Pier A. I take it that is what the backing and filling

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

meant, that she was moving around there in order to get a proper heading for the bridge. When the Tracy came along and saw the Slatington, with her float extending above this space, she was naturally in a hazardous position. As I said a moment ago, this case turns upon whether or not the Slatington did get across that entrance to the slip. If the Slatington did get her tow across there then the collision is accounted for. I think she did. Backing and filling under those circumstances does not mean backing and filling out in the river, but such backing and filling as was necessary to make the bridge slip.

As to the testimony of the disinterested witness from the Transfer that the Slatington was not backing, his opportunities for observation were so limited that I hardly think they can overcome the natural probabilities, especially when supplemented by positive testimony from the Captain of the Tracy that the Slatington's tow suddenly appeared above the floats lying at Pier A.

My impression in this case is that the proximate cause of the collision was the backing and filling of the Slatington without taking any precaution to notify vessels coming out of the slip that she was there and would be engaged in an operation of that kind which would necessitate care on the part of the outgoing vessel.

Of course criticisms can be made on the navigation of the vessels apart from what I have said. It is nearly always so, that some criticism can be made upon the navigation of vessels engaged in a collision, but I think what I have just stated ought to determine this matter in favor of the Tracy and there will be a decree accordingly.

Robinson, Biddle & Benedict (Wm. S. Montgomery, of counsel), for appellant.

Carpenter, Park & Symmers (James Emerson Carpenter, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

ELECTRIC VEHICLE CO. et al. v. C. A. DUERR & CO. et al.

(Circuit Court, S. D. New York. September 19, 1909.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GASOLINE AUTOMOBILE.

The Selden patent, No. 549,160, for a road locomotive, granted in 1895 on an application filed in 1879, claims 1, 2, and 5, are all for combinations the elements of which were all old in some form, although changed, modified, and co-ordinated by the patentee to adopt them for harmonious action in such combinations, especially the "liquid hydrocarbon gas engine of the compression type," which constitutes the motive power and is the most important feature. At the time of the filing of the application, the art to which it relates, that of a self-propelled road vehicle with a considerable radius of action over ordinary highways and capable of management by a single driver, and he not necessarily a skilled engineer, had no practical existence, and the patent, which embodies all the parts of an operative vehicle of that kind, discloses invention of a primary character. As so construed, claims 1, 2, and 5 are infringed by the Ford machine, and claims 1 and 5 by the Panhard French machine.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 125*)—CONSTRUCTION AND OPERATION—EFFECT OF DELAY IN PATENT OFFICE.

That an applicant for a patent acquiesces in delay in the Patent Office is immaterial to the courts, and does not affect his rights under his patent, so long as the statute law is not violated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 177; Dec. Dig. § 125.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suits by the Electric Vehicle Company and George B. Selden against C. A. Duerr & Co. and the Ford Motor Company, against the O. J. Gude Company, against John Wanamaker and others, against Société Anonyme Des Anciens Etablissements, Panhard & Levassor, and Andre Massenat, and against Henry & A. C. Neubauer, for infringement of letters patent No. 549,160 for a road locomotive, granted to George B. Selden November 5, 1895. On final hearing. Decree for complainants.

Betts, Sheffield & Betts (Frederick P. Fish, William A. Redding, Samuel R. Betts, Edward Rector, and John W. Peters, of counsel), for complainants.

Coudert Bros., for defendants Panhard & Levassor and others.

Cardozo & Nathan (R. A. Parker, Frederic R. Coudert, W. Benton Crisp, and John P. Murray, of counsel), for defendants Ford Motor Co. and others.

HOUGH, District Judge. The application for the patent on which these actions are based, was filed in 1879, or more than 16 years before the grant was made. The principal claim in suit (No. 1) reads thus:

"The combination with a road locomotive, provided with suitable running gear including a propelling wheel and steering mechanism, of a liquid hydrocarbon gas engine of the compression type, comprising one or more power cylinders, a suitable liquid fuel receptacle, a power shaft connected with and arranged to run faster than the propelling wheel, an intermediate clutch or disconnecting device and a suitable carriage body adapted to the conveyance of persons or goods, substantially as described."

The second claim varies from the first only in requiring the "suitable carriage body" to be "located above the engine," while the fifth claim sets forth substantially the same combination, but specifically describes the engine as comprising a plurality of cylinders, with "pistons arranged to act in succession during the rotation of the power shaft."

These three claims are alleged to be infringed by all the defendants. This statement of complainants' position seems sufficient to show that the subject-matter of these suits is the modern gasoline automobile. The defendants are severally the manufacturer, seller, and user of the Ford machine, a well-known American make, and the maker and importer of the Panhard, a celebrated and typical French product. If these defendants infringe, it is because complainants own a patent so fundamental and far-reaching as to cover every modern car driven by any form of petroleum vapor and as yet commercially successful. Such a claim lends interest even to such a record as is here submitted, and requires careful examination, to the end that the parade of forces in this court may at least serve to shorten and simplify the certain conflict in the appellate tribunals.¹

¹ NOTE.—It is a duty not to let pass this opportunity of protesting against the methods of taking and printing testimony in equity, current in this circuit (and probably others), excused, if not justified, by the rules of the Supreme Court, especially to be found in patent causes, and flagrantly exemplified in this litigation. As long as the bar prefers to adduce evidence by written deposition, rather than viva voce before an authoritative judicial officer, I fear that the antiquated rules will remain unchanged, and expensive prolixity re-

Upon one question of law all counsel are agreed. The patent claims under consideration are all for combinations. There is, of course, no agreement that the combinations set forth are patentable, and none as to the interpretation of their language, if valid at all; but there is no denial that in form nothing but combinations are claimed. This is emphasized, because it seems to open and simplify the discussion. Selden does not pretend to have invented any new machine or combination of matter, in the same sense that Whitney invented the cotton gin or Howe the sewing machine. He does not in application or claim specify any one mechanical device for which in some branch of art a prototype cannot be found. There had been and were in 1879 running gears, propelling wheels, steering mechanisms, gas engines, etc., of many forms, and his patent covers no one form of any of these parts of his "road locomotive." He does assert that he selected, adapted, modified, co-ordinated, and organized the enumerated parts (including the usual mechanical adjuncts of each part) into an harmonious whole, capable of results never before achieved, and of an importance best measured by the asserted fact that after 30 years no gasoline motor car has been produced that does not depend for success on a selection and organization of parts identical with or equivalent to that made by him in 1879. If this be true, it may be held at once that in such a mental operation, and such an important result therefrom, invention, and that of a high order, undoubtedly does reside. Where Bradley, J., declined definition, he would be a bold man who tried it; but I am sure that invention is easily discernible as that which vitalizes Selden's selection, if that selection and its results have been truly described.

main the best-known characteristic of equity. But reforms some times begin with the contemplation of horrible examples, and it is therefore noted that the records in these cases, as printed, bound, and submitted, comprise 36 large octavo volumes, of which more than one-half contain only repeated matter: . . . e., identical depositions, with changed captions, and exhibits offered in more than one case. In reading the testimony of one side in one set of cases, there were counted over 100 printed pages recording squabbles (not unaccompanied with apparent personal rancor) concerning adjournments, and after arriving at this number it seemed unnecessary to count further. In many parts of the record, there are not 5 consecutive pages of testimony to be found without encountering objections stated at outrageous length, which may serve to annoy and disconcert the witness, but are not of enough vitality to merit discussion in 2,000 pages of briefs. Naturally tempers give way under such ill-arranged procedure, and this record contains language, uncalled for and unjustifiable, from the retort discourteous to the lie direct. (E. G. Ford, C. R. pp. 2873, 2967, 2968, 2987, 2988.) And all this lunders up the court record room, while clients pay for it! Even when evidence in equity was taken by written answers to carefully drawn interrogatories, the practice was not marked by economy or celerity; but stenography and typewriting, the phonograph and linotype, have become common since our rules were framed, have made compression and brevity old-fashioned, increased expense, and often swamped bench and bar alike by the quantity, rather than the quality, of the material offered for consideration. Motions to expunge and limit cross-examination should have been made in these cases, though they are feeble remedies, exposing counsel to personal reproach, and rendering judges afraid of keeping out of evidence what they cannot (on motion, at all events) understand. But the radical difficulty, of which this case is a striking (though not singular) example, will remain as long as testimony is taken without any authoritative judicial officer present, and responsible for the maintenance of discipline, and the reception or exclusion of testimony.

Broadly speaking, the defense in these cases rests on a denial of the truth of the foregoing summary of Selden's performance, which denial has two parts: (1) Selden did not do what he now asserts; and (2) defendants' combinations differ from Selden's, being neither identical nor equivalent. In considering what Selden did, and the meaning of the words in which he described and claimed his achievement, it is to be remembered that whether his combination constitutes invention and whether it possesses novelty and utility are primarily questions of fact, as to which the very grant of the patent raises a presumption in favor of complainants, while the demurrer decision (in *Electric Vehicle Co. v. Winton Motor Co.* [C. C.] 104 Fed. 814) is here controlling authority to the effect that on its face, plus all matters of which the court can take judicial cognizance, the patent is valid. To ascertain, therefore, how far defendants have succeeded in meeting the burden of proof, which in all matters of fact lies on them, it seems fair to begin by discovering from all the evidence what was the state of the art when Selden filed his application in 1879.²

But what is the art as to which this inquiry is to be made? On this preliminary point it seems to me that defendants' testimony and argument have taken too wide a range, or at least laid undue emphasis on matters of little moment. This invention does not belong to the steam engine art, nor that of any engine, regarded alone; nor is it fruitful to examine carefully the development of traction engines, whether primarily designed to haul "trailers," or transport persons and goods over their own wheels. Boats, also, and tram cars, propelled by engines of any kind, furnish but a limited field for useful investigation. The inquiry is: How stood art (and science too) in 1879, in respect of a self-propelled vehicle with a considerable radius of action over ordinary highways, and capable of management by a single driver, and he not necessarily a skilled engineer? Or, to use a phrase frequently occurring, in the testimony and exhibits, what was known of the "horseless carriage" industry in 1879, either at home or abroad?

The answer given by the evidence is entirely plain: There was no such industry, the art existed only in talk and hope, no vehicle even faintly fulfilling the requirements above outlined had ever been built, and there is no competent and persuasive evidence that any experiment had ever moved 100 feet, or revealed an organization warranting the expectation that it ever would do so. Some examination of the kindred arts, above alluded to, serves to explain this situation. For more than 100 years steam as a prime motor had dominated the world of mechanic art. Steam as the power for a self-propelled road vehicle had been exhaustively worked over, and patents obtained, from Trevithick (British 2,599, of 1802) to Monnot (U. S. 197,485, in 1877); and the result was the traction engine. It made no difference whether it carried passengers or hauled freight. The actual type and only type was a boiler on wheels, of enormous weight, slow speed, and small radius of action.

But the numerous experiments with steam road wagons had (how-

² NOTE.—From uncontradicted testimony, 1877 might well be fixed as the date of the invention alleged in this patent application. The experts, however, have throughout spoken of the art of 1879 as controlling, and that time is therefore taken as a convenient starting point.

ever meager the success attending them) served to make known to that wholly ideal and fictitious person, "the man skilled in the art," something of the organization of any road vehicle capable of operation by a small crew. Steering mechanism, operated by wheel before the driver, independent turning of the fore wheels, the chain drive, as well as beveled gear connection between power and driving shafts, devices for disconnecting power from running gear and letting engine run free, plans for brake control of quite a modern sort, and stowage of motive power in parts of the vehicle remote from passengers—all had been practiced or suggested. From patents and publications scattered over two continents and more than two generations there can be reconstructed (and defendants have done it on paper) something that is very far from even a good theoretical road wagon, but which does contain most of the elements of Selden's combination; and this represents the art, known to the man skilled in both theory and practice, a good mechanic, with a scientific education and widely read in the technical literature of all civilized nations, by whose incredible knowledge the achievements of patentees are so often measured. Obviously, if a fairly good road wagon cannot be reconstructed in 1909 out of materials so industriously collected from the scattered knowledge of 1879, it is desirable to ascertain whether there then existed some one lack, whether the art then required some one thing which was wholly missing, in order to produce a practical self-propelled road vehicle.

It seems to me plain that there was such lack, and it may be stated in the language of one of the numerous inventors who procured long and elaborate patents relating to road locomotion, and never (so far as this record shows) did anything more. Savalle (French 77,644, in 1867) says in a certificate of addition dated March 16, 1869:

"I have tried to apply to road locomotives several motors operating by air expanded by the heat produced, either by the explosion of gas or by air forced over a metallic surface, heated by coal or other combustible, or also by petroleum. These divers forms of motors apply perfectly when it concerns the traction of omnibuses or other large vehicles of this kind; but when it is necessary to apply this kind of locomotion to light carriages, only carrying one to six persons, or to drive a velocipede, these means become impracticable by the large space which they require."

The lack, the something that had to be supplied before it was worth while to organize the vehicle, was the engine. Steam had thus far failed, and this record seems to show that at about the time Savalle wrote the gas engine as a road wagon motive power began to be mentioned in serious publications, and patent specifications.³ Savalle was much mistaken in asserting that any of the assorted motors mentioned by him had successfully driven an omnibus or any similar conveyance; but he early hinted at the truth that in some form of motor actuated by a product of petroleum would be found, if not the immediate solution

³ NOTE.—In making this statement *Le Monde Illustré* and Pinkus (British 8,207, of 1889) have not been overlooked. The former proves nothing that relates to the form of engine to be considered in this litigation, while the absence of all later mention proves the car a sporadic failure. Pinkus was speaking of tram cars, and the use of such a publication against Selden by the Patent Office was, to say the least, not very intelligent.

of the problem, at least the missing element that would make the solution sure.

This missing element Selden avers he discovered, and it follows that over his engine the conflict in these cases has raged through several volumes. In trying to ascertain, however, the status in 1877-79 of engines in any way resembling Selden's, the court is fortunate in having in evidence a book entitled "The Gas Engine" published in 1885 by Mr. Dugald Clerk, who has also testified with admirable clearness as an expert for complainants. It appears that the materials for this book were gathered during the very period of Selden's experiments, while so completely has Clerk furnished a classic on the history of the gas engine art that even counsel, who sharply criticise his evidence, support their arguments from his book to such an extent that it is not too much to say that many chapters thereof could be reconstructed from their briefs.

In 1879 "internal combustion" engines were well known, and had reached a considerable degree of commercial success, despite the fact that the reasons for their success or more frequent failure were very ill understood. The fact that fuel might be burned in the engine cylinder itself, that such burning (if of gases) produced an expansion thereof, and that such expansion might be utilized by allowing it to push the piston, was and is the basic proposition. This knowledge had produced the Lenoir engine in 1860 and the Hugon in 1865, constructed in close adherence to the steam engine of the day, and giving less than one horse power per ton of weight. Both normally used illuminating gas at atmospheric pressure. The Otto free piston engine of 1867 marked an advance in effectiveness, but no form of gas engine had yet appeared which (so far as shown) was more than suggested as the propulsive power of a road wagon. In 1861 Million, and a year later Beau de Rochas, Siemens, and others, pointed out the advantage of compressing the gaseous fuel before ignition, in order that the expansion should be both greater and quicker, with the greatest possible pressure at the beginning of the expansive movement; and in 1872 Brayton in America, and in 1876 Otto in Europe, introduced compression engines, the latter with great commercial success.

The change from a gaseous fuel burning at atmospheric pressure to the same fuel burned under compression was a change of kind; for, though formed of the same chemical elements, the compressed fuel possessed a power, when used by men who live by breathing atmospheric air, that uncompressed and commercially possible gases did not and could not exert in any noncompression engine even as yet imagined. It therefore seems clear that the phrase "compression type," as applied to internal combustion engines, is reasonably indicative of a class, and appropriately describes an unmistakable and invariable species of the genus gas engine.⁴ The evidence is persuasive that the increasing

⁴ NOTE.—Compression is a relative word. Men can for short periods live and work in a caisson where the air is compressed; but a Lenoir engine, if it could operate in the caisson, would be a noncompression engine still, though using the air of its immediate environment. It is density of fuel, as compared with the air into which the engine exhausts, that determines and defines compression. This seems overlooked in some of defendants' cross-examination (Clerk, X-Q. 156-163), and neglected in some portions of their argument.

success of the gas engine, produced in the middle '70's of the last century, repeated dreams (they are no more) of applying a gas engine to a road wagon. In 1877 Rosenwald (French 116,871) made a picture of a brougham having an Otto free piston engine perched in an apparently insecure position between passenger and driver. His is a paper patent only, and is in my opinion clearly shown to be inoperative for reasons of which one only may be mentioned: The most improved type of Otto engine then known weighed over half a ton per horse power. He did not use the most improved type, and did not propose any improvement or modification which would have prevented his brougham from going to pieces at the first jar of his motor.⁵ This patent is the suggestion nearest to Selden, and is mentioned for comparison hereafter.

Although by 1879 internal combustion engines had separated into the compression and noncompression classes, they were (and still are) all known as gas engines, irrespective of the condition of their fuel immediately before the work of preparing it for combustion begins. The term originated, doubtless, when coal gas was the only gaseous fuel known; but the vapor of petroleum or of any product thereof (gasoline or petrol) is just as much a gas as another, and 30 years ago there was, and there is now, no distinction, generally obtaining, between engines whose fuel as ordinarily purchased is coal gas, and those using gasoline or crude petroleum, provided that what ultimately burns in the cylinder is that vaporous substance, "capable of expanding indefinitely"—which is gas.⁶

But if the substantial difference between compression and noncompression engines was known and recognized, certain other terms of art which have been far too much used in this litigation were non-existent in 1879. A great superstructure of argument has been built upon the difference between "constant pressure" and "constant volume" engines. These terms appear to have been devised by Mr. Clerk, and first used in his book before alluded to, as convenient phrases useful in studying the operation of engines and classifying their phenomena. The terms are instructive, as is the separation of nouns into declensions and verbs into conjugations; but much of the argument about the words attaches an undeserved importance to them. In all internal combustion motors, the result of expanding the burning gaseous fuel is to drive the piston; that is, the cylinder chamber in which the expanding gas is confined gives way on the piston side (so to speak). If the piston head offers no more resistance than will permit it to move under the expansive force produced by the initial compression alone,

⁵ NOTE.—Hilton & Johnson (British 10, of 1878) and Roberts (British 711, of 1877) are provisional only. If these patentees were not able to complete their own inventions, this court cannot be expected to perceive them. Menn (French 118,109, in 1877) is at best an impossible gas engine, in a structure irrelevant to this case.

⁶ NOTE.—Encyc. Brit. (9th Ed., 1878-1889) vol. 6, p. 310. It is curious and instructive that this publication contains no reference at all to road locomotion by gas engines. Under "Steam Engines" (volume 22, p. 522), see Lenoir, Brayton, Otto, and Clerk treated under the subhead "Gas Engines." This article was evidently written in 1886-87, immediately after the publication of Clerk's book, which is referred to.

evidently, since the piston moved under that pressure, it will be maintained to the end of the stroke, the expansion produced by ignition serving to keep up that "constant pressure." If, however, the compressed charge must be ignited before the piston moves, then whatever volume thereof is introduced into the cylinder increases (by combustion) its pressure on the piston head before the engine operates, and the machine is described as "constant volume." In both phrases "constant" refers to condition, at the instant piston movement begins, compared with that at the moment the fuel charge is inserted. If between the two moments pressure increases, then the volume is constant; while, if volume increases, pressure is constant. These conditions are theoretic. If in a constant pressure engine the load or piston resistance is suddenly increased, the expansive power produced by compression alone may not start movement before ignition or explosion; and accordingly (if too much importance be attached to phrases) the type of engine has changed. Of course, nothing of the kind has occurred. The relation of piston head to cylinder walls relative to time of explosion has changed, and it may nowadays (in many engines) be changed at will to suit load and speed by throttling and by timed ignition. These variations have been observed in all the engines testified about in this case. They occur, or may occur, in all compression engines, and are no more significant of specific or generic differences than are variations in rapidity of breath in different men, or in the same man at different times.

From this attempted outline of the knowledge and achievements of 1879, it seems to me that the way was singularly clear for any one who would really produce the thing described in Selden's first claim. Success is never anticipated by any number of failures, and when it is clearly kept in mind that what Selden claims is a combination, and not any one of its elements, the defendant's references to prior patents and publications may be thus finally disposed of so far as this court is concerned.

Much has been said concerning this inventor's personality, and there is some importance therein, as showing the likelihood of his comprehending his own experiments and telling the truth about them. The record shows him always interested in mechanical pursuits, receiving an appropriate education for the theoretical side thereof, but not himself a skilled practical mechanic. His application for a patent on a rubber tire wheel, made in 1869, is significant and interesting, and in view of quite recent litigation in this circuit instructive. Taking his evidence in connection with his letters and notes, he is shown especially attentive to traction problems from his early manhood. I am persuaded that he carefully studied Brayton's engine and understood it practically; but his knowledge of the theory of thermodynamics seems fairly illustrated by a remark to his workman, Gomm, when his original engine turned over: "We have struck a new power." There is no satisfactory evidence that before application filed he knew thoroughly anything of Otto's compression engine. All this was not a very complete equipment; but he had the true inventor's enthusiasm, and for more than five years (as the Chief Justice said of Morse, in 15 How. 108, 14 L. Ed. 601) "he pursued these investigations with unre-

mitting ardor and industry, interrupted occasionally by pecuniary embarrassments."

When he was ready to file his application, he had completed and experimentally operated one cylinder of a three-cylinder engine of the general type Brayton had patented in 1872 and 1874. He intentionally built a plurality of cylinders, to obviate or minimize the necessity for a fly wheel. He produced an inclosed crank case (which immediately reduced weight to an enormous extent), and used a small piston with a short stroke (which made possible the speed that would compensate for the loss of piston head area). This engine, with allowance for adjuncts Selden did not use, but (as experience has shown) should have used, weighed less than 200 pounds per brake horse power, as compared with over 800 pounds in the lightest form of Brayton's, and is capable of over 500 revolutions per minute, as against less than 250 by any type of gas engine known, built, or suggested in 1879. These I find to be the facts regarding the engine built by Selden before application filed. He then caused to be made a model and mechanical drawing of his suggested vehicle and actual engine, and submitted the same, with specification and claims, to the Commissioner of Patents.

Avoiding for the present the language of his original application, and the effect of the numerous changes therein during its many years in the Patent Office, was the thing fairly revealed by the model and drawings, and conceived under the circumstances above set forth, the embodiment of a combination patentable in 1879? I think the answer is, emphatically, "Yes;" that which is not obvious to skillful men is usually (as remarked by Mr. Clerk in his evidence) invention, and certainly what Selden shows in his model, and by the drawings, which have remained unchanged for 30 years, was anything but obvious. The inventive act is shown by comparing Selden and Rosenwald. If the latter's brougham had actually carried its engine, and traveled even a little, he might nevertheless (on defendants' own argument) have found his patent invalid by American law, because each part of his vehicle was doing just what it had always done, without any new "co-operative law," while his engine in particular was the same motor which, before it was applied to the brougham, had perchance driven a lathe and might to-morrow do something else. Rosenwald might have been held a mere aggregator (however successful); but Selden's combination cannot be taken apart, and each element recognized as something that had done the same thing or sort of thing before. The adaptation of the engine alone was something never before attempted (so far as shown). Such adaptation might have involved an infringement on Brayton; but that did not prevent Selden's combination from being strikingly new, useful if it would work, and eminently patentable.

To sum up what is shown to have been the mental concept embodied in 1879 by Selden's model and drawings: With Brayton's engine in mind, he organized a new road vehicle. To be sure, he did substitute one old and well-known prime mover (gas) for another (steam); but in so doing he devised and used an arrangement of Brayton's engine never before attempted, one that Brayton himself never suggested, made, or patented, and without which the road vehicle was an impossibility. This mental concept constituted invention, if capable of

reduction to operation, and if any operative example (not all operative examples) thereof was shown by the patentee. If this doctrine be admitted or found, defendants, before attacking the operativeness of Selden's vehicle, seek to limit the scope of the patent by asserting that the combination is not infringed by any vehicle whose engine is not substantially identical with that described in drawings and specifications, notwithstanding the language of the claim "liquid hydrocarbon gas engine of the compression type."

Thus it is asserted that, since Selden and Brayton show a spray of petroleum mixed with and carried by compressed air into the combustion chamber, they do not show a true gas engine; that the use of a carbureter separate from the engine proper, and producing gaseous mixture which it feeds to the engine, is something outside the patent and avoiding infringement; that a water jacket, being shown by Selden in a peculiar and unusual equivalent or attempted equivalent, is something outside the combination, and when used by defendant differentiates defendants' engine and combination from anything that infringes; and that, since Selden evidently shows in his drawings ignition by a constant flame, he is confined thereto, and cannot use electric ignition, while defendants, by using the same, do vary the combination. I have already tried to show that Brayton's petroleum engine, Lenoir's illuminating gas engine, and an Otto machine driven by gasoline, are now, and were in 1879, not only "gas engines" in the sense that they all operate on the same scientific principles, but they were known as and called "gas engines," by those best qualified to speak. To make gas in one place rather than another must be an immaterial variation, where a primary patent (such as this by complainants' contention) is under consideration. Water jackets were old in 1879, and had been used in many forms, and both flame and electric ignition had been used and were well known to gas engineers of the day, although in 1879 it seems to me that the flame method was by far more successful than the electric as applied to compression machines.

The force of these objections, based on the face of the drawings and specifications, as compared with the claims, depends on whether the patent is viewed as a primary or pioneer one, or the contrary; and this in turn depends on the state of the art at the time of invention. The art I have attempted to describe at perhaps too great length, because upon its condition this whole litigation seems to hinge. If I have correctly apprehended it, there was clearly room for a pioneer patent; and it must now be held that on its face, and in view of the art, Selden's is such a patent. This means that Selden is entitled to a broad range of equivalents, and this rule as applied here results in this crucial inquiry: Was Selden (or any one else) entitled in 1879 to appropriate as one of the elements of any patentable combination a "liquid hydrocarbon gas engine of the compression type"?

I think he was, and so was any other inventor; but he was the first so to do. If this be true, then the use or disuse of any then well-known mechanical appliance, which will increase the efficiency, usefulness, or commercial success of such combination, without changing what de-

fendants call its co-operative law,⁷ is on the one hand open to Selden, and on the other will not free defendants from infringement. Although there were in 1879 many liquid hydrocarbon gas engines of the compression type, there was not one which in its then form could be made an element (and the most important element) in a road wagon combination, and the radical difficulty was the same that Savalle had confessed to 10 years before. Selden on paper certainly—whether actually will be considered later—solved that difficulty, and such solution gave him the right to claim broadly the thing which was the leading element in his invention, when used in his combination. Thirty years have passed, and counsel admit that no successful gasoline motor car fails to use a liquid hydrocarbon gas engine, of the compression type, with a short rapid stroke, and inclosed crank case, and a plurality of cylinders.

These are the very things which are at the foundation of success. To be sure (as will be considered more fully later) no very great degree of success can be reached without improvement over 1879 in carbureters and electric ignition, and increase of knowledge concerning the respective mechanical possibilities of two, four, and six cycle engines. The faster, also, the reciprocating parts of an engine move, the greater the necessity of constant and abundant lubrication, and Selden's lubrication is confessedly primitive; and, finally, the great difference between any results Selden's most optimistic supporter can claim for him in 1879, and the successes of 1909, arises from increased compression, so that engine weight per brake horse power has now been reduced to about 10 pounds. But these are nonessential, if in 1879 Selden could lawfully use as an element in his patentable combination the "compression type" or species of a whole genus of engines. As already stated, I think he could and did, and further showed and made an exemplar of said "type."⁸

⁷ NOTE.—This phrase, which runs through all defendants' argument, seems to be defined (Main Brief p. 157) as "a new mode of operation," referring to *Rapp v. Central, etc., Co.* (C. C.) 158 Fed. 440. It is insisted that Selden's combination introduced no new "co-operative law," and must therefore fail. The trouble with this argument is that there never was such a combination as Selden's before 1879, and there is nothing to compare it with but paper projects and admitted failures. The same phrase is repeatedly used when quoting *Ex parte Faure*, 52 O. G. 752. If Selden had merely utilized Brayton's existing engine to drive a wagon, the doctrine of the case cited might have applied. Perhaps it would have been good American law against *Rosenwald*; but if Selden selected, adapted, and united old elements to produce a new result, the phrase is inapplicable.

⁸ NOTE.—As quite possibly my foregoing efforts to follow defendants' argument on the interpretation of the specification and claims in the combined light of prior and present art have failed of complete success, the following statement may be excused: Defendants seem continually to assume (without saying so) that Selden invented nothing more than a modified Brayton engine, and then assert that they do not infringe, because they do not use that particular motor, and do use a modified Otto. They admit that the claim is for a combination, but continually seek refuge in defenses that would be good against any patent on Selden's engine, but are worthless against the combination if it be patentable at all. Mr. Selden is a member of the bar, especially devoted to patent causes. He seems to have been his own solicitor during most of his contests with examiners over this application, and the clearly and simply

Thus far the claims and specifications have been treated as though they were presented to the Commissioner in 1879, in the shape they left his office in 1895. This was not the case. Nothing remained in 1895 of the language of 1879 but the description of the vehicle and engine (and not all of that). The claims were reworded and the specification amplified many times, and usually, after a rejection made or criticism offered by the examiner, Selden did nothing by way of amendment or reply for about two years—the extreme limit of inactivity permitted him by the then rules of Patent Office practice. By these means he received in 1895 a patent for an invention of 1879, and in the meantime had never built a motor car, and never succeeded in getting any one sufficiently interested in his theories to experimentally try them out with larger means and better mechanical ideas than Selden himself had.

During the later years of this period, and while Selden was in very leisurely fashion combating examiners who evidently had small conception of what was meant by light self-propelling vehicles usable on the common roads, Duryea, Olds, Ford, and others in America, and the Panhard and Peugeot Companies (and many others) in France were experimenting with actual cars, and in 1894 a public race meet was held in France, whereat cars now as archaic in appearance as Selden's demonstrated that they actually could propel themselves from Paris to Rouen at about 12 miles an hour. The engines of some of them were modified Ottos, and "liquid hydrocarbon gas engines of the compression type," and it must be found that when Selden's patent issued there had been developed engines answering to his phrase, which as matter of history are not derived from his engine—that others reached his type without knowledge of him or his labors. Indeed (while certainty is impossible) it is my belief from this evidence that Selden has contributed little to motor car advancement in the United States, and nothing at all abroad. As matter of fact, I believe that nearly all the cars made in the United States when these actions began were modeled on French ideas, and used engines descended from Otto through Daimler, and not from Brayton through Selden or any other American. In short, this American patent represents to me a great idea, conceived in 1879, which lay absolutely fallow until 1895, was until then concealed in a file wrapper, and is now demanding tribute from later independent inventors (for the most part foreign) who more promptly and far more successfully reduced their ideas to practice. But the patent speaks from the date of its issue, and unless Selden did something unlawful during his 16 years' wrangle with examiners, or unless intervening American rights, available to defendants, sprang up while Selden was rewording claims, he is within the law, and his rights are the same as those of the promptest applicant.

worded claims in suit are good professional work. He has avoided the trap into which Morse fell (*O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601), and thereby lost most of the fruits of his efforts. This case seems to me suggestive, in that the Chief Justice several times speaks of "process" as legally synonymous with "combination." And see Morse's claim restated so as to avoid the criticism that destroyed it in 19 *Harv. Law Review*, p. 37. I think Selden might have patented his engine as an improvement on Brayton; but he would have had to pay Brayton a royalty, and these suits would certainly never have been possible.

Without prolonging discussion, it may be held briefly that Selden did not overstep the law. He did delay. He was not in a hurry. He could not get any one to back him, and doubtless appreciated that, if he was ahead of the times, it was wise not to let his patent get ahead, too. If he had gotten his grant in 1880, without a moneyed backer, the patent might and probably would have expired, or nearly so, before any one saw its possibilities; and, if the business world had seen them within 17 years, that term would then so nearly have expired that Selden would never have been able to get to final hearing before it ran out. At best, an accounting and not an injunction would have been his lot. The difference he may well have considered as a lawyer, and personally I believe he did think of it. If he did not delay unlawfully, what intervening rights did he permit to spring up?

Remembering that Selden clearly showed a "liquid hydrocarbon gas engine of the compression type" in 1879, and actually manufactured one, I think it clear that his original claim was wider than any of those in suit. The third claim as originally filed read thus:

"The combination in a road locomotive provided with suitable running gear and steering mechanism, of a gas engine, traction wheels, and an intermediate clutch or disengaging device, substantially as set forth."

It is true that throughout the original papers he speaks continually of "gas engine L," that being the alphabetical designation given his motor in the drawing submitted; but the claim quoted shows how wide was his original demand, and without further elaboration I hold, with complainants, that all subsequent changes of claim are in diminution or contraction of this first statement of invention. The file wrapper, cross-examination thereon, and argument concerning it form a bulky volume; but it seems to me sufficient to quote from the amendment of June 6, 1889, when Selden amplified his specification by inserting the following:

"I have succeeded in overcoming these difficulties by the construction of a road locomotive propelled by a liquid hydrocarbon engine of the compression type, of a design which permits it to be operated in connection with the running gear, so that the full carrying capacity of the body of the vehicle can be utilized for the transport of persons or goods, and which, by dispensing with skilled attendance and with steam boilers, water, water tanks, coal, and coal bunkers, very largely reduce the weight of the machine in proportion to the power produced, and enables me, while employing the most condensed form of fuel, to produce a power road wagon which differs but little in appearance from, and is not materially heavier than, the carriage in common use, is capable of being managed by persons of ordinary skill at a minimum of trouble and expense, and which possesses sufficient power to overcome any usual inclination."

And at the same time he put what is now claim 1 into substantially its present shape. The language last quoted is in the final specification, it describes the thing which Selden conceived and pictured in 1879, and in 1889 the man skilled in the art, though he knew more than he did in 1879, did not know as much as Selden sets forth in the quoted words. It was still possible for the gasoline compression engine to be made part of a patentable road wagon combination. No one in the United States had passed, or even caught up with, Selden, while foreign efforts have been fairly and attractively told by Mr. Krebs of the

Panhard Company. He quite fully depicts the history of meritorious and successful efforts in road locomotion apparently as ingenious as Selden's and more vigorously pursued; but they did not begin until after 1879, and in 1889 were still clearly behind Selden's concept.⁹

Defendants have advanced many other arguments based on the contents of the file wrapper. Thus the original third claim, above set forth, declares a combination in a road locomotive, while the first claim in suit covers a combination with a road locomotive. The change is declared to be an abandonment of the original combination. It is further shown that some patent examiner rejected certain claims, referring to the Pinkus patent, *supra*, and thereupon Selden amended the claims and disavowed and disclaimed Pinkus. The argument based on this is that, since Pinkus' "co-operative law" is the same as Selden's, the disclaimer of Pinkus was in effect an abandonment of the very combination now relied on. I have already indicated my view of the major premise of the last proposition; but these arguments, and many others of the same ilk, cannot prevail if it be true that Selden clearly showed in 1879 the thing he had invented. If so, he could rewrite the description of that thing as many times as the rules of practice permitted down to 1895. That such rewriting is all Selden did I believe to be true.

Defendants now urge that Selden's invention is inoperative. The one-cylinder engine built by Selden on the three-cylinder casting in 1877-78 was put in evidence as Exhibit 47. Thereafter the cylinders of Exhibit 47 were all bored out or rebored, new working parts fitted to them, and the engine put into a vehicle, the whole called Exhibit 89, completed in the winter of 1905-06, and constituting the first physical embodiment of Selden's patent. The complainant licensee, Electric Vehicle Company, also constructed a new engine from the patent drawings (Exhibit 132) and a complete vehicle (Exhibit 157). Defendants aver that neither of these vehicles is a Chinese reproduction of Selden's drawings, and have devoted volumes of print to recording and arguing about the performances of Exhibit 89. In my opinion Exhibit 89 as constructed was such Chinese reproduction. Exhibit 157 was not; complainants having changed the water cooling device, used only electric ignition, and made some other departures from the mechanical details shown in the drawings. But these variations were (as previously indicated) within the range of equivalents permitted to a primary patent.¹⁰

⁹ NOTE.—It is not intended to admit or assert by this that, even if some one had between 1879 and 1889 devised an engine or a combination, which if devised in 1869 would have been a clear anticipation of Selden, such person's device would be a defense to these suits. The fact that no such device exists renders discussion of this point unnecessary. Benz has not been overlooked, but is not thought to require further mention.

¹⁰ NOTE.—Great complaint is made of the "destruction" of Exhibit 47, and after defendants learned of the construction of Exhibit 89, they frequently demanded that Exhibit 47 be produced, knowing that it could not be done. I can see no force in the complaint; the function of an exhibit is to furnish evidential information, and it is too obvious for argument that whatever value (it is not much) Exhibit 47 has, it was enhanced by building even the rebored cylinders into Exhibit 89. It may also be noted here that in my opinion Sel-

The evidence on the subject of operativeness is the most flagrant example of unsupervised testifying I have ever seen or heard of. Whether in 1905 Exhibit 47 was any better than scrap, whether Exhibit 89 would start on flame ignition, whether Exhibit 132 showed diagrams revealing volume or pressure constant, were perhaps interesting, but unimportant, questions. They raised a false issue, over which months of time and volumes of print have been expended. The serious, and I think only, question was, and is, whether a machine made in substantial conformity to drawings and specifications, without going beyond the range of equivalents permitted, was operative, even though rudimentary. Exhibit 157 answers to this description, and its performances may, I think, be thus summarized: It is a wretchedly poor car for 1905; there were probably as good, if not better, cars in 1895; but it is a marvel of invention for 1879. And that is more than enough for the purposes of these cases.

One instance of alleged prior use remains. Before 1879 Brayton undertook to furnish an engine which would drive an omnibus to certain men in Pittsburg. It is shown that he endeavored to adapt his then well-known engine to traction purposes. That he failed utterly is clearly proved. The reasons for his failure are not so clear; but the failure is enough to invalidate the defense.

No litigation closely resembling these cases has been shown to the court, and no instance is known to me of an idea being buried in the Patent Office until the world caught up to and passed it, and then embodied in a patent only useful for tribute. But patents are granted for inventions. The inventor may use his discovery, or he may not; but no one else can use it for 17 years. That 17 years begins whenever the United States so decrees by its patent grant. That the applicant for patent rights acquiesces in delay, or even desires delay, is immaterial to the courts, so long as the statute law is not violated. On these principles complainants are entitled to a decree.¹¹

den's original drawings indicate the existence of a check—or wicket-valve in the appropriate place. It was a well known and perfectly simple mechanical adjunct, it should have been there, it was by no means the key of the invention, and Rebasz' testimony is probable and uncontradicted.

The so-called Ford-Lenoir machine has received attention. To me it is interesting but irrelevant. Mr. Clerk did intimate that he doubted whether any vehicle with a noncompression engine could move at all. Mr. Ford has shown that he was mistaken. By making the engine four times the size of Ford's compression type, there is obtained about one-seventh of the power. It hardly seems that the pleasure of contradicting Clerk was worth so much trouble.

¹¹ NOTE.—The legal principles relied on are so simple (the difficulty being only with the opinion evidence) that it has not seemed necessary to quote from decisions. The leading cases considered are (as to nature and act of invention) *Smith v. Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; (as to probative value of references) *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; (as to meaning of "pioneer" patent, and effect of file wrapper) *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; (effect of delay in Patent Office) *U. S. v. Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144; (right to deny use to others while patentee not using) *Continental Paper Bag Company v. Eastern Paper Bag Company*, 210 U. S. 424, 28 Sup. Ct. 748, 52 L. Ed. 1122.

The Panhard machine does not, in my judgment, infringe the second claim. Construed as they have been in this opinion, infringement of claims 1, 2, and 5 by the Ford machine, and of 1 and 5 by the Panhard, can hardly be said to be denied.

It is so found, and decrees will pass accordingly.

In re TERENS.

(District Court, E. D. Wisconsin. September 30, 1909.)

1. BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—FALSE FINANCIAL STATEMENTS—TIME.

Where a bankrupt obtained property from a creditor on the faith of a false financial statement within four months prior to bankruptcy, the date of the statement was not material on the creditor's right to prevent a discharge under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), providing that obtaining property on credit from any person on a materially false statement in writing made to such person to obtain such property on credit shall be a bar to his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

2. BANKRUPTCY (§ 407*)—DISCHARGE—FALSE STATEMENT.

Under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), providing that the obtaining of property on credit on a materially false written financial statement given for that purpose shall bar a discharge, it is no excuse that the statement was given by the bankrupt as a mere matter of form and with no intention to defraud.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 407*)—DISCHARGE—FALSE FINANCIAL STATEMENT—PARTNERSHIP.

A bankrupt, on behalf of a firm of which he was a member, made a false financial statement as a basis for credit, and thereafter purchased his partner's interest in the firm, taking all the assets and assuming all the liabilities. *Held*, that a creditor's right to prevent a discharge of the bankrupt because of such false statement was not affected by the fact that credit was extended to the firm, and not to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In the matter of Nic H. Terens, bankrupt. Heard on objections to the granting of a discharge. Objections sustained.

Objections to the discharge are filed by the International Harvester Company of America (to be hereinafter designated as the Harvester Company). The specifications of objections may be briefly summarized as follows:

First. That the firm of Terens & Oswald entered into a commission contract with the Harvester Company, whereby the firm was to sell goods consigned to them on commission, the title to such goods to remain the property of said vendor. That while such contract was in existence, and on the 18th of December, 1907, the bankrupt on behalf of his firm made a property statement to the Harvester Company in writing and signed the firm name thereto, and his own name as a member of the firm, representing certain facts as to the financial standing of the copartnership "for the purpose of obtaining credit from you, or as a basis of credit for future business or extending past due indebtedness," etc. This statement was made upon a printed blank furnished by the Harvester Company. Opposite the printed interrogatory, "Owe bank (loan or overdraft)," there was written in pencil the word "None." This blank was filled up by Mr. Jakle, an agent of the Harvester Company, from in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

formation given him by Mr. Terens as the several questions were read and propounded to him.

Evidence was offered showing that this statement was relied upon in shipping goods and extending credit to the firm. Within four months of bankruptcy goods were shipped by the Harvester Company to the firm, as it alleges, upon the strength of this continuing representation. At the time this property statement was made, the firm did owe the Bank of Two Rivers about \$5,000. The Harvester Company also sold several bills of goods to the firm absolutely, and at the time of the bankruptcy there was due to the Harvester Company a considerable amount for such goods so sold outright to the firm. The Harvester Company filed a claim in the bankruptcy court for the entire amount claimed by it, including the commission and sales account, and such claim was allowed at \$2,170. About a month before the bankruptcy the firm was dissolved; Mr. Oswald stepping out, and Mr. Terens assuming all liabilities and taking all assets. Before the bankruptcy an effort was made by the Harvester Company to collect the amount due from the bankrupt, and for that purpose an agent of the Harvester Company went with the bankrupt to the Bank of Two Rivers, where the situation of the firm was thoroughly examined, and an effort was made by the bankrupt to secure a loan sufficient to pay off the Harvester Company's claim. To facilitate such efforts the general agent of the Harvester Company extended the time for payment of the entire claim for 30 days. Before the expiration of this period a voluntary petition was filed by the bankrupt. When such extension was granted, the agent of the Harvester Company was in possession of the true state of affairs as to the indebtedness of the bankrupt at the bank.

The second specification was predicated upon the alleged embezzlement by the bankrupt of the proceeds of the sales of the commission goods; demand having been made therefor by the Harvester Company and refusal by the bankrupt.

On the hearing a large amount of testimony was taken, which disclosed the situation as hereinabove briefly summarized.

Wigman, Martin & Martin, for objecting creditor.
Isaac Craite, for bankrupt.

QUARLES, District Judge (after stating the facts as above). Section 14b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides in substance that obtaining property on credit from any person upon a materially false statement in writing, made to such a person for the purpose of obtaining such property on credit, shall be a bar to a discharge. It is contended by the bankrupt that, as the alleged false property statement was not made within the four months period, it therefore furnishes no just ground for objection. This doctrine seems to have been laid down by Mr. Brandenburg in his work on Bankruptcy (section 370), but no precedent is cited to sustain the text. It will be observed that Congress, in framing the third subdivision of section 14b, has not prescribed any limitation of time. This supposed omission cannot be attributed to oversight, because in the fourth subdivision of the same section such limitation is expressly prescribed. Of course, the court cannot interpolate a condition which Congress saw fit to omit. By a careful reading of the text, however, it would appear that the bar to the discharge is not the making of such false statement, but the obtaining of property on credit based upon such written statement.

It is matter of common knowledge that such property statements are frequently intended as a continuing representation for indefinite periods of time. I am of opinion that the date of the statement is im-

material, if property has in fact been obtained upon the strength of it within the four months period, as is the case here. We are not called upon to decide whether under any circumstances the four months limitation can be read into the third subdivision of section 14b, and merely hold that, where goods have been furnished and credit has been extended on the strength of such statement within four months of the bankruptcy, the date of the property statement should be held immaterial. There is no question here about the falsity or materiality of the representation. The bankrupt testified that he had nothing to do with the financial part of the business, and relied upon his partner for information as to everything shown by the books; but the bankrupt admits that he was well aware, at the time he signed his statement, that the firm was indebted to the Bank of Two Rivers in a considerable amount, although he might not have had the exact amount in mind.

It is urged that this property statement was considered by the parties as a mere matter of form, and that it was so designated by the agent of the Harvester Company at the time; that the bankrupt had no intention to defraud the Harvester Company, and was guilty of nothing more than negligence or carelessness in signing a paper without due consideration. These suggestions cannot, however, be accepted by the court in extenuation. The clause of the bankruptcy act that we are considering does not require that the false property statement shall have been made with any definite intention to defraud, or with any specific intent. *Re Gilpin* (D. C.) 160 Fed. 171.

Neither is the result changed by the fact that the credit was extended to the copartnership. *Re Dresser* (D. C.) 144 Fed. 318.

It therefore becomes unnecessary to consider whether the evidence makes out a technical case of embezzlement against the bankrupt, and also unnecessary to consider certain other legal questions that were mooted at the hearing.

The first objection must be sustained, and discharge denied accordingly.

DE BARY et al. v. DUNNE, Collector.

(Circuit Court, D. Oregon. October 4, 1909.)

1. INTERNAL REVENUE (§ 12*)—WHOLESALE LIQUOR DEALERS—PLACE OF SALE.

Plaintiffs, who were wholesale liquor dealers in New York City, paid the special internal revenue tax there and kept imported wines on storage with McC. & Co., at Portland, from which jobbers in that city and vicinity were supplied. Plaintiffs delivered to McC. & Co. a list of dealers to whom they were authorized to deliver wines from the stock on storage when requested to do so by such dealers, not exceeding a certain number of cases in any one month. The persons or firms on such credit list, when desiring to purchase wines of plaintiff, delivered to McC. & Co. a written order for the number of cases desired, and if the maximum limit to which the purchaser was entitled for the current month had not been exceeded McC. & Co. immediately delivered the goods without consulting plaintiffs, and reported the sale to them at New York, from whence an invoice for the goods at the current price would be shipped to the buyer and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

price remitted to plaintiffs in New York. There was no contract that the accredited purchasers should buy any particular quantity per month, or any at all. *Held*, that sales made under such arrangements were made in Portland, and not in New York, and that plaintiff was therefore subject to the payment of a federal wholesale liquor dealer's tax in Oregon, imposed by Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 30; Dec. Dig. § 12.*]

2. SALES (§ 1*)—DEFINITION.

A "sale" is a contract by which property is transferred from the seller to the buyer for a fixed price in money paid or agreed to be paid by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

Suit by Adolf De Bary and others against David M. Dunne, as Collector of Internal Revenue for the District of Oregon. Judgment for defendant.

See, also, 162 Fed. 961.

Williams, Wood & Linthicum, for plaintiffs.

John McCourt, U. S. Dist. Atty., for defendant.

BEAN, District Judge. This is a suit brought against the collector of internal revenue for the district of Oregon, to recover the amount of a special tax, paid by plaintiffs under protest, as wholesale liquor dealers in the city of Portland, for the year ending June 30, 1905. Section 3244, Rev. St. (U. S. Comp. St. 1901, p. 2096), provides:

"Special taxes are imposed as follows: * * * Wholesale liquor dealers shall pay \$100.00. Every person who sells or offers for sale foreign or domestic distilled spirits or wines in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer."

The plaintiffs are wholesale liquor dealers in the city of New York, and paid a special tax for the year ending June 30, 1905, in that city. They had no office or resident sales agent in the district of Oregon during that year, but kept a stock of imported wines on storage in the warehouse of the J. McCracken Company, at Portland, from which jobbers in the city and vicinity were supplied. The method of doing business was as follows: The plaintiffs purchased wines in France and shipped them to Portland in bond. The J. McCracken Company paid the necessary charges to take the goods out of bond and the expense of transferring them to its warehouse, which sums were returned to them by the plaintiffs. The goods, when taken to the warehouse, were placed in storage as the property of the plaintiffs, and they paid the storage thereon. The plaintiffs furnished the McCracken Company a list of persons and firms in Portland and vicinity to whom they, the McCracken Company, were authorized to deliver wines from the stock on storage, when requested to do so by such persons, not exceeding a certain number of cases in any one month. When any person or firm on this accredited list desired to purchase wines of the plaintiffs, they made out and delivered to the McCracken

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company a written order for the number of cases desired, and if the maximum limit to which such person was entitled for the current month had not been exceeded the McCracken Company immediately delivered the goods, without consulting the plaintiffs. The delivery was reported by the McCracken Company to the plaintiffs at New York, and in due course of mail the purchaser received from the plaintiffs a bill or invoice for the goods at the current market price, and the money in payment therefor was remitted by such customer direct to the plaintiffs at New York. There was no contract or agreement between the plaintiffs and any person on the accredited list by which such person was obliged to purchase from plaintiffs any particular quantity of wines per month, or to purchase wines from them at all. The list was merely authority to the McCracken Company to deliver wines on storage belonging to the plaintiffs to the persons on such accredited list.

The question for decision is whether the sale of the wines delivered by the McCracken Company to plaintiffs' customers at Portland, under the circumstances stated, took place in Portland or in New York. If in Portland, the special tax was legally and properly exacted, and plaintiffs cannot recover in this action; but if the sale was in fact, or in legal effect, made in New York, the plaintiffs are not subject to a second tax in Portland. In my opinion the transaction was clearly a sale and delivery of the goods in Portland. A sale is briefly defined as a contract by which property is transferred from the seller to the buyer for a fixed price in money, paid or agreed to be paid by the buyer. 24 Am. & Eng. Ency. 1022; 2 Bouvier, Law Dictionary, p. 943. All the essential requisites of such a transaction took place in Portland. The goods, which were the subject-matter of the contract and which were to be transferred from the seller to the buyer, were in Portland, in the possession of a warehouseman, holding them for the seller, but with authority to deliver them to the buyer. They were so delivered with the intent that the title should pass. The buyer then and there became the owner of the goods, and liable to the seller for the market value thereof in money. The fact that the warehouseman reported the delivery to the seller at New York, and the bill or invoice was there made out and forwarded to the buyer, is unimportant. That was after the delivery of the goods and title had passed, and was nothing more than a presumably convenient method of advising the buyer of the price and the manner in which he would be expected to make payment.

The case of *De Bary v. Souer*, 101 Fed. 425, 41 C. C. A. 417, is relied upon by plaintiffs. In that case the order for the liquors was sent by the customer to the plaintiff in New York, and there approved before the warehouseman received authority to deliver the goods to the purchaser. The transaction was therefore deemed a New York contract, and the sale held to have taken place in that city. But here no such method was pursued. The goods were in fact delivered to the purchaser, and the title passed irrevocably to him, before the plaintiffs were advised of the transaction. It may be that where an order for liquors is received by a dealer at a place where the special tax has been paid, and is there duly accepted and the purchaser so informed, and the invoice transmitted to him from such place, a subsequent delivery

of the goods from a warehouse elsewhere will not make the seller liable to a special tax at the place of delivery. In such case it may be well held that the contract is complete, and the sale in law made, at the place where the order is received and accepted. But it has been held that a liquor dealer, who receives orders at his place of business to ship liquors to another place, there to be delivered to the person ordering them upon payment of the price, is liable to the payment of a special tax at the place of delivery because the sale is actually made at such place. *U. S. v. Shriver* (D. C.) 23 Fed. 134; *U. S. v. Cline* (D. C.) 26 Fed. 515; *Stevens v. Ohio* (C. C.) 93 Fed. 793.

But, however that may be, the transactions involved in this action constituted sales at Portland, and plaintiffs are not entitled to recover. Findings may be prepared in accordance with these views.

In re NEUGEBAUER.

(District Court, W. D. Pennsylvania. October 11, 1909.)

No. 1,388.

ALIENS (§ 68*)—NATURALIZATION—WITNESSES—HEARING—POSTPONEMENT.

The naturalization act (Act Cong. June 29, 1906, c. 3592, § 5, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423]) provides that the clerk immediately after filing a petition for naturalization shall give notice thereof by posting in a conspicuous place in his office or in the building in which his office is situated the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date as nearly as may be of the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf, and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the applicant to appear on the day set forth in the final hearing, but, in case such witness cannot be produced on the final hearing, others may be summoned, and section 6 declares that in no case shall final action be had on a petition until at least 90 days have elapsed after filing and posting the notice. *Held*, that the subpoena referred to in section 5 was the ordinary subpoena ad testificandum; and hence, where one of an alien's witnesses specified in the published notice could not be produced, the petitioner could substitute another witness whose name had not been posted without postponing the hearing until the name of such witness could be posted for 90 days.

[*Ex. Note.*—For other cases, see Aliens, Dec. Dig. § 68.*]

Application for citizenship by Ignatz Neugebauer, to which the United States filed objections. Objections overruled, and application granted.

Palmer S. Chambers, for the United States.

ORR, District Judge. On September 28, 1909, Ignatz Neugebauer applied to the court for naturalization at the time fixed for final hearing. Prior to that time he had complied with the requirements of the naturalization laws of the United States. He had previously appeared before the clerk with two witnesses, and the clerk had posted in a public and conspicuous place in the building in which his office is situated, under an appropriate heading, the name, nativity, and resi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dence of the alien, the date and place of his arrival in the United States, and the date, as nearly as could be, for the final hearing of the applicant's petition, and the names of such witnesses whom the applicant expected to summon in his behalf. At the time of the hearing the applicant appeared with only one of the witnesses named in such notice, and gave evidence that one of the witnesses was sick and could not attend the hearing, that he was also in the state of Ohio, and that he had informed his sister who lived in this district by letter that he did not intend to return, but would take employment where he was located after his recovery from illness. The applicant asked leave to substitute another witness in place of the witness who could not attend the hearing. This request of the applicant was opposed on behalf of the government, unless the hearing should be postponed in order that the name of the substituted witness could be posted for 90 days, because of the provision in the sixth section of the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423]), which provides that "in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting and notice of such petition," and because the representative of the United States believed that there would not be a proper notice in accordance with section 5 of said act, to which we will hereafter refer, unless the name of such substituted witness appeared in said notice. The position of the United States does not appear to be sound.

Section 5 of said act is as follows, the latter portion being italicized:

"That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; *and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned.*"

The mode provided in that section for the compelling of witnesses to appear in court is the ordinary mode with which all are familiar. The subpoena, which may issue upon the request of the applicant, is, of course, the writ of subpoena ad testificandum, and is a judicial writ requiring the persons named in it to appear on a certain day in court in order to testify under a certain penalty in case of disobedience. The time at which the witnesses are to appear is the time fixed in the notice for the final hearing, and the time contemplated by the act in which another witness may be substituted and summoned is the time fixed for final hearing. It is not contemplated by the act that there should be two final hearings. That provision in the act was intended for just such a case as the present. The framers of the act must have had in view the liability to sickness and death and temporary or permanent absence from the district of one or both of the witnesses named in the notice at the time fixed by the notice for the final hearing. This view of the law does not limit the opportunities of the government to procure information as to the character, residence, and purpose of the

applicant in any case. The production of the original witnesses affords sufficient opportunity to the representatives of the government to ascertain what they would desire to know.

The reasoning of Judge Lacombe in the Matter of the Petition of Joseph O'Dea (in the Circuit Court for the Southern District of New York) 158 Fed. 703, does not appeal to me with great force. His suggestion that persons seeking naturalization could file with their petitions the names and addresses of alias witnesses, whom they propose to call in the event of the failure of an original witness to attend, does not appeal to me. Such course would unnecessarily increase the burdens of the clerk, and would tend to compel the unnecessary attendance before him of persons who might never be called upon at final hearing. Cases like the present seldom arise, and it was for such cases that the proviso in said section was enacted.

The applicant, having in all respects complied with the law, was entitled to citizenship.

In re MIZE et al.

(District Court, N. D. Alabama, W. D. July 17, 1909.)

1. BANKRUPTCY (§ 136*)—CONTEMPT—PROOF.

Disobedience of referee's order involving incarceration of the bankrupt for contempt must be established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—ORDERS—SURRENDER OF FUNDS TO TRUSTEE—CONTEMPT.

Whether a bankrupt is guilty of contempt in failing to comply with a referee's order directing him to pay funds alleged to have been withheld to his trustee depends on the bankrupt's present ability to comply therewith.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 136*)—WITHHELD FUNDS—CONTEMPT—EVIDENCE.

Where the bankrupt denied having any money other than that declared exempt in his possession, the fact that moneys unaccounted for were traced to the bankrupt within the few months of bankruptcy, and that his explanation of disposition of some of the items was unsatisfactory, was insufficient to justify an order committing him for contempt for failure to pay over the money to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of J. H. and A. P. Mize, bankrupts. From a referee's order requiring the bankrupt, J. H. Mize, to pay to the trustee \$1,250, he appeals, and the trustee applies for an order committing him for contempt in failing to comply with the referee's order. Application denied, and referee's order reversed.

Brown & Ward and Henry Fitts, for bankrupts.

Oliver, Verner & Rice, for trustee in bankruptcy.

GRUBB, District Judge. This matter comes on to be heard upon a petition to review an order of the referee requiring the bankrupt, J. H. Mize, to pay to the trustee in bankruptcy \$1,250, assets of the estate,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
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upon the idea that it was in his possession when the order was applied for, and also upon the certificate of the referee of the bankrupt's failure to comply with the order within the time prescribed, and upon the application of the trustee that he be punished for contempt for such failure.

The order of the referee requiring the payment by the bankrupt, if it were only enforceable by civil proceedings, would in my opinion be sustained by the inferences fairly to be drawn from the record. Disobedience of the order imposes on the bankrupt punishment for contempt of the bankrupt court, which would probably consist of imprisonment until the bankrupt complied with the order. In view of the method of enforcement of the order, the rule is that the disobedience must be established beyond reasonable doubt, or, as otherwise expressed, in doubtful cases punishment for constructive contempts should not be inflicted.

The question in this case to be established beyond reasonable doubt is whether the bankrupt, J. H. Mize, at the time the order was applied for and made, had the present ability to comply with it; that is, had in his possession or under his control \$1,250 of the assets of the estate, over and above the amount allowed him as exempt by the referee. That he had \$991 at least for some time after the petition in bankruptcy was filed is clear; but this the court allowed to him as exempt, and the order only requires him to pay what he had in excess of this sum. I have little doubt that the bankrupts according to a proper accounting should have turned over more assets to the trustee than they in fact did. I am not convinced beyond reasonable doubt, or with that degree of certainty that would justify the making of an order committing the bankrupt, J. H. Mize, until he pays the sum found by the referee, of the fact that J. H. Mize had in his possession or under his control such sum beyond his exemption at the time the order was applied for and made, or that he had then the ability to comply with it. The result of such an order in the event of his inability to comply would be indefinite imprisonment of the bankrupt, or his release while still in contempt and defiant. For that reason, it seems to me, the adjudication of contempt should only follow clear conviction that the bankrupt had the money and could with it comply with the order. The bankrupt, J. H. Mize, denied having any money other than that declared exempt in his possession. It is true that moneys are traced to the bankrupts within a few months of the bankruptcy, and that their explanation of the disposition of some items of them is not satisfactory. The contention that their attempted explanation of other items should be rejected on this account, and in the absence of other contradiction, while persuasive in a civil proceeding, is rather severe in this proceeding, in view of the fact that in many instances the bankrupts alone could make the explanation and would be without the possibility of purging themselves for this reason, if such a rule were adopted. The courts have been very careful not to permit contempt proceedings to be converted into a means of coercing payment of debts from funds other than assets wrongfully withheld by the bankrupt, and for this reason have required the clearest evidence that the bankrupt had the assets in his possession and the present ability to turn them over to the trustee as

directed by the order. In re Purvine, 2 Am. Bankr. Rep. 787, 96 Fed. 192, 37 C. C. A. 446; Samel v. Dodd, 16 Am. Bankr. Rep. 163, 142 Fed. 68, 73 C. C. A. 254; In re Davison (D. C.) 16 Am. Bankr. Rep. 337, 143 Fed. 673; Boyd v. Glucklich, 8 Am. Bankr. Rep. 393, 116 Fed. 131, 53 C. C. A. 451.

The order of the referee requiring the bankrupt, J. H. Mize, to pay to the trustee within the time mentioned the sum of \$1,250 is set aside, and the application of the trustee for an order adjudging the bankrupt, J. H. Mize, to be in contempt upon the certificate of the referee that he disobeyed said order, is denied.

In re STONE.

(District Court, D. Oregon. October 4, 1909.)

BANKRUPTCY (§ 404*)—PRIOR APPLICATION—DISCHARGE—DEFAULT—RES JUDICATA.

Where a bankrupt, through the neglect of his attorney, failed to apply for a discharge within the time limited by Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), such failure, in effect, was a judgment by default, in favor of his creditors, that he was not entitled to a discharge, and was res judicata in a subsequent voluntary bankruptcy proceeding, in which the bankrupt scheduled the same debts and no additional assets.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

In the matter of George T. Stone, bankrupt. Heard on objections to the granting of a discharge. Objections sustained.

B. S. Pague, for petitioner.

L. E. Latourette, for contesting creditors.

BEAN, District Judge. This is an application for the discharge of a bankrupt. From the record it appears that in December, 1904, the petitioner was adjudged a bankrupt by the District Court of the Southern District of West Virginia, and his estate administered upon and the proceeds distributed among his creditors by that court. He failed, however, through the neglect of his attorney, to apply for a discharge within the time provided by the bankrupt act (Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), but on May 26, 1908, filed a voluntary petition in bankruptcy in this district, in which he scheduled the same debts, and no additional assets, as were scheduled in West Virginia. He now asks for a discharge, but it is objected to by the creditors on the ground that the matter is res adjudicata.

The law seems to be settled that the failure of a bankrupt to make a lawful application for his discharge within the time limit in section 14 of the bankrupt act is, in effect, a judgment by default, in favor of his creditors, to the effect that he is not entitled to a discharge from their claims, and is as conclusive as a judgment upon a trial. He cannot institute a subsequent proceeding in bankruptcy for the mere purpose of obtaining a discharge from debts scheduled and provable in the former proceeding, and the court should dismiss the latter as soon as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the real purpose is called to its attention. This has been so often decided that it is enough to refer to the authorities. *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477; *In re Schnabel* (D. C.) 166 Fed. 383; *The Pokanoket* (D. C.) 161 Fed. 588; *In re Silverman*, 157 Fed. 675, 85 C. C. A. 224; *In re Kuffler*, 151 Fed. 12, 80 C. C. A. 508. This rule may, and no doubt does, work hardship in many instances; but this cannot change the law.

The application for a discharge is denied, and the proceeding dismissed.

UNITED STATES v. BARBER LUMBER CO. et al.

(Circuit Court, D. Idaho. September 7, 1909.)

No. 47.

1. PUBLIC LANDS (§ 120*)—CANCELLATION OF PATENTS—SUIT BY UNITED STATES.

In a suit by the United States to cancel patents to land for fraud, the bill must allege specifically and in detail in what the fraud consists, and the complainant can recover only on the case so made, and the allegations must be established affirmatively by clear and convincing proof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 335; Dec. Dig. § 120.*]

2. EVIDENCE (§ 591*)—OBJECTIONS BY PARTY INTRODUCING EVIDENCE.

A party who introduced witnesses, while not bound by their testimony, cannot insist that they are unworthy of belief, and, unless their testimony is self-contradictory or inherently improbable, it cannot be disregarded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2440; Dec. Dig. § 591.*]

3. PUBLIC LANDS (§ 139*)—TIMBER AND STONE ENTRIES—LEGALITY.

An applicant for the purchase of land under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), as amended, has the right after he has made his initial application and before final proof to contract to sell the title thereafter to be acquired, and the intending purchaser may lawfully advance to him the money with which to make final proof in order that he may comply with his contract.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 369-374; Dec. Dig. § 139.*]

4. PUBLIC LANDS (§ 120*)—CANCELLATION OF PATENTS—SUIT BY UNITED STATES—SUFFICIENCY OF EVIDENCE.

The fact that a defendant purchased a large tract of timber lands substantially in a body from persons who had entered the same under the timber and stone act shortly after their entry is not sufficient to establish the fraudulent character of the entries, and entitle the United States to a cancellation of the patents, even though some of the entrymen knew that defendant was buying or desired to buy timber land in the vicinity, and made their entries with the expectation of selling to defendant at an advance over the government price, where there were no relations between the parties prior to the entries and no agreement or understanding direct or implied for the sale of the lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

In Equity. On final hearing.

See, also, 169 Fed. 184.

Peyton Gordon and Charles A. Keigwin, Special Assistants to the Attorney General, for the United States.

C. T. Bundy and A. A. Fraser, for defendants.

BEAN, District Judge. This is a suit brought by the government against the Barber Lumber Company, a corporation, and others, to cancel and set aside 210 patents for lands in the state of Idaho, issued by the complainant to that number of entrymen and entrywomen under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), the title to the lands described in such patents having by proper conveyances vested in the defendant corporation.

The complainant charges, in substance: That the defendant, the Barber Lumber Company and its codefendants, intending to defraud the complainant out of large tracts of valuable public lands, did combine, conspire, and agree to and with Frank Steunenberg, now deceased, and one John I. Wells, and with other parties not necessary to be named, to fraudulently procure for themselves and for their use and benefit and pecuniary advantage large quantities of public lands by procuring certain named persons to avail themselves of the provisions of the timber and stone act by filing written statements and doing the other things required by said act, and the regulations of the Commissioner of the General Land Office, under an agreement then and there and theretofore had and entered into, wherein, and whereby the said company and its codefendants agreed to purchase the lands described in the respective statements and applications of the applicants as soon as they should secure title thereto, they agreeing to furnish or procure to be furnished and supplied to the applicants the amount of money necessary to pay all expenses in connection with making the filings and procuring title, including the sum necessary to pay for the land. That in pursuance of this unlawful and corrupt conspiracy and agreement, and to carry out and effect the object and purposes thereof, the defendant the Barber Lumber Company and its codefendants, together with Steunenberg and Wells, did unlawfully, falsely, fraudulently, and corruptly induce and procure divers named persons to apply at the United States Land Office at Boise, Idaho, for lands under the provisions of the act of Congress referred to, and did cause, induce, and procure such parties, and each of them, to appear before the register or receiver of the Land Office, and each to make and subscribe an oath to the written statement required by the act of Congress of persons desiring to avail themselves of the provisions thereof, in substance, that he did not apply to purchase the land described in his statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract with any person or persons whomsoever by which the title which he might acquire might inure in whole or in part to the benefit of any person except himself; that the statement so made by each of the applicants was false, fraudulent, and untrue, and made for the purpose of procuring title from the United States to the lands described in the several sworn statements to the

persons named, pursuant to the unlawful, false, fraudulent, and corrupt conspiracy, combination, and agreement referred to. That, in truth and in fact, divers of the several applicants had been supplied and furnished the money with which to pay for the lands, and the fees and expenses incident to obtaining title thereto, by the Barber Lumber Company and its codefendants pursuant to such unlawful combination and conspiracy. That thereafter the Barber Lumber Company and its codefendants, by reason of such unlawful, corrupt, and fraudulent schemes and practices, and by and through the various persons named in the bill as employed by them for that purpose, fraudulently obtained and procured the patents of the complainant to be issued to the various named persons, and that such patents were not procured in compliance with the laws of the United States, but were illegal, fraudulent, and void as against the complainant, and contrary to equity and good conscience.

The Barber Lumber Company alone answered, denying the fraud charged in the bill, and pleading affirmatively that it purchased the lands in controversy from the several entrymen and entrywomen in good faith for a valuable consideration, and without notice or knowledge of illegality in the method of procuring title from the government, if any such existed. Upon the issues thus joined, the case was referred to a master to take testimony, and, upon his report, the case has been tried and submitted.

The suit is brought to set aside land patents issued by the government on the ground of fraud. The bill of complaint sets forth in detail the acts constituting the alleged fraud, which consist substantially in an averment that, while the lands in question were entered ostensibly in the names of the several entrymen and entrywomen, they were in reality entered for the use and benefit of the Barber Lumber Company, and under a corrupt and illegal agreement between such entrymen and entrywomen and the company made prior to the time the respective applications for the purchase of the land were filed in the local land office, and that the affidavits attached to each of said applications, and the oath of each applicant made at the time of his application that he did not apply to purchase the land on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire should inure in whole or in part to the benefit of any person except himself, were false and untrue. Upon this averment complainant must recover, if at all. In a suit of this character the bill must show specifically and in detail in what the fraud consists and how it was effected, and, although the complainant may make out a case which, under other circumstances, would entitle it to the aid of the court, yet, if it is not the case made by the bill, it cannot recover. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; *Kent's Adm'r v. Kent's Adm'r*, 82 Va. 205; *Lewis Pub. Co. v. Wyman* (C. C.) 168 Fed. 756. With this understanding of the issues and the rule of law governing the proof thereunder we can proceed to a consideration of the facts.

The evidence is voluminous, consisting of between 4,000 and 5,000 pages of closely typewritten matter, together with a large number of exhibits, and in the nature of things it is impossible to note it in detail, or the various inferences or conclusions drawn therefrom. I can do nothing more than state briefly my conclusions, after a careful consideration of the record, aided materially, as I have been, by the able and exhaustive arguments and briefs of counsel. A large part of the testimony was taken over the objection of the defendant that it was immaterial, irrelevant, and incompetent, and these objections were renewed on the trial by a motion to strike out. It is not necessary, however, to consider the objections at this time, for the reason that, whether the testimony is competent or not, it does not affect the conclusions to which I have arrived. The lands involved, because of their locality and the time and circumstances under which the title was acquired from the government, are naturally divided into three classes, and have been so considered throughout the trial, although not so designated in the bill, viz., 92 entries in the Boise Basin, and known as the "Basin Lands," a like number of entries in the Crooked river country, some distance east of the Basin and known as the "Crooked River Lands," and 26 entries in township 6, 4 E., known as the "6-4 lands." The Basin lands were all open to entry prior to the year 1898, but no entries were made therein until the year 1901. During the late summer or early autumn of that year Parrish & Manning, a Minnesota firm, advertised in the Minneapolis papers that they were able to and would show persons desiring to purchase lands under the timber and stone act valuable tracts of lands in the Boise Basin, in the state of Idaho, for a consideration of \$135 paid by each, which was to include the cost of transportation from Minnesota to the lands. In pursuance of this advertisement, and under an arrangement with Parrish & Manning, five or six people came from Minnesota to Idaho with the intention of taking land under the timber and stone act. Among the number were Patrick H. Downs and a man by the name of Snow. Downs and Snow were somewhat familiar with timber, acquainted with the government surveys, and capable of estimating the timber on a given tract of land, and tracing out the boundary lines thereof. After they arrived in Idaho, they worked five or six weeks for Parrish & Manning in cruising the lands in the Boise Basin, and thus familiarized themselves with the quantity and quality of the timber thereon, and with the location of the several tracts. Parrish & Manning's scheme, however, proved unsuccessful, and was abandoned early in the fall of 1901, but, either on account of the notoriety which it had given to the Boise Basin, or because of a local railroad enterprise headed in that direction, or the unaccountable desire to acquire title to public lands which sometimes possesses a community without any apparent reason, or for some other cause, a sudden demand seems to have arisen for timber land in that vicinity by persons desiring to purchase the same under the timber and stone act, and Downs and Snow conceived the idea of engaging in selling the information they then possessed or might thereafter acquire to such persons. Snow, however, soon returned to Minnesota, and Downs formed a partnership with John I. Wells, a resident of the Basin country. Under the arrangement be-

tween them Wells was to move to Boise City, some 40 or 50 miles distant from the land, and there receive applications from persons desiring to enter the same, and send such applicants up to Downs, who was to show them the various tracts, for which they were to charge the applicant a fee of \$25, to be divided equally between them. In pursuance of this agreement, about 75 applications were made by persons who were shown the lands by Downs and Wells up to January 1, 1902, about 20 of whom had tendered their final proof. No final certificates, however, had been issued in any of these cases, because prior to the filing of the applications a general order of the Land Department suspending the right of the officers of the local land office to issue such certificates on timber and stone entries, and requiring the final proof in all such cases to be sent to Washington for examination there, had been issued. As the time for final proof approached, several of the applicants found themselves without means with which to pay for the land, and about the 1st of January, 1902, Wells arranged with William Sweet, a resident of the Basin, to furnish to such of them as might need it the necessary money with which to make such payments, and from 18 to 20 of the applicants making final proof after the 1st of January were supplied with money by Sweet through Wells. Soon after agreeing with Wells to furnish this money, Sweet conceived the idea of purchasing and assembling as large a tract of this land as possible in one holding, and for that purpose employed defendant John Kinkaid, formerly a resident of the Basin, to purchase the lands for him from the applicants, but Kinkaid did not do so because final certificates had not been issued, and as he understood the law, and as it was then interpreted by the Land Department and generally understood by the profession, it was illegal and unlawful for an applicant under the timber and stone act to sell or contract to sell his land prior to the issuance of the final receipt.

In February, 1902, Ex-Governor Steunenberg of Idaho became interested with Mr. Sweet in this venture, purchasing or contracting to purchase a one-half interest therein, and by the 1st of March he and Sweet had acquired control of about 6,400 acres, and Steunenberg began to look about for some person or persons with capital sufficient to acquire the title to the lands held by himself and Sweet, purchase other lands in the vicinity, and otherwise handle the enterprise. To that end he submitted the matter to A. B. Campbell of Spokane, but Mr. Campbell, not desiring to engage in the timber business, referred him to A. E. Palmer of that city, who had formerly been in the employ of the Northwestern Lumber Company of Wisconsin, in which the defendants Barber and Moon were largely interested and the principal officers, and who had been requested by Mr. Barber to report to him any prospective timber deal which looked promising. On February 21, 1902, Palmer wrote to Barber and Moon at Eau Claire, Wis., advising them of Steunenberg's proposition, and recommending its consideration by them. This was the first information either Barber or Moon had concerning the lands in question, or that there were any timber lands in Boise Basin. After several letters and telegrams had passed between Palmer and Barber in reference to the matter, Barber wired for Steunenberg to come to Eau Claire. Steunenberg arrived

in Eau Claire on March 6th, and had an interview with Barber and Moon, in which he represented to them that he and Sweet had become interested in some land titles in the Boise Basin in the state of Idaho; that they had purchased or acquired about 6,400 acres, for which they had final receipts, but had taken no deeds because patents had not issued, and that they were holding back part of the purchase money until patents should be issued; that there were from 4,500 to 5,000 acres more in the same locality for which applications had been made and upon which final proof would soon be made, and he was confident that it could be purchased when it came on the market at not to exceed \$5 an acre, and that enough more land could be secured in the same vicinity by the use of lieu land scrip to make a total of 25,000 acres; that Sweet was not able or willing to finance the matter any further, but would sell out at a profit of 50 per cent. on his present investment, and requested Barber and Moon to buy Sweet out, furnish the money with which to purchase the other claims when they should come on the market, and to buy scrip with which to secure an additional amount of land necessary to make the aggregate of 25,000 acres.

After considerable negotiation between Barber and Moon and Steunenberg, a written contract was finally prepared and signed by Barber and Moon on the 12th of March, 1902, in which it was stipulated and agreed that in the event they should purchase and acquire the interest of Sweet in the lands in question, and pay him therefor the amount of his actual investment, together with an additional 50 per cent., that Steunenberg could and would procure by good and perfect title and vest in them within six months from the date thereof 25,000 acres of land with at least 200,000,000 feet, board measure, of merchantable pine and fir timber standing and growing thereon, in substantially compact form, along and adjoining Grimes and Moores creeks in what is known as Boise Basin, in the southern part of Boise county, Idaho, and so situated as to be valuable for manufacturing into lumber, the total cost thereof not to exceed in the aggregate the sum of \$140,000. In consideration of this stipulation on the part of Steunenberg, Barber and Moon agreed that they would pay to Sweet the amount of money actually expended by him in assembling such lands, with 50 per cent. added, and that they would, from time to time and when required, advance the necessary funds to purchase government scrip with which to obtain title to other lands, and to acquire title from persons other than the United States, provided that no funds should be advanced except for actual investment in lands and obtaining title thereto in the name of Barber and Moon. It was further stipulated that, when the title should be vested in Barber and Moon to 25,000 acres under the contract, they might, at their option, cause a corporation to be organized under the laws of the state of Wisconsin with a capital stock equal to the investment made in acquiring title thereto, and cause all such lands to be conveyed to such corporation. But, in the event that title to 25,000 acres should not be vested in Barber and Moon within six months from the date of the contract, they were to be at liberty to sell and dispose of all the lands acquired by them in pursuance thereof after giving Steunenberg six months' notice of their intention to do so, and retain out of the moneys so received the whole

amount which they might have advanced under the contract. This agreement was not to become effective until Steunenberg's statements and representations about the land and the investment of Sweet therein should be verified by Mr. Palmer, who was to act as the agent and representative of Barber and Moon.

On the day the contract was signed by Barber and Moon at Eau Claire, Mr. Barber left for the South on his vacation, and on the next day Mr. Moon forwarded a copy of the contract, together with a letter of instructions, to Palmer, and requested Palmer to proceed to Boise as soon as convenient to examine into the matter, and to close with Steunenberg if he found the conditions as represented. In pursuance of this understanding and agreement, Palmer went to Boise the last of March or the 1st of April, and, after an investigation, closed the contract with Steunenberg on the 10th of April, paying him for himself and Sweet about \$40,000. This was the first connection that Barber and Moon, or either of them, had with the Basin entries. At that time all of such entries involved in this suit had been made except about 18, but no final certificates had been issued because of the order referred to, although that fact was not known by nor communicated to Barber and Moon. There is no evidence whatever in the record that any of the entries were made at the instigation of or in the interest of Barber and Moon, or the Barber Lumber Company, which was subsequently organized by them on the 20th of the following July. None of these entrymen were the agents or employés of Barber and Moon, nor were Barber or Moon acquainted with them, nor had they ever heard of the land in Boise Basin or its condition until advised by Palmer of Steunenberg's proposition in February, 1902, and their subsequent interview with him about the 1st of the following March. Forty-nine of the 92 entrymen and entrywomen whose applications are involved in this controversy were witnesses in the case. They all testified that their applications were made by them for their own use and benefit, and not under any contract or agreement with Barber and Moon, or the Barber Lumber Company, or any other person, by which the title to the land which they might acquire would inure to their benefit. The order suspending the action of the local land office was vacated in June, 1902, and final certificates began to issue. Immediately thereafter Steunenberg commenced taking deeds from the applicants in order to comply with his contract with Barber and Moon. For that purpose, he employed the defendant Kinkaid, who, in turn, engaged the services of defendant Pritchard to assist him; Steunenberg agreeing to allow Kinkaid \$800 for each claim he could purchase. Upon the delivery of the deeds and final receipts by Kinkaid, Steunenberg paid him the amount due the several applicants, drawing on Barber and Moon therefor. It would seem from this testimony, and it is undisputed, that the averment of the bill that the entries were made ostensibly in the name of the applicants, but in reality for the Barber Lumber Company, is wholly unsupported by the testimony.

It is argued on behalf of the government that because there is some evidence tending to show that the pecuniary condition and financial ability of many of the applicants and of Downs and Wells, the locators, were such as to render them unable to provide the money nec-

essary to make final proof, there must have been some powerful financial influence back of the movement, and the applications must have been thus induced; and, since thereafter the Barber Lumber Company acquired title to the lands, it must be assumed as conclusive, in the absence of evidence as to the supposed interest back of the movement, that it was the promoters of that company. But a patent of the United States for land, regularly issued and signed by the proper officers of the government, cannot be avoided or set aside on mere conjecture or suspicion. The fraud charged in the bill in a suit for that purpose must be established by clear and convincing proof. In the Maxwell Land Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949, the Supreme Court takes occasion, in view of the importance of the question and the number of cases then coming before the court, instituted by the Attorney General to set aside patents, to announce with some particularity the rule as to the nature of the testimony and the circumstances which will justify a decree in favor of the complainant in such a suit. It is there said:

"The deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the progress by which this evidence of title is issued to the grantee, demands that to annul such an instrument and destroy the title claimed under it the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such instrument may be avoided. * * * We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law have been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the efforts to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This doctrine has been followed and approved by the Supreme Court in many subsequent cases. *Colorado C. & I. Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; *U. S. v. Stinson*, 197 U. S. 204, 25 Sup. Ct. 426, 49 L. Ed. 724.

It was therefore not incumbent upon the answering defendant to explain any of the suspicions or inferences as to the influence behind the original movement in the location of the land in the Boise Basin,

if there was any improper influence, a fact not deducible from any testimony in this case except the merest inference. It is just as reasonable and certainly more just to suppose that the entrymen and entrywomen in making the applications to purchase acted, as they each testified, honestly and in good faith, than it is to conjure up some contrary theory, which necessarily assumes that all the witnesses in this case upon that question perjured themselves on the trial. Patents have been regularly issued for all of these lands, and the defendant has purchased and paid for them at the rate of at least \$800 per claim, and the burden of proof is on the government to show that the patents which it has issued were procured by fraud before such patents can be avoided. Mere inference, conjecture, or suspicion is not enough.

The next in order are the Crooked river lands. The acquisition of title in this section of the country was not in contemplation by either Barber or Moon or Steunenberg at the time the contract of March, 1902, was entered into between them. It was supposed at that time that the investment would be confined to the Boise Basin. During the fall and winter of 1901, while Downs and Wells were engaged in locating people in the Basin, Downs learned that there was probably valuable timber land in the Crooked river country, and it was arranged between himself and Wells that he should investigate that country the following spring after the snow had disappeared, which he did, and ascertained that there was a considerable body of valuable timber land in that section. No applications to purchase here were made under the timber and stone act until the last of August, 1902. About that time Barber and Carson, who was interested with him as a stockholder in the Barber Lumber Company, visited Boise to look after their interests in that section, and while there were advised by Steunenberg that there was a large body of land in the Crooked river country which could be secured by the use of lieu land scrip. Steunenberg was then instructed by them to send an estimator into that country to examine and estimate the timber for the purpose of ascertaining whether it was of sufficient value and in sufficient quantity to justify them in securing title thereto by the use of scrip. About the time of this visit and the instructions to Steunenberg to have the Crooked River country investigated, Downs and Wells, no doubt with knowledge of that fact, began actively locating residents of Boise City and vicinity in that section of the country under the timber and stone act, charging and collecting from each applicant a fee of \$25, and from the 27th of August to the 18th of October 79 claims were so located. About the 1st of October Steunenberg employed a man by the name of Taylor, and sent him into the Crooked river country for the purpose of investigating and estimating the quantity of timber, in pursuance of instructions given the previous August by Barber and Carson. Taylor learned from the residents that a large part of the land had already been filed on by applicants under the timber and stone act, and upon his return so reported to Steunenberg. In December, 1902, Steunenberg wired Barber and Moon, at Eau Claire, Wis., that he was going East with important information with reference to the Crooked river lands. Upon his arrival at Eau Claire, he advised them of the situa-

tion, and that it would not be possible to acquire the land by the use of the scrip because of these applications, and was instructed by Barber and Moon to have the lands examined, and if the timber was found satisfactory, to purchase them if he could do so at not to exceed \$1,000 a claim after final proofs were made and they came on the market. After these filings were made, the defendant Kinkaid secured control of them and was offering them for sale. Steunenberg, in pursuance of his instructions from Barber and Moon, entered into negotiations with Kinkaid for their purchase and finally succeeded in February, 1903, in making a contract to take them at a price of \$950 for each claim, and Steunenberg drew on the Barber Lumber Company for \$20,000, which was the first money furnished by the company for this purpose. Twenty-nine or 30 additional applications were filed in the land office after this date, and were subsequently purchased by the company through Steunenberg. It is charged in the bill, and argued on behalf of the government, that all of these entries were made by the entrymen ostensibly in the names of the entrymen and entrywomen, but in reality for the use and benefit of the Barber Lumber Company, and with the intention on its part to evade the provisions of the timber and stone act. Except the mere inferences to be drawn from the fact that the company was willing and perhaps anxious to obtain lands in that district, and that it did subsequently acquire title to all these lands, there is no evidence to support the averments of the bill. On the contrary, all the testimony negatives any such a conclusion. Many of the entrymen and entrywomen were called as witnesses in this case. Each and every one of them testified unequivocally and directly that the averments of the bill, so far as he or she was concerned, were false, and that there was no understanding or agreement by which the title to the land should inure to the benefit of any person other than the applicant, and that he or she had made no agreement directly or indirectly with any person to that effect. Thirty-four of them testified that they did not know at the time of their filing of any market for the lands. Some of the others said that they had been told that the land could be sold, but that they did not know who the purchaser was to be. Now, in the face of this testimony, which stands here on the record uncontradicted, the court would not be justified in finding the allegations of the bill to be true. It is to my mind more reasonable to suppose that Downs and Wells, and perhaps Kinkaid, having learned or suspected that the Barber Lumber Company was contemplating acquiring title to the land by the use of scrip, conceived the idea of frustrating this plan and earning some money for themselves from persons desiring to purchase land under the timber and stone act than to suppose the applications were made in pursuance of an unlawful and corrupt agreement between the applicants and the defendants.

"6-4 Lands": The plat of the 6-4 lands was not filed in the local land office until July 15, 1903. Some time previous to that date the defendant Moon visited Idaho to examine the property owned by his company with a view of determining whether it was sufficient to justify the putting in of a manufacturing plant. While there he noticed some of the timber on what subsequently became township 6-4, and directed Mr. Connor, an estimator in the service of the company, to

examine the land and to estimate the amount of timber thereon with a view of using lieu land scrip if the timber was of sufficient value. A few days before the plat of the land was filed in the land office, Barber telegraphed Steunenberg not to neglect 6-4. The state, however, had 60 days after the plat was filed in which to exercise its right to select land in such township, and, until its rights were exercised or waived, no other entries or selections could be made. Pending the matter, the attorney for the Barber Lumber Company called at the executive office in Boise to ascertain whether the state intended to exercise its right of selection, and was informed by the Governor that it did. He thereupon suggested to the Governor that the state waive its right, or, if not, to reduce the quantity of land which it contemplated taking. During all of this time the evidence showed that Steunenberg, as the representative of the Barber Lumber Company, was making preparation to file lieu land scrip then owned by the company on land within this township. For that purpose he employed an attorney to prepare the necessary papers, but, as this scrip was in the name of Mr. Moon, some delay and difficulty was encountered in obtaining the necessary power of attorney from him. In the meantime, and before the land became open to entry, and before the scrip could be used, Downs hired Kinkaid to ascertain from the state land office the description of the lands which the state proposed to select, and Kinkaid did so a few days before the land was open to entry. As soon as Downs secured the information, he immediately took a large number of persons who had applied to him to secure land under the timber and stone act into the township, and they selected all of the valuable land therein which had not been previously selected by the state, and each of the applicants paid Downs \$25 for his services and the information. In order that there might be no confusion or mistake in the applications, as it was important that they should be correct in order to frustrate the purpose of the Barber Lumber Company to take the land with lieu land scrip, Downs advised intending applicants to secure the services of Kinkaid in preparing the papers, which most of them did, and on Saturday before the opening of the township on Monday these applicants began to assemble at the local land office and remained there in line until the opening of the office Monday morning, when there were 30 persons in line, and their applications were duly received and filed. Some of these persons were advised to enter the land by Kinkaid and some by Downs, but many of them acted upon their own initiative. Twenty of the entrymen testified as witnesses in this case, and each and every one of them swore positively and unequivocally that the entry was made for his own use and benefit, and not that of any one else; that all of them paid a location fee of \$25, and, in addition, the expenses of visiting and examining the land, the land office fees, and all of the other expenses in the matter, and that all but two or three paid for the lands from their own funds, and they borrowed the money from Kinkaid. There is no evidence that this money was furnished by or was the property of the Barber Lumber Company, but, if it had been, it would not invalidate the entries unless they were made originally for the Barber Lumber Company, or under a contract or agreement, express or implied, between it and the

entrymen or entrywomen that the title acquired should inure to the benefit of the company. There would have been no illegality nor fraud in the entrymen or entrywomen subsequently contracting to sell the land to the company prior to the issuance of patent, and the company advancing the necessary money with which to make final proof to enable the entrymen and entrywomen to comply with such contract. It is probably true that some of the applicants for these 6-4 lands knew that the Barber Lumber Company was or had been buying lands in that vicinity, and it may be that they expected that they would be able to sell their land to such company in case they should later conclude to dispose of it; but there is no testimony showing that there was any such agreement or arrangement prior to the time the applications were made. Indeed, it would be passing strange that the Barber Lumber Company should make such an arrangement or agreement, for at that time it was the owner of at least 6,000 acres of lieu land scrip costing \$5.35 an acre which it could have used and obtained title to the land in a lawful and legal way. It is incredible, therefore, to believe that it would resort to a fraudulent or unlawful scheme of acquiring title through dummy applications at a cost and expense to itself greater than it would have cost it to have acquired the lands by the use of scrip in a legal and lawful manner.

Some stress is laid by the complainant on the fact that prior to the time this land became open to purchase the attorney for the defendant manifested some solicitude that the state should waive its right to make selection in the township, and from that fact the inference is sought to be drawn that there was some corrupt and unlawful understanding on the part of the company to acquire this property in an unlawful manner, through dummy applications, but the inference is not justified by the facts. It is far more probable that the purpose of the company was to acquire title to the land by the use of lieu land scrip than to suppose that it intended to resort to the unlawful and hazardous means of securing it in the manner suggested.

Reliance is also had upon the statement of the witness Horsley that a few days prior to the date the land became open to entry Mr. Barber gave him at Eau Claire, Wis., a book purporting to contain a record of the holdings of the Barber Company in Idaho, and in which book the lands subsequently acquired by the company in 6-4 were noted. Horsley was employed by the Barber Company about the middle of September, 1903, to go to Idaho and take charge of its logging operations. He testifies that, before he left Wisconsin, Mr. Barber gave him a book containing a record of the holdings of the company in Idaho. Upon the trial of this suit, he said that the checkmarks in the book in township 6-4 were not in it at the time it was given to him by Mr. Barber in Wisconsin, and there is other testimony showing that the statement is true. It seems, however, that on some previous occasion, either in a statement to some government official or as a witness on some previous trial, Horsley stated that the book as then produced, and which contained the entry of the 6-4 lands belonging to the Barber Company, was in the same condition as it was in when it was delivered to him by Mr. Barber in September, 1903, and before there were any entries whatever in this township. Horsley as a witness in

this case explains, or attempts to explain, the previous statement in reference to this matter, and gives an apparently reasonable explanation thereof. But, whether this explanation is to be regarded as satisfactory or not, the previous statements made by him are not testimony in this case. They were competent only, if at all, for the purpose of impeachment, and not as substantive evidence.

Again attention is called to a letter from Mr. Barber to George S. Long, dated November 13, 1903, in which he asks Long's permission to have deeds for lands which the Barber Lumber Company was about to acquire put in Long's name. This was before final proof had been made in the 6-4 entries. After such proof and the purchase of these entries by the Barber Company, title was in fact taken in the name of Long, and it is argued that the letter to him was evidence of a previous agreement with the entrymen, but the fact, if it is a fact, that the Barber Company made an arrangement with Long before the final proof in these entries had been made, and, if this be taken as evidence of an existing agreement had at that time between the company and some of the entrymen by which the company was to purchase the land after final proof, it is no evidence tending to support the averments of the bill, and is not proof of fraud. One who has located a tract of land under the timber and stone act is at liberty to sell his title as freely as he may sell any other property he has lawfully acquired. "The act does not," says the Supreme Court in *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, "in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it or any contract or agreement for it the act is satisfied. Montgomery [the purchaser] might rightfully go or send into that vicinity and make known generally, or to individuals a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government." Indeed, under later decisions, an applicant for the purchase of timber lands has a right after he has made his initial application, and before final proof, to contract to sell the title thereafter to be acquired, and the intending purchaser may lawfully advance to him the money with which to make final proof in order that he may comply with his contract. *Williamson v. U. S.*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; *U. S. v. Biggs*, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305.

It therefore seems lawful, under the timber and stone act: (1) One desiring to acquire title to timber land may make known his willingness to buy the same at an advance over the government price. (2) Another person knowing of that fact may make entry with the expectation of selling to such intending purchaser. (3) The entryman may, at any time after his application, sell or contract to sell to the other. (4) The transaction is not denounced by the statute or illegal or unlawful, if there has been nothing further in the way of communication or contract or agreement between the parties than as here stated. Now,

the evidence in this case does not show as intimate connection between the entrymen and the defendant company as the courts have thus approved. There is no evidence that the Barber Company or any one representing or acting for it ever at any time signified a willingness or desire to purchase lands in either the Crooked river or the 6-4 districts at an advance over the government price, or at all, except by the use of lieu land scrip. Nor is there any testimony that any of the applicants intended or expected at the time their initial applications were filed to sell or dispose of their lands to the Barber Lumber Company. It is, I think, probable that there was a general understanding among the entrymen and entrywomen, not put into words perhaps, but nevertheless existing, that they would take the land, and it would subsequently be assembled into one large body and sold at a uniform price to some subsequent purchaser, but there is no evidence that they had any particular purchaser in view, nor that the Barber Lumber Company was regarded as the probable purchaser, nor that it had any intention of acquiring title to the lands by means of applications under the timber and stone act, nor that any of these entries were made by its procurement or solicitation, nor under any contract or agreement with it, express or implied.

In this case, the government grounds its right to recovery upon the averment that the entrymen and entrywomen did not make application for the land in good faith for their own use and benefit, but, on the contrary, entered such land for the benefit and under an agreement with the answering defendant. All or substantially all of the entrymen and entrywomen were residents of the state of Idaho, and most of them of the city of Boise. One hundred and thirty of them were called as witnesses, and each and every one of them testified that the averments of the complaint and the charges made by the government therein are untrue as far as he or she was concerned. Messrs. Barber and Moon, the promoters and organizers of the Barber Lumber Company, and through whose efforts the land was purchased, testified to the same effect, and that neither Wells, Downs, Kinkaid, nor any of the other defendants or entrymen or entrywomen were the agents or employés of the company, or represented it in any of the transactions referred to in this case. Wells and Downs, who showed the applicants the lands located upon by each of them, both testified that they had no understanding or agreement whatever with the applicants as to what should be done with the land, and that they had no interest in the matter except to obtain the location fees; that they were not employed by nor in the service of Barber and Moon, or the Barber Lumber Company, or any of their agents or employés, but were acting for themselves alone, and such was the testimony of Kinkaid and Pritchard as to their connection with the matter. All of this evidence stands uncontradicted except by mere inference or conjecture.

It is insisted that the entrymen and entrywomen who have testified in this case, although called as witnesses by the government, were hostile to it, and that their testimony should therefore be disregarded or viewed with suspicion, but there was no particular hostility manifested by any of these witnesses, unless it is due to the fact that their

testimony does not support the averments of the bill. The government was, of course, not concluded by their testimony, but it cannot insist that they are unworthy of belief or that their testimony should be entirely disregarded and the facts found by the court to be contrary to what these people have testified to without some evidence upon which to base such a conclusion. The testimony was competent, and, unless self-contradictory or inherently improbable, it must necessarily prevail in the absence of contravailing evidence. *Dravo v. Fabel* (D. C.) 25 Fed. 116; *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421; *U. S. v. Clark* (C. C.) 125 Fed. 774; *U. S. v. Clark*, 138 Fed. 294, 70 C. C. A. 584. There are some matters connected with the acquisition of title to some of the lands and the payment therefor which are calculated to arouse suspicion as to the good faith of the transaction, but they are not sufficient to overcome the positive testimony in the case, and could probably have been explained but for the untimely assassination of Ex Governor Steunenberg.

It is argued on the facts as disclosed by the evidence that the plaintiff is entitled to relief because the contract of March, 1902, between Barber and Moon and Steunenberg contemplates the use by them of the timber and stone act to acquire title to a larger area of the public lands not then filed upon than the parties to the contract were entitled to take in their own right. That it is a fraud upon the government for an individual or an association of individuals to undertake to acquire a larger area of public land under the act referred to than such a party or association are entitled to in their own right may be conceded. *U. S. v. Trinidad Coal Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; *U. S. v. Keitel*, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230. But neither the contract nor the evidence in this case discloses such a scheme on the part of Barber or Moon or Steunenberg; on the contrary, the language of the contract, the subsequent correspondence between the parties, and the testimony of all of them, as well as their conduct, show that the intention was to acquire title by lieu land scrip to a sufficient area, with that already filed on, to make an aggregate of 25,000 acres, and not to use the timber and stone act for that purpose.

A large volume of correspondence of the defendant company and Barber and Moon concerning the matters involved in this suit has been read into the record. It is suggested, on behalf of the government, that this correspondence is probably a fabrication, and is unworthy of credit, because in one of Steunenberg's letters, dated February 3, 1902, reference is made to a certain Mr. Tipton "present Assistant U. S. Attorney," while, in fact, it is said Mr. Tipton was not appointed to that office until August, 1908, but this fact, standing alone and without any explanation whatever, is insufficient to discredit all the rest of the correspondence which was taken from the files of the defendant company and appears to have been had in the usual course of its business. It would have been quite impossible to have fabricated all of this correspondence, and, certainly if any one had done so, he would not have made the mistake occurring in Steunenberg's letter.

In reaching a conclusion in this case, I have not overlooked the testimony concerning what is known as the Wells and Granger and Anderson groups of entries made in the Boise Basin in September,

1907, nor the influence from high sources said to be brought by defendants or some of their agents to bear upon the special agent detailed by the Department to investigate these entries. None of them are involved in this suit. They were canceled by the Department, and never passed to patent. The evidence in relation thereto, therefore, has but little if any bearing upon the question of whether the particular entries mentioned in the bill of complaint were made in the manner and for the purpose therein alleged, and that is the sole question to be determined in this case.

Upon the whole record, my conclusion is that the averments of the bill are not sustained, and that it should be dismissed. Let a decree be entered accordingly.

HITCHMAN COAL & COKE CO. v. MITCHELL et al.

(Circuit Court, N. D. West Virginia. September 21, 1909.)

1. TRADE UNIONS (§ 1*)—LABOR ORGANIZATIONS—LEGALITY AND RIGHTS.

A voluntary association of working men, whether secret or not, for the mutual benefit of its members, is lawful, if the purposes they seek to attain and the means employed to that end are peaceable and lawful; and among the rights of its members is that of collectively and peaceably leaving the service of their employer when the terms thereof become unsatisfactory to them, and also the right under ordinary circumstances to solicit other workmen to join their association by reason, argument, and persuasion.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. INJUNCTION (§ 101*)—COMBINATIONS—INTERFERENCE WITH CONTRACT BY THIRD PERSONS.

An employer and its employes may lawfully contract with respect to the terms of the employment, and as incidental thereto that the employes shall not join a labor union and the employer shall not employ union men; and, when such a contract has been made, a combination between officers or members of the labor union to induce either party to violate the contract, with which they have no rightful concern, constitutes an unlawful conspiracy, to restrain the carrying out of which the other party is entitled to an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. § 101.*]

In Equity. On motion to modify preliminary injunction.

Upon October 24, 1907, the plaintiff corporation presented its bill for injunction to a judge of this court against John Mitchell and nine others, alleging itself to be a corporation under the laws of West Virginia and the defendants to be citizens and residents of several different states other than West Virginia; that nine of said defendants first named are presidents, vice presidents, and secretary-treasurers, respectively, of the United Mine Workers of America, and of the International Union United Mine Workers of America, of District No. 6 United Mine Workers of America, and of subdistrict 5 of District No. 6 United Mine Workers of America, and the defendant Thomas Hughes to be an organizing agent of said organizations; that plaintiff is the owner of about 5,000 acres of coal, has a mine and mining plant on the Baltimore & Ohio Railroad that is mining and shipping a daily output of about 1,400 tons of coal, largely under contracts, between 500 and 600 tons to the railroad for its daily engine fuel, and has large contracts for future delivery;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that prior to April 1, 1906, it operated its mine by employment of men affiliated with the United Mine Workers of America, but on that day a strike was ordered by the officers of the union, and on April 16, 1906, the men so employed, in obedience to the demands and orders of defendants, went out and ceased to work. It is charged that this strike was ordered because certain other operators refused to sign the scale demanded by the union; that so far as plaintiff was concerned it was wholly without justification or excuse, because it distinctly agreed to pay the scale price and any increased price fixed thereby from April 1, 1906, the date of the strike order, whenever it might be fixed and agreed upon, with which proposition the miners themselves, whose labor was involved, were entirely satisfied; that notwithstanding this, at the instance of defendants, its mine was shut down from April 16 to June 12, 1906, to its great financial loss and embarrassment by reason of its inability to comply with its existing contracts. The bill then sets forth in detail in effect that on the last-named date, in order to be able to run said mine, it entered into a contract with its men whereby it agreed with them to run its mining operation wholly upon a nonunion basis, refusing absolutely to employ any union men, and whereby the men on their part agreed not to join or become members of this union and to work for plaintiff as nonunion men; that plaintiff has since that time been running its mine under this contract with its men to the entire satisfaction of both, paying its men as high wages as paid in any of the union mines. It then charges the officers and agents of the union, with full knowledge of the existence of this contract, to have repeatedly sought to have plaintiff violate it and agree to reunionize its mine, which plaintiff has refused to do, whereupon such union officers and agents are seeking by inducements, threats, and intimidation to induce plaintiff's employes, bound by said contract with it, to leave its service, break their contract, join the union, and also to prevent other men from engaging in its employ, and this it is charged with the unlawful purpose to prevent any but union men to work in its mine, compel it to employ none but union men, and to submit its business and its property to the jurisdiction and control of said union and its officers. The bill then proceeds to charge the United Mine Workers' Union of America and its subordinate organizations to be unincorporated organizations, having unlawful purposes and designs to create a monopoly and trust in coal mining labor, and in support of these allegations sets forth in extenso what purports to be excerpts from the constitutions and by-laws of the supreme and subordinate unions, together with the obligation required to be taken by its members and extracts from the proceedings of its national conventions. A distinct conspiracy on the part of defendants as individuals is charged to secure, by reason of their positions as officers of this union, the abandonment by the men of their contract with plaintiff, their joining the union, the inability of plaintiff to employ others, and the entire shutting down of its mine, to its irreparable loss and injury. Presented with this bill were some 28 affidavits in support of its allegations. A temporary restraining order was granted until the next regular term of court, to be held at Parkersburg on January 14, 1908, for which date plaintiff's motion for a temporary injunction was set down for hearing. This hearing, on motion of defendants, was continued until May 26, 1908, when plaintiff presented more than 20 additional affidavits and argued its motion for temporary injunction; counsel for defense stating they "did not desire to be heard in opposition to said motion so far as the granting of a temporary injunction at the time was concerned, and not consenting, but objecting, thereto." The temporary injunction was on that day granted in exact accord with the terms of the restraining order.

Answers have been filed, exceptions entered thereto, motions as to certain unserved defendants to have said bill dismissed as to them have been made, and a motion by defendants, disclaiming "any intention of conceding the truth of the allegations of the plaintiff's bill whereby fraud, coercion, and intimidation or violence in any form whatsoever is imputed to them," has been entered to dissolve the injunction, "on the face of the bill and exhibits," in so far as said injunction restrained said defendants, or any of them, from the use of argument, reason, and persuasion, to induce the employes of the plaintiffs, or any of them, to become members of the United Mine Workers of America or any of its subordinate branches; in so far as it restrains them from interfering

or talking to any person or persons in the employment of the plaintiff, or about to enter the employment of the plaintiff, for the purpose of inducing such persons to become members of the United Mine Workers of America or any of its subordinate branches, in a peaceable and law-abiding manner, and unaccompanied by intimidation, force, fraud, violence, or coercion; also in so far as it restrains defendants from visiting the homes of plaintiff's employes for the purpose of inducing them by reason, persuasion, and argument, unaccompanied by force, fraud, intimidation, violence, or coercion, to become members of the United Mine Workers of America or any of its subordinate branches; in so far as it restrains defendants from going near the premises of plaintiff for the purpose of talking with or inducing the employes of plaintiff to become members of the United Mine Workers of America; in so far as it restrains from unionizing or attempting to do so plaintiff's mine, if by "unionizing" is meant action on the part of defendants to induce the employes of plaintiff to become members of the United Mine Workers of America by the use of argument, persuasion, and reason, unaccompanied by force, violence, coercion, or intimidation; and also in so far as it restrains defendants from interfering with plaintiff's employes, if by the term "interfering" is meant that defendants shall be precluded from interviewing and visiting plaintiff's employes for the purpose of inducing them to become members of the union. This motion on April 7, 1909, was argued and submitted, and is now to be determined.

George R. E. Gilchrist, for plaintiff.

Charles E. Hogg, for defendants.

DAYTON, District Judge (after stating the facts as above). That this motion has been most thoroughly and ably argued goes without saying, when the character and ability of counsel engaged is considered. It is a source of regret that, because of a multitude of duties, I have not had even more time to consider the questions involved than I have taken; but the fact that all these questions may again be presented and considered upon a final hearing, and above all may be finally reviewed by a higher court, with full power to correct any error I may commit, has led me to comply with request of counsel for an early decision as to this motion. It is to be borne in mind that this motion is made only for partial dissolution, and that, too, without prejudice to defendants' right to move for full dissolution upon final hearing. It is based solely upon the ground that the allegations of the bill on its face warrant, if they do not demand, it. Under these circumstances, while I am entitled to construe the allegations of the bill, and all of them, in the light most favorable to the plaintiff as upon demurrer, I am not inclined, at this time, to consider the charges, substantially made, that the United Mine Workers of America is an unlawful organization seeking to establish a monopoly in labor contrary to the common law, or a trust therein contrary to the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Such questions deserve more consideration than I have had time yet to give them, and may well be postponed to the final hearing after the case has been fully made up, if it then becomes necessary to decide them under the conditions at that time existing.

Nor do I regard it necessary to discuss the utility or futility of labor organizations. The right of labor to organize for its mutual benefit and protection is as well settled and determined by law as the right of capital to organize for the same purpose. That one may resort to the voluntary association of individuals without incorporation and the

other to articles of incorporation is wholly immaterial, provided the voluntary association be one for lawful purposes and be conducted in lawful manner. That such associations may be secret in character, may have and enforce by-laws, and act through officers and agents, cannot longer be disputed. Their members may stand together, may accumulate funds for the support of those of their number not employed, may unite with other unions, may advise with their officers and others as to their interests and employment, may expel those who refuse obedience to the authority of the association's laws, and may individually or collectively peaceably leave their employer's service when the terms thereof become unsatisfactory to them, as so clearly set forth by Taft, Judge, in *Thomas v. C., N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803, by Thayer, Judge, in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99, and by Mr. Justice Harlan in *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414. It is absolutely needless to add that, under ordinary circumstances, the right of the members of a labor union to solicit others and by reason, argument, and persuasion induce them to join their labor associations is just as clear a right as that of members of fraternal organizations, such as Masons, Odd Fellows, and the like, to do the same thing. While all these things are true, it is not to be forgotten that associations organized for the best and noblest purposes, church organizations even, may be misused by those who have secured control for the purpose and prostituted them to unlawful purposes and designs. When this is done, it becomes as much the duty of the law to restrain them from lawlessness as is its duty to stay the hand of the legally incorporated company of capital that has perverted its lawful purposes to lawless deeds.

It is necessary for us in this case to recognize that this is not a controversy between plaintiff and its employes; it is not a strike; it is not a case where the labor union has longer any legitimate interest or concern. If the allegations of this bill are true, the employes of this company are not members of this union, but have actually contracted with the company not to become members of it as a condition precedent to their employment. Mr. Justice Harlan, in *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, speaking for the Supreme Court, says:

"While, as already suggested, the right of liberty and property, guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraint as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever the reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant, Adair, however unwise such a course may have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, however unwise such a course on his part might have been, to quit the service in

which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

And many cases are cited in support of these principles. It necessarily follows that if the employer can discharge his employé because he belongs to a labor organization, and if the employé can quit his employment because his employer employs nonunion men, they two, having these personal and individual rights, can contract with each other as to what the status of the employment in this particular shall be. The employé on his part may require, as a condition precedent to the sale of his labor, that the employer shall buy it under the terms and upon the conditions prescribed by the labor union, and, moreover, shall employ his other labor upon the same terms. If the employer contracts to do this, he must be held to his contract; for he has accepted the labor upon those conditions. Per contra, the employer may contract with his employé to buy his labor upon terms other than the union ones, and, in order that the union ones may not be disturbing elements in the conduct of his business, may bind his employé not to become a member of the union, and thereby disqualify himself, it may be, by reason thereof, from continuing his employment upon the terms and conditions of the contract. These views seem to be clearly established in principle by this *Adair Case* and the authorities cited therein. With full knowledge that such a contract has been legally consummated between employer and employé, what legal status has the union in the premises? It may regret that its advice, help, and assistance was not sought by the employé in disposing of his labor; but, now that it is disposed of, can it come forward and incite either to break the contract? Its mission, it claims, is to aid and uplift labor; but it could hardly fulfill this mission by persuading men to become breakers of contracts and the repudiators of their lawful promises and pledges, and, if they do, their legitimate functions are prostituted into a conspiracy to destroy others' vested contract rights.

In *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, it is held:

"According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in the execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employé or body of employés to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law."

And the Supreme Court of the United States, in *Angle v. C., St. P., M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, and *Bittermann v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, have distinctly set forth this same general principle in cases involving a different state of facts.

In *Transportation Co. v. Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, the Supreme Court of Appeals of this state has held:

"If one wantonly and maliciously, whether for his own benefit or not, induce a person to violate his contract with a third person, to the injury of that third person, it is actionable."

And in *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, this doctrine as to contracts generally is reaffirmed and applied to labor contracts. It is there held:

"One who maliciously entices a servant in actual service of a master to desert and quit his service is liable to action therefor."

And again:

"The act found in Code 1899, § 14, Append. p. 1053, does not authorize any individual, or number of individuals, to maliciously entice servants to desert service in which they are engaged, or to prevent them from engaging in such service under a contract for such service."

These last two cases, recent in date, decided by its court of last resort without dissenting voice, would seem absolutely to settle the law of this matter in this state. But it is insisted that to ask and induce, by reason, argument, and persuasion, plaintiff's employes to join a labor union, is not asking them directly to violate their labor contracts. It is, so far as this organization is concerned. They have not only contracted, as a condition to their employment, that they will not join this particular union; but, if they do join it, they must absolutely quit such employment, because the plaintiff has contracted not to employ members of this union, and this union has on its part, by its laws, solemnly declared that none but its members shall be employed at the mine.

But, in addition to this question of inducing the violation of lawful contracts, it seems to me very clear that, no matter how meritorious an organization this United Mine Workers of America may be in purpose and intent, the allegations of this bill, if true, and they must be conceded to be so upon the determination of this motion, disclose as plain a conspiracy upon the part of these defendants to injure and ruin the plaintiff as could well be conceived of. They have secured control of this organization. They have bound its members to obey their orders and do their will. Clothed with this power, they have said to plaintiff: "Notwithstanding you have complied with all the requirements of the organization, have agreed to all its terms and conditions, have employed only union men, have secured near \$10,000 to the union's funds in the way of dues from your miners, we propose to stop your operations, require your men to cease working for you, shut down your mine, compel you to violate and lose your contracts," and, in accordance with this purpose to injure, have actually carried out these declarations, have stopped operations, have called out the men, and compelled them, against their will, to cease work, have shut down the mine, and held it in this condition from April 16th to June 12th, some 50 working days, at a loss, judging from the output of the mine, that may be estimated from \$300 to \$700 per day, and with then no promise of let-up before plaintiff's final ruin should be accomplished. What excuse is set up for so foul and injurious prostitution of this organization, claimed to be in existence for philanthropic and lawful purposes, to a conspiracy so glaringly designed to injure and destroy? The sole excuse is alleged to be that some of plaintiff's

rival operators refused to comply with the union's demands and exactions! Rival operators, whose actions plaintiff necessarily could not control! Rival operators, who under many conditions might design and scheme to bring about this very condition of things in order to ruin plaintiff and destroy its rivalry! Such an excuse, if it be the only one that can be advanced, adds only insult to injury, and makes more clear and irrefutable the existence of the conspiracy alleged.

Actuated by a natural sympathy for labor and an earnest desire to uplift and aid it, which we all have, many sincere, but misguided, persons would concede to it an estate superior to and above that possessed by other classes in this republic of liberty and equal rights, and they are fond of denouncing courts of equity for staying the hands of labor leaders in their unlawful exercises of power to achieve this end. We must not forget that we have a Constitution guaranteeing these equal rights, and that courts established thereunder have no discretion in enforcing its guaranties in favor of all those who are denied them and may appeal for redress. As said by Snyder, Judge, in *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863:

"A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, to give evidence, and to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery—between liberty and oppression. * * * The vocation of an employer, as well as that of his employé, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the Constitution. *People v. Otis*, 90 N. Y. 48. The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution."

And again:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances."

These principles were enunciated in a decision holding unconstitutional a legislative act, passed at the instance of labor organizations, which sought to regulate the method of payment of labor wages. The *Adair Case*, to which I have referred, held unconstitutional an act of Congress seeking to restrict the right of an employer to discharge his employé because of his membership in a labor organization. These are but two of many cases illustrating how carefully these inalienable property rights have been and must be guarded by the courts, in order that our liberties under constitutional government may be perpetuated.

It seems clear that under the allegations of this bill a conspiracy has existed between these defendants to injure and destroy the plaintiff's business; that it has already occasioned a damage of many thousand dollars to it, which, it would seem from the authorities we have cited, plaintiff has a clear right to institute its action at law to recover against them, personally and independent of their connection with the labor

organization and any relation it, as such, may have to the controversy. The important question now arises whether, this injury being an accomplished fact, there remains any reason for the exercise of the restraining power of equity through the intervention of this injunction. Is this conspiracy a thing of the past, or does it continue at the present time for the same original purpose to injure and destroy? Here the allegations can have no uncertain meaning. It is charged in effect that these defendants, thwarted in their purpose for the time being by the making of the contracts with the employes direct, now are actively seeking with renewed effort to achieve their unlawful purposes; that they have the same control over the labor organization; that its by-laws still require the same exclusion from work at the mines, under its control, of all nonunion labor; that its members are to be bound by the same obligation to cease labor when ordered to do so by these defendants as its officers; that they were, at the time the injunction was granted, actively seeking to persuade plaintiff's employes to break their contracts and become members of this organization, bound by such laws and obligations; that their organizing agent has been sent upon the ground, and has stated, as shown by affidavit filed, that:

"He had succeeded in having 125 men at the Hitchman mine sign their names, agreeing to become members of the United Mine Workers, and that just as soon as he got 25 more names he was going to shut the Hitchman mine down."

Surely these things, if true, negative any idea of abandonment of the conspiracy; and they would, if true, fully justify the charge that plaintiff is in imminent danger of irreparable loss and injury unless equity shall intervene. It would, then, seem that such intervention is necessary for the protection of all parties concerned. The language of the Circuit Court of Appeals (Fourth Circuit) in *Atwell v. United States*, 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, applied there to the court's discretionary power to punish for contempt, may well be here applied to the necessity for it to exercise the injunctive power in a case like this:

"Very frequently those who complain the loudest against its exercise are ultimately benefited the most. Men, inflamed by passion, are frequently not capable of rightly judging of their own conduct or of foreseeing the consequences thereof. In such cases the restraining power on the part of judges, acting under solemn obligations to do 'equal right to the poor and to the rich,' chastened and humbled by the sense of the weighty responsibilities laid upon them, may save such persons from liability to civil and criminal actions, calculated to bring to them ruin and loss of liberty."

The motion to modify or dissolve this injunction in any particular must at this time at least be overruled.

EDWARDS et al. v. BAY STATE GAS CO. OF DELAWARE.

(Circuit Court, D. Massachusetts. September 23, 1909.)

No. 230.

1. ATTORNEY AND CLIENT (§ 155*)—COMPENSATION OF ATTORNEY—ALLOWANCE FROM FUND IN COURT.

Where suits in equity, instituted on behalf of the bondholders and stockholders of an insolvent corporation, resulted, through the appointment of a receiver and suits instituted by him, in gathering a fund which made the defendant corporation solvent, leaving a surplus after paying its indebtedness, such fund, being purely equitable, is subject to the payment of equitable costs, including the fees and disbursements of the solicitors for the original complainants for services rendered up to the time of final decree.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. § 155.*]

2. ATTORNEY AND CLIENT (§ 155*)—COMPENSATION OF ATTORNEYS—ALLOWANCE FROM FUND IN COURT.

It is the general rule that the right to equitable costs, such as counsel fees, exists only with respect to a fund created by the services charged for; but where proceedings on behalf of bondholders by intervention, having a reasonable basis and which might have resulted in establishing the right of the interveners to a large sum as interest from a fund in the hands of a receiver, were compromised by a consent decree, which provided that the receiver should retain from the fund in his hands a sum sufficient to cover, inter alia, allowances to counsel for the interveners, the allowance of such fees from the fund must be taken as one of the terms of the compromise, and enforced as such, so that the interveners may receive the amount stipulated on their bonds without being subjected to a charge for counsel fees.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. § 155.*]

3. RECEIVERS (§ 163*)—PAYMENT OF CLAIMS—INTEREST.

On the allowance of counsel fees out of a fund in the hands of a receiver, interest will not be awarded beyond that obtained by the receiver on the fund.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 313; Dec. Dig. § 163.*]

In Equity. Suit by Jacob Edwards and others against the Bay State Gas Company. On application for allowance of counsel fees. Applications granted in part.

Whipple, Sears & Ogden, C. Godfrey Patterson, A. A. Folsom, Wm. F. Donovan, Morse & Friedman, Lee M. Friedman, Benj. L. M. Tower, H. M. Burton, J. H. Benton, Jr., H. H. Ward, Bancroft G. Davis, and Henry Major, for complainants.

Parker C. Chandler, Nathan Matthews, Homer Albers, Alfred S. Hall, and Tower, Talbot & Hiler, for defendant.

PUTNAM, Circuit Judge. The pending matters are applications for certain allowances to counsel and others from a fund which was gathered through the exercise of the equity powers of the Circuit Court of the United States for the District of Delaware, supplemented by ancillary proceedings in this court, all in suits against the Bay State Gas Company, a corporation created under the laws of the state of Delaware. We say proceedings against a fund gathered in the manner we have said, because, although the Delaware Gas Company, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was insolvent when the proceedings commenced, but as a result thereof has become solvent, and has, therefore, been permitted to receive a large portion of the fund, is now defending against the claims in issue, and is the sole party interested to defend against them, yet sufficient of the fund remains still under the hand of the court to liquidate the claims here in controversy; and, further, both the portion of the fund which the Delaware Gas Company received, and all the portion remaining, are, and always have been, subject to whatever equities arose in connection with, and incidental to, or as a result of, the gathering of the fund by the equity powers of the courts. Consequently we expunge from the case every suggestion or argument based on the fact that the Delaware Gas Company is now defending against these claims, and is now the holder and owner of part of the fund; and we rest all the matters before us on precisely the same basis as though the whole fund were still in the registry of the court, or in the hands of the receiver. This will eliminate the necessity of further discussion of certain propositions connected with this topic stated by the counsel on both sides at considerable length.

The pending claims resolve themselves mainly into two classes: First, the claim of the counsel who initiated the proceedings, which is the first and the most substantial topic to be considered; and, second, the claims of the counsel who intervened for the purpose of securing complete liquidation with reference to the income bonds, so called, and the payment thereof.

The income bonds of the principal sum of \$507,000 were the larger indebtedness of the corporation when these proceedings commenced. The entire indebtedness at that time is given by some of the counsel as exceeding \$700,000, and the entire available assets as approximately \$35,000. Assets were secured by the efforts of the receiver to the amount of approximately \$2,000,000. This was accomplished without any assistance by the Bay State Gas Company, and very considerably by successful legal proceedings which met the hostility of its officers. The favorable results in this particular were at the end of very elaborate and difficult litigation, involving expenditures vastly beyond the pecuniary resources of the Bay State Gas Company. Without going further into details, and without undertaking to verify the figures, or to state them accurately, it is beyond question that, at the time proceedings were commenced, the Bay State Gas Company was not only utterly insolvent, but wholly unable to accomplish the favorable results which have been accomplished by the receiver, and utterly without hope or promise of any attempt in that direction. The ultimate end was that all the liabilities of the respondent corporation, including the income bonds, have been paid, the corporation made solvent, as we have said, and in addition thereto received out of the fund gathered by the court in excess of \$500,000 in cash above all its liabilities.

The proceedings were commenced by the applicants here, Patterson & Major, as solicitors and counsel, in the Circuit Court for the District of Delaware, on February 10, 1898, by two bills—one in behalf of Edwards and others as income bond holders, for themselves and such other bondholders as might join them; and one in behalf of Edwards and others as stockholders, for themselves and such other stockholders as might join them. The stock suit was never carried to a

decree. The master to whom these claims were referred, according to the interlocutory decree which we will give later, has reported, nevertheless, that proceedings in the stock suit supported the proceedings on the creditors' bill and were essential to the success of the latter. We are not disposed to make any distinction between the two, inasmuch as the practical result was that complainant Edwards succeeded, as the financial result shows, as a stockholder as well as a creditor. The record is such that we are satisfied that the two proceedings are to be regarded for present purposes as though they had been consolidated, so that in what we say with reference to the claim of Patterson & Major we will treat the two as though they were consolidated, and not make any distinction, as the master has done, between services and disbursements in one suit and services and disbursements in the other.

From that time to the present litigation in behalf of the original complainants so far has been conducted by Patterson & Major, and they have remained their sole counsel and solicitors.

The bills demanded an accounting, to which on the face of the bills the complainants were fairly entitled. It was also so held by the Circuit Court for the District of Delaware in two cases: *Edwards v. Bay State Gas Company* (C. C.) 91 Fed. 942, 946. Nevertheless, the litigation was protracted and difficult to such an extent that the counsel for the respondent corporation, who were reputed as gentlemen of great ability, and also of great tenacity of purpose, were able to bar the appointment of a receiver until May 26, 1903. Then the receiver was appointed, and he has been active as such through all subsequent years until the balance of the fund was paid over to the respondent corporation, as we have said, and the receiver was discharged, except as to the amount retained to meet the claims now in controversy.

In due course of time applications for the payment of the income bonds were made, out of which applications came the claims of the counsel of the second class. This litigation was also protracted, and resulted in a proceeding before Causten Browne, Esq., as master, which are printed in a volume known as the "Green Book," to which we have no particular occasion to refer with any detail. Two main propositions arose in reference to the income bonds, of which there were 507 outstanding, of \$1,000 each, carrying interest at the rate of 7 per cent. per annum, of which none had been paid since 1893; thus accumulating, all together, if interest proved to be a valid claim, a possible amount of about \$1,000,000. The main propositions about these bonds were, first, the claim on the part of the corporation that, as the principal of the income bonds had not become payable according to their terms, and especially as the corporation had been rendered solvent, holders of the bonds had no present right to have them liquidated and paid—a proposition which, if it could have been successfully maintained, would, in view of the improbability of income, and of the weakened credit of the Bay State Gas Company, although for the time solvent, have rendered their market value merely nominal, as they were not payable till May 1, 1939. The second main proposition was, in behalf of the income bond holders, that, although there was no evidence of any net income out of which the interest on the income bonds was to be paid according to their face, yet the respondent corporation had been

negligent and wasteful, and might have earned income sufficient therefor, so that, for that and other reasons, interest was to be added to the principal as we have said.

In its own mind the court leaned to the view on the first proposition that, according to the rules in regard to proceedings against insolvent debtors, a corporation when once insolvent is always insolvent, so far as the winding-up litigation is concerned, so that in bankruptcy universal liquidation is the rule. On the other hand, the court was of the impression that income bond holders were bound by the terms of the bonds, and entitled to nothing unless there was actual net income. The bill was originally filed and proceeded on this basis, as we understand, because it asked an accounting of income, and claimed that it had been wasted or applied to purposes to which, under the terms of the income bonds, it was unlawful to apply it. However, it is plain that these questions were serious, involving, as they did, large amounts. In behalf of the bondholders it was claimed that their proposition as to the interest had been sustained in the decisions we have referred to, although a careful examination leads the court to the view that there was nothing decisive in them in this particular.

This court has been insistent that an ancillary suit should be regarded as strictly ancillary, and that the proper court of administration, as well as the court of distribution, is the court of the domicile. We have sometimes refused to appoint receivers until proceedings of some kind had occurred in the district of the domicile. Here nearly the entire fund gathered by the receiver as described was gathered in this district. Nevertheless, presumably we should have remitted it to the district of the domicile, and sent all the parties there to obtain distribution. The record contains somewhat with reference to the removal of the fund from this district to the district of Delaware, and its removal back; but in the eyes of the law it was of no consequence whether distribution was in Delaware or here, and it happens that the fact that it is now here, and is being distributed here, arises, not from any efforts of counsel, but from informal communications between the judges.

On claims being filed for the liquidation and payment of the income bonds, they were referred to Causten Browne, Esq., as master, before whom, as we have said, very protracted proceedings occurred, as we have also said. The second class of claims before us is for counsel fees and disbursements in regard to such liquidation and payment; the proceedings therefor having continued through various phases until, by compromise, the face of the income bonds and a modicum of interest have been paid. To a certain extent these claims involve other claims for services of the first class we have described; but, as this relates to minor amounts, we can dispose of them in connection with the claims of the same claimants of the second class.

The claim of Patterson & Major as submitted was for \$125,000, plus disbursements of \$5,230.66. There is no question made by the Bay State Gas Company as to the amount awarded by the master to whom these claims were referred for their services and disbursements. Its objections go to the validity of the whole. The services were of the nature we have described, filing the two bills for Jacob Edwards and others, and following them through to the end.

It is especially objected that no allowance can be made to Patterson & Major for services subsequent to the appointment of the receiver. It is true that the receiver took charge of all litigation after his appointment, and employed his own counsel, who have been paid; and it was through his efforts and those of his counsel that the funds we have referred to were secured. Whatever Patterson & Major did with reference to the proceedings instituted by the receiver was nominal; and their services after the receiver was appointed were of a purely incidental character, and the master did not allow a very large amount on account thereof. Nevertheless, that, under the general rule, the compensation to be awarded by the court does not stop with the appointment of a receiver, was determined, for ordinary cases, by a careful opinion passed down by the Circuit Court of Appeals for the Fifth Circuit in *Burden Co. v. Ferris Co.*, 87 Fed. 810, 812, 31 C. C. A. 233. It was there shown that the obligations of counsel for the complainant in a bill like that filed in behalf of Jacob Edwards and others do not stop until the final decree, and do not stop pending proceedings. This rule was followed in the Second Circuit in *Bowker v. Haight Co.* (C. C. A.) 170 Fed. 67, in an opinion passed down in February, 1909. This question was passed over by us in *Weiss v. Haight Co.* (C. C. A.) 165 Fed. 432, in an opinion passed down November 17, 1908.

As to the generality of this claim, we have been unable to discover any substantial difference between this case and *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. The counsel for the Bay State Gas Company made a vigorous and plausible contest on the ground that, in *Trustees v. Greenough*, the fund was not sufficient to pay the legal expenses, so that after all the question there was purely one of contribution between creditors of the same class. From one point of view that is true, and it is also true that in many cases cited before us, or which may be found, the question was one substantially of contribution between those of the same class. This principle is stated in *Trustees v. Greenough* in the sentence beginning at the foot of page 532, and ending at the top of page 533, of 105 U. S. (26 L. Ed. 1157). It is an equitable principle, especially where the bill is expressly filed by an individual in behalf of himself and other individuals of the same class, with the express condition that the other individuals shall contribute to the expense of litigation. Of course, when others come in, they by implication assent to the terms on which they are invited to enter, although this limited rule has not stopped with those who have formally accepted the invitation.

There is another rule which is a broader one. So narrow a rule as that claimed by the Bay State Gas Company would sometimes be difficult of application, because under some circumstances a mathematical working out of it would be impracticable, and plainly unjust. But it is unnecessary to discuss this question at any length. The case before us is one of the administration and distribution of a fund which is purely equitable, because gathered by the equitable process of the court in equity. The rule is almost universally recognized in the United States that such a fund is subject to the payment of equitable costs. At any rate that rule is universally recognized in the federal courts.

This is stated at the outset at the foot of page 532 of 105 U. S. (26 L. Ed. 1157) in *Trustees v. Greenough*, while the rule claimed by the Bay State Gas Company is stated there only alternatively, and as cumulative. What is claimed here by Patterson & Major is strictly equitable costs, though not known as costs to the statute law or the common law. The tribunal in which these proceedings are is no more controlled by such limited rules as to costs than it is governed by the statute law or the common law in reference to many other topics.

As we have said, the Bay State Gas Company, which is the only party adverse to the claims here, makes no discussion of the amount allowed Patterson & Major. The master made no absolute finding on most of the claims referred to him. He found certain questions of law which presented difficulties to him. Assuming that these questions of law are mainly out of the way, as we have shown they are, he awarded Patterson & Major for their services \$61,390, and for disbursements \$5,230.66. He included in the disbursements the sum of \$1,000, as to which he says as follows:

"I find that \$1,000 in addition to the above was deposited with the clerk of the court in lieu of bond as security for costs upon filing petitions for interveners."

What became of the \$1,000, whether it was refunded, or whether it might have been refunded if called for, is not pointed out. Moreover, all the costs which the deposit was intended to protect may be taxed and recovered under the orders in reference to costs which have been or will be entered. Therefore we disallow that amount here. Patterson & Major excepted to the amount allowed by the master. There was properly some pruning as to minor matters pro and con by the master. For example, there were some questions about services for interveners other than the original complainants in the original bills in the Delaware district, also about allowances after the receiver was appointed; but we are satisfied that the whole amount allowed by the master is a liberal one, and that, in view of that fact, we need not stop with reference to the incidental items of the classes to which we have referred. We decide that an order may be entered, in accordance with the terms of the interlocutory decree of January 9, 1908, for the payment to Patterson & Major of \$65,620.66, in full for everything to be paid to them in pursuance of that decree; the same to be acknowledged as in full for all claims against any person or fund for services and disbursements with reference to any of the proceedings in the suits instituted by them, or in any ancillary suits.

We now take up the claims of counsel for services and disbursements in intervening proceedings, and all others which are covered by the interlocutory decree of January 9, 1908. These claims stand on an entirely different basis, and would not be entitled to cognizance here, except for the interlocutory decree of January 9, 1908, and except for the understanding between the parties to which that decree gave effect.

That decree, with the amendment of February 26, 1908, and the preliminary decree of May 16, 1907, were as follows:

May 16, 1907.

PUTNAM, Circuit Judge. This cause came on to be heard at this term upon the petition of the receiver for instructions, and upon the petitions of Charles H. Greenleaf for leave to intervene and for the establishment of claims and distribution of funds in receiver's possession, the petition of Thomas L. Sprague for leave to intervene, and the petition of Wilbur E. Barnard for leave to intervene. At the hearing due proof of service of the orders of notice upon said petitions was made before me. Certain additional appearances for holders of income bonds of the defendant were entered as follows:

C. Godfrey Patterson, Esq., for the complainants Jacob Edwards, Jacob Pfaff, Christopher M. Tower, George A. Smith, Lillie Chase, Fanny Chase, Gerard Bement and Katherine B. Bement, as executors of the last will and testament of Henry Pfaff, deceased, and for Caleb Haley and George H. Case, as executors, and Walter M. Bennett;

J. H. Benton, Jr., Esq., and H. H. Ward, Esq., for the defendant, Bay State Gas Company (of Delaware);

Messrs. Morse & Friedman for Dumont Clarke, and for John W. Dunklee, Emeline P. Barnes, Charles H. Greenleaf, and Herbert H. Barnes, executors of the estate of the late Amos Barnes, and Godfrey Morse;

Bancroft G. Davis, Esq., for Frank E. Smith;

Benjamin L. M. Tower, Esq., for Thomas L. Sprague; and

A. A. Folsom, Esq., for Wilbur E. Barnard.

And permission was given by the court to file the following petitions and answers, to wit:

The petition of Dumont Clarke for leave to intervene;

The petition of John W. Dunklee, Emeline P. Barnes, Charles H. Greenleaf and Herbert H. Barnes, executors of the estate of the late Amos Barnes, and Godfrey Morse, for leave to intervene;

The petition of Frank E. Smith for leave to intervene, and the intervening petition of the said Frank E. Smith; and

The answer of the defendant Bay State Gas Company (of Delaware) to the receiver's petition for instructions;

The answer of the said defendant Bay State Gas Company (of Delaware) to the petition of Charles H. Greenleaf, intervening bondholder, and other similar petitions;

The answer of Charles H. Greenleaf and Dumont Clarke to the receiver's petition for instructions; and

The answer of the complainants to the receiver's petition for instructions (to be filed by C. Godfrey Patterson, Esq., on or before Friday, May 17, 1907).

Thereupon it is ordered and decreed that all the foregoing petitions and answers be referred to Causten Browne, Esq., special master, to take proofs in reference thereto, make findings of fact and rulings of law, and recommendations with reference to the premises, and report all the same to the court, with all the proofs and proceedings before him, on or before the 8th day of June, 1907.

It is further ordered and decreed that the receiver be allowed and directed to appear before the master and be heard by him, so far as all the general interests require the same, and to produce before the master all such books and papers as may be proper and expedient in reference to the premises.

It is further ordered and decreed that all persons who have filed petitions for leave to intervene shall be permitted to appear before the master and to be heard by him, and to submit proofs and make suggestions, and to object and except to the master's report, and to be heard on such exceptions.

It is further ordered and decreed that the receiver pay from the fund in his possession as receiver the charges and disbursements of the master and of himself in reference to the premises, including reasonable allowance to counsel for the receiver to be determined by the court.

By the Court:

L. C. Tucker, Deputy Clerk.

January 9, 1908.

PUTNAM, Circuit Judge. This cause came on to be heard at this term upon the petition of the receiver for instructions, and upon the petitions of Charles H. Greenleaf for leave to intervene, and for the establishment of

claims and the distribution of funds in the receiver's possession, and petition of Thomas L. Sprague for leave to intervene, and petition of Wilbur E. Barnard for leave to intervene, and petition of Dumont Clarke for leave to intervene, and petition of John W. Dunklee et al., executors, for leave to intervene, and the petition of Godfrey Morse for leave to intervene, and petition of Frank E. Smith for leave to intervene, and intervening petition of Frank E. Smith, and answers to the several petitions; and thereupon, the several intervening petitioners and said Bay State Gas Company of Delaware and the complainants in said cause consenting thereto, it is ordered, adjudged, and decreed as follows:

First. The receiver shall set aside and retain from the funds in his possession a sum sufficient to pay the sum of ten hundred and seventy (\$1,070) dollars to the holders and owners of each and every one of the five hundred and seven (507) outstanding income bonds of the Bay State Gas Company of Delaware, bearing date May 1, 1889.

Second. The receiver shall out of such fund pay to the owner and holder of each of said income bonds the sum of ten hundred and seventy (\$1,070) dollars as soon as each such bond shall be surrendered to the receiver for cancellation.

Third. The intervening petitioners shall not be required to make other or further proof of their ownership of said bonds than they have made before Causten Browne, Esq., the master appointed in this cause.

Fourth. All persons having claims against the defendant company, the Bay State Gas Company of Delaware, may present the same to the receiver on or before the 1st day of April, 1908, and any claim not assented to by the defendant and the receiver shall, immediately upon presentation, be referred to Henry A. Wyman, Esq., of Boston, as special master to hear the parties and their evidence and report the facts to the court. No claim presented after the aforesaid date shall be considered or allowed by the receiver.

Fifth. The receiver is further ordered and decreed to give notice of the entering of this decree and that the owners and holders of the income bonds hereinbefore mentioned may present the same to him for payment and cancellation of same, together with proof of their ownership of said bonds, and that claims against the defendant may be presented and proved as hereinbefore ordered, by publishing a copy of this decree in a newspaper published in the city of Boston, a newspaper published in the city of New York, and a newspaper published in the city of Philadelphia.

Sixth. The receiver shall further retain in his hands a sum sufficient to cover the disbursements made by or on behalf of the complainant and of the intervening bondholders for examiners' fees, stenographers' fees, clerks' fees, and other expenses incurred in connection with the suit and proceedings in this jurisdiction, and in connection with the suits and proceedings in the United States Circuit Court for the District of Delaware which resulted in the appointment of the receiver, and to cover, also, allowances to counsel for the complainants and for intervening petitioners and for the defendant, and allowance to the receiver and receiver's counsel, and to cover the charges and disbursements of the master in the proceedings had under the interlocutory decree referring said cause to Causten Browne, Esq., as master, and to cover the claims presented against the defendant company under the terms of this decree, and the master's fees and expenses in any reference under this decree, as may be agreed to by the receiver and the defendant company, or as may be determined hereafter by this court.

Seventh. The receiver is authorized to pay from the funds in his hands in this jurisdiction as follows:

(1) The bonds presented as and when they may be presented as hereinabove provided.

(2) All claims, allowances, counsel fees, and expenses otherwise mentioned in this decree as and when they may be assented to by the defendant and receiver, or as and when they may be adjudicated, and the amount thereof determined by the court.

Eighth. The balance of the fund remaining in the receiver's hands over and above what may be required to pay said bonds as aforesaid, and said allow-

ances of disbursements and said claims, shall be forthwith remitted by the receiver to the court of primary jurisdiction in Delaware.

Ninth. It is further ordered, adjudged, and decreed that any person herein authorized to present any claim whatsoever to the receiver may, in lieu of so presenting the same to the receiver, file it in the office of the clerk of this court by a petition addressed to the court and properly setting out the details of the claim. Thereupon the receiver shall be duly notified of the filing thereof.

Tenth. It is further ordered, adjudged, and decreed that every income bond paid by the receiver as herein provided shall immediately on payment thereof be canceled by him by suitable inscription thereon, showing the payment thereof by him in accordance with this decree, and naming the date of payment and the person to whom paid, and immediately thereafter the same shall be filed by the receiver with the clerk of this court, to remain in the office of such clerk until otherwise ordered.

Eleventh. It is further ordered, adjudged, and decreed that the notice to be given by the receiver as herein provided shall be by publishing three several times in the Boston Daily Advertiser, a newspaper published daily in the city of Boston, in The Sun, a newspaper published daily in the city of New York, in The Morning News, a newspaper published daily in the city of Wilmington, Delaware, and in The Press, a newspaper published daily in the city of Philadelphia, copies of this decree duly certified as such by the clerk of this court, and that the receiver shall cause the same to be published as aforesaid in each of the above papers once during the current month of January, and at least twice in each of such papers during the month of February, next, and that the receiver shall make to the court due proof of such publications on or before the 14th day of March next.

By the Court:

Alex. H. Trowbridge, Clerk,

By L. C. Tucker, Deputy Clerk.

We hereby assent to the entry of the foregoing decree, the length of time for the presentation of claims to be 30 days from the date of the last publication, or such other time as the court may fix, and the special master to be Henry A. Wyman, Esq., or such other person as the court may name.

Henry Major,

C. Godfrey Patterson,

Counsel for Complainants.

C. Godfrey Patterson,

Counsel for Robert J. Edwards.

C. Godfrey Patterson,

Counsel for Haley & Case, Executors, and Bennett Morse & Friedman,

Counsel for Greenleaf, Dunklee, Clarke, Godfrey Morse and Emeline P. Barnes et al., Executors of Estate of Amos Barnes, Income Bondholders. Morse & Friedman,

Counsel for Godfrey Morse, Executor of Estate of Leopold Morse.

Benj. L. M. Tower,

Counsel for Thomas L. Sprague.

H. M. Burton,

Counsel for Wilbur E. Barnard.

Bancroft G. Davis,

Counsel for Frank E. Smith.

J. H. Benton,

N. Matthews,

Counsel for Bay State Gas Company of Delaware.

Alfred S. Hall,

Counsel for Walter D. Middleton.

February 26, 1908.

PUTNAM, Circuit Judge. It is ordered, adjudged, and decreed that the decree entered on January 9, 1908, be amended so that the fourth paragraph thereof shall apply to all claims to which said decree relates, whether against

the Bay State Gas Company of Delaware, or against the said receiver, or any funds which have come or may come into his hands.

It is further ordered, adjudged, and decreed that there be given Henry A. Wyman, Esq., as master under the decree entered on January 9, 1908, a certified copy of the said decree and of this amendatory decree, which will stand as his commission in reference to all the matters covered thereby.

By the Court:

Alex. H. Trowbridge, Clerk,

By L. C. Tucker, Deputy Clerk.

The interlocutory decree of January 9, 1908, was entered after his report had been made by Mr. Browne, and before the questions involved had been submitted to the court. All there was in that direction were the informal expressions of the views of the court, already stated, that the holders of the income bonds were entitled to have their bonds liquidated and paid and that nothing could take the place of net income, so that no interest in arrears could be recovered unless it was shown that there had been net income which had been misappropriated or squandered. As to the claims of counsel for the interveners, they are opposed, both as to their validity, so far as we are concerned, and as to amounts. As we have already said, the claims are concretely represented as to the amount of legal services and labor involved by the very voluminous "Green Book," to which we have already referred.

It is claimed by the Bay State Gas Company that the interveners were early informed that the proposition of the Bay State Gas Company that the holders of the income bonds were not now entitled to have them liquidated and paid was abandoned. Very likely the burden of the conversations on that topic was in that direction. At any rate, the master was so impressed thereby as to find in substance that the interveners were advised that they had no occasion to litigate that question, and that, therefore, the litigation before Mr. Browne should have been limited to the question of interest, and that as to this the interveners were wrong; so that, on that, on both propositions, from an equitable point of view, their counsel should take nothing. On the other hand, the court is clear that, if the Bay State Gas Company did not intend to contest the question of liquidation and payment, it should have informed the court by some pleading or other full statement to that effect, and that, in the absence of this, the interveners were entitled to litigate, and should have done so.

As to the labor and expense, represented in the "Green Book," which related to the claim of the interveners for interest, that they finally abandoned this claim, that the claim could not legally be maintained, and that, therefore, in an equitable point of view, they should take nothing by it, the court accepts the view of the Bay State Gas Company that what is described as "equitable costs" is ordinarily, though not always, analogous to allowances for salvage services. This right to allowances arises out of the creation of a fund by the parties who claim them, and not out of ordinary services in litigation. Ordinarily the fund must have been created by the services. Here there is nothing of that nature. There is no claim that any fund was thus created. Therefore there is no ordinary basis for applying the rules which support the claim of Patterson & Major, and no basis for a charge against the fund for these services and disbursements, except the agreement of counsel as represented in the decree of January 9,

1908. Looking at the circumstances of the case as known to the court at the time this decree was assented to, the court has no question that it was a compromise decree, and that it was intended to provide generally for the services and disbursements of the class which we are discussing. Therefore, like all other claims for professional services and disbursements, these were to be rendered to, and originally paid for by, clients independently of the success of the counsel employed, so long as there was nothing to impugn good faith or reasonable care.

It is apparent, as we have already expressed our opinion, that, notwithstanding the inchoate views of the court, as we have stated them, there were, in reference to this question of interest, and also, as the case stood, in the absence of any pleadings to the contrary, on the question of the immediate realization of the income bonds, sufficient to sustain good faith and reasonable care on the part of the counsel for the interveners in proceeding as they did. In fact, it may well be said that, in the state of the authorities, especially in view of the fact that the proposition had not been authoritatively determined by the Supreme Court of the United States, counsel for the interveners would have been at fault if they had not made some effort with reference to the question of the very large amount of interest involved, as also it may be said that the counsel would have been at fault if, after careful investigation was had, they had refused to assent to a compromise which enabled them to realize cash for the full face of securities which would have been almost nonnegotiable for a series of years if the litigation had continued. At any rate, in view of the circumstances, the court must construe the interlocutory decree of January 9, 1908, as intending to reimburse the services and disbursements of the counsel for the interveners in such sums as they might properly have charged their clients, so that each client will be able to receive his income bonds in full, net, and without charges or rebates. By force of that decree the court is to award here whatever, under the ordinary rules between counsel and client, counsel would have been entitled to recover for services and disbursements; and this independently of any objection that, under the rule which protects the claim of Patterson & Major, and without the decree of January 9, 1908, nothing could have been awarded in this proceeding.

The principal claim of the class we are considering is that of Morse & Friedman. Morse & Friedman apparently filed sundry income bond holders' bills in equity for their special clients in the district of Delaware subsequently to the bills filed by Patterson & Major, but looking for similar relief. These bills resulted in nothing, although we understand they were consolidated with one or both of the original bills filed by Patterson & Major. Services and disbursements in independent bills of that character are not within the scope of the decree of January 9, 1908; and it may well be doubted whether they are within the jurisdiction of this court. Morse & Friedman also intervened directly for sundry income bond holders in the suit brought by Patterson & Major, as they had a right to do by the invitation to join contained therein. Of course, their clients in the independent suits to which we have referred, after those suits were consolidated, if they were consoli-

dated, with the suit brought by Patterson & Major, are entitled to be regarded also as interveners in the original proceedings.

These interventions by Morse & Friedman, and also by other counsel, were allowed by the Circuit Court in Delaware; but this, under the settled rules of practice, gave the interveners no standing except as interveners. As interveners they had no right to control the litigation, and no right to interfere with it, and no occasion to employ counsel for either, unless by special leave of the court. Apparently one or more of the interveners made objections against the competency of Patterson & Major, and sought to obtain a standing other than as mere interveners; but the charges against Patterson & Major were not sustained, and by the order of the court the objectors were left to remain mere interveners. The duty of lawyers acting in behalf of interveners under these circumstances does not involve anything more than the ordinary duty of solicitor, and in no way involves duties corresponding to those of barristers. Therefore their charges should be on the scale of charges by solicitors, being merely for drafting applications, attendance, and disbursements; and, in valuing the compensation to be allowed mere interveners, that view of the law must be maintained by us. This does not refer to the active intervention with reference to the proceedings before Mr. Browne, which was active for the purpose of securing liquidation and payment, and in which, in the eyes of the law, all interveners stood on the same basis of right and control.

In addition to the interventions which we have referred to, Morse & Friedman claim to have made certain investigations and performed certain services with reference to various matters concerning the litigated assets of the Bay State Gas Company. As to these, however, they obtained no standing as counsel in the Circuit Court for the District of Delaware, and therefore they cannot as to such be recognized by us now, for the reasons we have already suggested. The principal services of Morse & Friedman, indeed the services which constitute the basis for any considerable allowance to them, were in connection with the litigation represented by the "Green Book." In that litigation they represented quite an amount of income bonds, although not very large. Yet, though not in any way pointed out by the law as having the exclusive control of those proceedings, they initiated them, and, by common consent, they seem to have borne the burden thereof.

Their claim covering all their services and disbursements was \$35,-513.15. The master, on account of certain propositions of law which embarrassed him, made only contingent findings in their favor. The propositions of law which he reported to the court we have disposed of by what we have already said. Going over his computations, we think we substantially adopt his award so far as the value of the services is concerned, and do justice so far as we can understand this complicated record, and make a slight addition, by directing that an order be entered paying them \$10,000 for all their services and disbursements, with the same provision that this be in full as stated with reference to our allowance to Patterson & Major.

We will state here once for all that this provision which we direct with reference to making the allowance for Patterson & Major to be in full is to be so stated in all the orders herein provided for.

The next claim is that in favor of Mr. Bancroft G. Davis. The court knows personally that Mr. Davis was attentive with reference to the litigation represented by the "Green Book"; but on the whole it is satisfied that the amount suggested by the master, \$1,800, is liberal compensation for all services and disbursements, and an order will be entered accordingly.

With reference to the claim of Mr. Benjamin L. M. Tower, which, so far as we can discover, entitles him only to a solicitor's allowance in connection with interventions, we direct an order for \$552.71, for services and disbursements, the same to be awarded to the legal representatives of his estate, who have appeared of record.

Burton & Folsom have filed no brief before us. We understand that they were purely counsel for interveners who proceeded before Mr. Browne. The present master has reported an allowance of \$300 in full for services and disbursements, with which we are satisfied; and we direct an order accordingly.

Mr. Hall occupied a like position with Burton & Folsom, and we direct an order for \$100 for services and disbursements, as suggested by the master.

Mr. Hoffecker has filed no brief before us. We cannot discover that he rendered any services, except as solicitor for interveners in one or both of the original suits in the district of Delaware. He claims to have been employed as counsel in connection with Patterson & Major, but we find no proper evidence thereof; and we accordingly direct an order in his favor, on the basis of the computation for solicitors, in the sum of \$150.

Mr. Kittredge apparently did not enter any appearance as solicitor or counsel; so that, though he may have been useful as a negotiator, which is the characterization given him by the master, he has no standing which entitles him to recognition from the court in these proceedings.

Mr. Barton was employed by the respondent corporation, and his claims should have been proved in the usual way before the receiver. We do not think we are bound to take any jurisdiction in reference to them; and, as the questions of fact involving the amount and the value of his services are very doubtful and complicated, we shall direct that his claim stand as a claim to be adjusted in the usual way by the receiver under the general orders for proofs of claims. If, however, both parties agree to an order allowing him the amount reported by the master, \$1,271.46, it may be entered.

The claim in behalf of the estate of James E. Leach is an anomalous one, over which we have no jurisdiction. It is a claim for compensation as a receiver in a suit brought by the Bay State Gas Company, out of which that corporation apparently received a very large benefit. In the final decree, apparently by an oversight, no compensation was awarded him. The bill was filed in a state court, and that court alone has, or had, jurisdiction to determine or award the compensation now asked for. It is plain, however, that the representatives of his estate have a strong equity against the respondent corporation, and the court is confident that the matter will be satisfactorily and fairly adjusted without interference by us.

Interest will be allowed on the amounts herein awarded at the rate of $2\frac{1}{2}$ per cent. per annum from the time the fund from which these claims will be paid was deposited in the National Shawmut Bank in accordance with the order entered on August 12, 1908, to the date of our order appended hereto; and no other interest will be allowed. *Thomas v. Western Car Company*, 149 U. S. 95, 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663; *Hutchinson v. Otis*, 115 Fed. 937, 944, 53 C. C. A. 419.

No costs will be allowed, except what may be due the clerk, including all printing, with the printing of this opinion, and the disbursements of the receiver, and the compensation and disbursements of the master, Henry A. Wyman, so far as each has not been satisfied. The cost of reporting additional evidence in accordance with the order of April 1, 1909, will be left standing on that order. The clerk is directed to submit a taxation to the respondent corporation, and the respondent corporation is directed to submit an order in accordance with the taxation when the same has been settled.

Each claimant to whom an allowance has been made will file a draft order within one calendar month from the day of the passing down of this opinion, in the absence of which the respondent corporation will enter an order that his claim is dismissed. The respondent corporation may file corrections of draft orders within two weeks from the expiration of such calendar month. The clerk is directed to enter the following order:

Ordered, that orders allowing or disallowing the claims referred to Henry A. Wyman, master, per the interlocutory decree of January 9, 1908, as amended, be entered as directed in the opinion passed down this 23d day of September, 1909, and all other claims referred to the master under that decree are hereby dismissed on their merits, and the taxation of the costs and the payment thereof will be as directed in such opinion.

THE MARSHALL O. WELLS.

In re PERTH AMBOY DRY DOCK CO.

(District Court, D. New Jersey. September 16, 1909.)

1. COLLISION (§ 73*)—SAILING VESSEL AND FISHING BOAT—BURDEN OF PROOF.

Under article 26 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which makes it the duty of sailing vessels to keep out of the way of sailing vessels or boats engaged in fishing, and not in the fairway used by vessels other than fishing vessels or boats, a schooner which ran down a fishing boat, either anchored or fishing with trawls, to avoid liability, has the burden of showing that she was without fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 103; Dec. Dig. § 73.*]

2. COLLISION (§ 71*)—SCHOONER AND FISHING BOAT—FAILURE TO KEEP LOOK-OUT.

A schooner held liable for the death of an occupant of a fishing boat, which was run down by the schooner while the boat was either anchored or engaged in fishing in New York Bay, and practically stationary, on grounds commonly used for catching lobsters; it appearing that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

schooner kept no efficient lookout and that no one on board saw the boat prior to the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit by the Perth Amboy Dry Dock Company, as owner of the schooner Marshall O. Wells, for limitation of liability, in which Jacob Elzer, Sr., administrator, claimed damages for the death of Rudolph Elzer in collision. Claim for limitation allowed, and decree for damages in favor of claimant.

Cushman, Dewell & Cushman, for libellant.

McDermott & Enright (Jacob Fromme, of counsel), for respondent.

RELLSTAB, District Judge. On the 3d day of June, 1905, Rudolph Elzer, while employed on a small power boat, met his death in New York Bay, in consequence of said boat being run into and sunk by the schooner Marshall O. Wells. On the 20th day of May, 1907, Jacob Elzer, Sr., as administrator of Rudolph Elzer, brought suit in the Circuit Court of the United States for this district against the Perth Amboy Dry Dock Company, owner of the schooner, for \$25,000 damages, alleging that said death was caused by the careless, unskillful, and negligent handling and managing of said schooner by the agents of the defendant. On the 17th of June, 1907, in order to obtain the benefit of the law of limited liability, said defendant filed a libel in this court against the said administrator and all other persons who had suffered loss or damage by said disaster. The libel is in the usual form of libels in causes of limited liability, setting forth the bringing of such action, libellant's sole ownership of the vessel, its size, capacity, value, business engaged in at the time of the disaster, and that it was then being navigated and controlled by a competent crew; denying libellant's responsibility for such death and liability for the collision; declaring its purpose to contest such action, and all claims by reason of said disaster; and praying for an appraisal of the value of its interest in said schooner, the issuing of a monition citing all persons claiming damages by reason of said collision to appear and make proof of their claims, and for an adjudication by this court of the matter in controversy, limiting its liability (if any be found) to the value of said schooner, etc., and the restraining of the further prosecution of the action brought by said administrator. In the third and sixth articles of its libel the libellant alleges the facts under which said collision took place, to be as follows:

"Third. That on the 3d day of June, 1905, the said schooner Marshall O. Wells, was on a voyage from a port in the state of New Jersey to New York, light, looking for cargo. That while proceeding on said voyage, and having arrived at a point between the lighthouse known as 'Robins Reef light' and the bell buoy near the same, a launch, boat, or skiff propelled by some kind of mechanical power, without any warning to those on board said schooner, crossed the bows of said schooner and brought herself into collision with said schooner. That at once upon it being discovered that the collision had upset the said power launch, boat, or skiff, and that one of the men from said power launch, boat, or skiff was in the water, the way of said schooner was stopped, and a boat launched, and an attempt made to rescue the said man.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

That said attempt being unsuccessful, although diligently prosecuted by the crew of the said schooner and the companion of the man who had been precipitated into the water by the collision, the said schooner proceeded on her voyage."

"Sixth. That on the said voyage of the said schooner Marshall O. Wells, at the time of the accident heretofore described, on the 3d day of June, 1905, the navigation and control of the said schooner Marshall O. Wells were in charge of a competent crew. That the collision which resulted in the sinking of the said power launch, boat, or skiff, and the drowning of the said Rudolph Elzer, were done, occasioned, and incurred without the privity or knowledge of your libelant and petitioner, as well as without any fault or negligence on the part of those in charge of the navigation and control of the said schooner Marshall O. Wells. Your libelant and petitioner believes, and so alleges the fact to be, that the said collision was brought about entirely by the carelessness and negligence of the said Thomas Lindsay and Rudolph Elzer, who were navigating and controlling said power launch, boat, or skiff, in attempting to cross the bows of the schooner Marshall O. Wells in an unlawful and improper manner."

Upon proofs taken the value of the schooner was determined to be \$1,500. Thereupon the stipulation to pay said amount if the court should so adjudge, and the proof of claim and answer of said administrator were filed. The fifth paragraph of the respondent's answer contains the statement of the facts under which the disaster took place, as contended for by the claimant, which statement is as follows:

"Fifth. He alleges * * * that at the time of the death of said Rudolph Elzer, as hereinafter stated, and prior thereto, the schooner Marshall O. Wells was owned and, as he is informed and believes, under the control, management, and navigated by, the Perth Amboy Dry Dock Company, the above-named libelant, a corporation organized under the laws of the state of New Jersey, having its place of business at Perth Amboy, in the state of New Jersey, and that upon information and belief respondent's intestate, Rudolph Elzer, on or about the 3d day of June, 1905, was in a skiff upon the water of the bay of New York, between what is called the 'bell buoy' and Robins Reef light, Richmond county, state of New York, and while Rudolph Elzer was in said skiff as aforesaid said schooner Marshall O. Wells with great force and violence ran into and upon said skiff, thereby sinking said skiff, and wounded, bruised, and crushed the body of Rudolph Elzer, and threw the said Rudolph Elzer into the waters of said bay, thereby causing him to lose his life by drowning, without any fault of his own, but solely through the fault, carelessness, and negligence of the above-named libelant, Perth Amboy Dry Dock Company, its servants, agents, or employes; that it was the duty of said Perth Amboy Dry Dock Company, its servants, agents, or employes, at all the times hereinbefore mentioned, to carefully and skillfully move and propel, manage, and control said schooner, so as to avoid colliding with, striking, and running into said skiff in which said Rudolph Elzer was as aforesaid, but that said Perth Amboy Dry Dock Company wholly failed to perform said duty as aforesaid, owing to this carelessness and negligence, and that of its agents, servants, or employes, among other things in the following particulars: (1) That said schooner Marshall O. Wells was insufficiently and improperly manned and equipped for the voyage on which she was bound. (2) That she had no competent and sufficient lookout, properly stationed and attentive to his duty as such, and engaged in the proper performance thereof. (3) That said schooner Marshall O. Wells took no timely and proper steps to avoid the skiff in which said Rudolph Elzer was, as said schooner was bound by law to do. (4) That said schooner had no sufficient and competent man at the wheel. (5) That said schooner Marshall O. Wells took no proper steps whatever to avoid said collision or lessen the damages, thereby causing the death of said Rudolph Elzer, as hereinbefore stated, for which claim is made by the respondent for twenty-five thousand (\$25,000.00) dollars damages."

The respondent prays for an adjudication that the loss was occasioned by the carelessness and negligence of said shipowner, etc., and that it occurred with the privity and knowledge of the owner of said schooner.

There is nothing in the evidence that suggests privity or knowledge of the libelant, and there is no contention by it that, if Elzer lost his life by the careless or negligent handling of the schooner, the damages recoverable equal the ascertained value of that vessel, viz., \$1,500. It will be noted that the libel charges that the small motor boat (which hereafter will be called boat) was in motion, and that its navigator was trying to cross the schooner's bow at the time it was struck. The answer denies this, and charges that the boat was anchored at the time it was run down, and that the schooner had no competent lookout, and was carelessly and negligently handled, and that that was the cause of the disaster. If the boat was at anchor when struck, the liability of the schooner is clear. *Wells v. Armstrong* (D. C.) 29 Fed. 216-219; *The Agnese*, 97 U. S. 309-315, 24 L. Ed. 890; *The Dean Richmond* (D. C.) 103 Fed. 701, affirmed 107 Fed. 1001, 47 C. C. A. 138; *The Michigan* (C. C.) 52 Fed. 501-505. If the boat, when struck, was used in fishing, and was not obstructing the fairway used by vessels other than fishing boats, the schooner is liable. Article 26, Act August 19, 1890, c. 802, 26 Stat. 327, re-enacted by article 26, Act June 7, 1897, c. 4, 30 Stat. 96-102, 2 Fed. St. Ann. pp. 163-181 (U. S. Comp. St. 1901, p. 2883).

Of the four witnesses called to testify to the occurrence, but two saw the collision—Thomas Lindsay, the owner of the boat, and Joshua W. Taxter, the captain of the ferryboat Middletown. The witness John O'Conner, cook and deckhand, and William Spice, captain, of the schooner, did not see the collision, and knew nothing of it till afterwards. The undisputed evidence establishes that the boat was 21 feet in length by 6 feet in width, drawing about a foot and a half of water, propelled by a three horse power motor; that about 8:30 a. m., on June 3, 1905, at about flood tide, the weather clear, and a fair breeze from W. N. W., this boat, while at a point off Robins Reef, between the light and bell buoy northeast of the buoy, and about 400 feet therefrom, containing Lindsay and the deceased, was run down by the two-mast schooner Marshall O. Wells, running light, which had shortly before come out of the Kills under its own sails steered by the master, Capt. Spice, headed eastward for Red Hook, Brooklyn; that Lindsay saved himself by grasping the schooner's stays, drawing himself over its bow; that Elzer was knocked into the water and drowned; that both Lindsay and Elzer were fishermen, and had gone out to the reef that morning to trawl for lobster; that that was a regular place, frequently used by Lindsay and others, for lobstering; that the schooner was passing in the place customary for vessels to pass. The contradictory testimony relates to the situation of the boat and whether the schooner had a proper lookout.

As to the situation of the boat, whether anchored or in motion, and, if the latter, how and why moved, Lindsay testified that when they got to the reef the boat was anchored on the east bank, between the light and the bell buoy, northeast of the buoy and southeast of the light,

about 150 yards from both, in about 20 feet of water, there being about 13 to 15 feet of water there at low tide; that the higher part of the reef was between the boat and the light, there being about 6 feet of water on the reef; that he anchored, awaiting slack water before fishing, because the tide was too strong to lift the lobster gear; that his anchor was a regular 25-pound anchor, and he had 60 to 90 feet of rope out; that when he first saw the schooner it was coming from the westward out of the Kills, about a mile away, south of the light and west of the buoy, headed for the reef; that she crossed the reef between the buoy and the light; that when first seen the schooner was not headed for the boat; that she subsequently changed her course and struck the boat about amidships; that the schooner yawed considerably; and that as soon as it was apparent that the schooner was coming across the reef Elzer blew the horn, and continued blowing until the collision.

Capt. Taxter, of the ferryboat Middletown, called by the libellant, the only other witness to the collision, testified that he saw the boat and schooner about ten minutes before the collision; that the boat was but about 400 feet E. N. E. from the buoy, and not in the main channel; that she was on his port side, he being west of her; that both the men in her were standing up; that the man in the after part was hallooing and waving his hands for about five minutes before the collision; that he couldn't tell whether the boat was anchored or stationary, not being close enough to see; that one man was in the stern, and the other as if in the act of pulling the trawl to lift the pots; that the boat did not change her position at any time; that he did not see her moving with power, and that she was not cruising; that she was moving along, lifting the trawls under the power had from pulling the trawl; that he did not see any pots, and could not say how far she moved; that she did not cross the schooner's bow, as far as he knew, and that all he knew was that the schooner hit her; that the schooner did not change her course from the time that he first saw her until after the collision; and that at the time of the collision he was 500 or 600 feet away.

The difference in the testimony of the witnesses Lindsay and Taxter as to whether the boat was at anchor is not so radical as to be irreconcilable. They agree substantially as to the location of the boat for some minutes before and at the time of the collision. Lindsay, as the only surviving occupant of the boat, and the one who operated the motor when the boat was cruising, was, of course, in the best position to know the fact. Taxter was at the wheel in the pilot house, directing the course of the ferryboat on its southern trip from New York to Staten Island. In one portion of his testimony he says he first saw both the boat and the schooner about ten minutes before the collision, and in another place he says five minutes. Taking the latter statement as the more probable, he would be a considerable distance from the boat when he first saw her, and he was never nearer than 600 feet. He does not say that the boat was not anchored. He does say that the men in the boat were conducting themselves so as to give him the idea that they were lifting up the trawls, and that the boat was moving along the line of the trawls. He was looking at the boat from a con-

siderable distance, and his testimony as to the motion of the boat was more an argument than an assertion of fact.

The testimony of Lindsay is that the anchor was down and held by a rope about 60 feet long, being attached to the stern. It would seem that, with such a length of rope out in water not more than 20 feet deep, a boat of this small size, even at anchor, might be moving from one trawl to another, so that both statements, Lindsay's that the boat was at anchor, and Taxter's that it was his idea that they were trawling, could be true. Again, what appeared to Taxter, at the distance he was, as trawling, might have been the lifting up of the anchor by one of the men in the attempt (if such attempt was made) to get out of the way of the oncoming schooner. It is the duty of the court to reconcile differences or inconsistencies in testimony, if it can be done without violating the principles of logic; and my opinion is that there is nothing in the testimony of the witness Taxter that is so contradictory of the positive statements of Lindsay that the boat was at anchor at the time of the collision as to prevent the court from concluding that the boat was at anchor as stated.

But, even assuming that the boat was in motion at the time of and during several minutes before the collision, there is nothing in the testimony of Taxter that suggests that the boat was cruising, or was being propelled by its motor, or was making any attempt to cross the bow of the schooner at the time of the collision. If it should be held that the boat was not at anchor, the utmost effect that could be given to Taxter's testimony is that the men were then engaged in fishing, pulling up trawls; the boat moving along as they proceeded from one trawl to another. In either case, whether the boat was at anchor or actively engaged in fishing, it was the duty of the schooner, under sail, under the rules already stated as to the duty of sailing vessels under way when approaching a boat at anchor or engaged in fishing, where a fairway is not obstructed, to keep out of the way of such boat, because, under the facts in this case, if the boat was not at anchor, but fishing, there was still a fairway open for the schooner to effect its passage.

Therefore, whether the court should find that the boat was at anchor or actually engaged in fishing at the time of the collision, the fault is the schooner's. In determining this question the court is unable to give any weight to the alleged admission of Lindsay, as testified to by both Spice and O'Conner. Neither of these men, according to their testimony, saw the boat at the time of or before the collision, or knew anything about it until after Lindsay appeared on the deck of the schooner. They both testified, however, that the first words of Lindsay were an admission that he had tried to cross the bow of the schooner. O'Conner gives the words as follows:

"I tried to get across your bows, Captain; but I couldn't. My other man is overboard."

If Lindsay, at the time of escaping the consequences of the collision, made the statement attributed to him, it would, in the absence of creditable testimony that the fact was otherwise, be persuasive evidence that the collision was directly due to Lindsay's recklessness in

steering his boat across the bow of the schooner. Capt. Taxter's testimony, however, coming from the only disinterested source, precludes the idea that this collision took place while the boat was making such an attempt. A man standing up and gesticulating, and hallooing for several minutes before the collision, suggests rather an attempt to divert the course of the approaching schooner than an attempt to cross its bow. Furthermore, such testimony, when given by officers or seamen of the hostile vessel, is to be scrutinized with great care and doubtfully examined, as such evidence is easily manufactured, and often is.

No credence whatever can be given to the testimony of O'Conner. Its examination reveals a remarkable lack of memory, to put it mildly. Capt. Spice, the master of the schooner, has a strong interest in the result of this controversy; and the changing of a word or two of the statement as attributed to Lindsay will produce a radical change in meaning. Lindsay had just crossed the schooner's bow in escaping the collision. His mate had not succeeded in escaping. If he said anything about crossing the bow of the schooner, it might have referred to his own crossing after the collision, or the failure of his companion to do so, and have had no reference whatever to the cause of the disaster. It requires no imagination to conclude that neither Lindsay nor either of the two men on the schooner was in a perfectly normal condition at the time Lindsay spoke. He himself would be under the excitement of the rapid events involving the collision, and the man on the schooner, not having seen the boat or the collision, would be startled by the sudden appearance of a stranger on the schooner's deck. I doubt whether any of the three could give an accurate statement of the words that passed between them under such circumstances.

In the absence of Capt. Taxter's testimony, this testimony of an admission of culpability on Lindsay's part could have little weight as a refutation of his testimony of the causes that led up to the collision; but with Capt. Taxter's testimony before us it is too improbable for belief. There is no evidence that would justify the conclusion that the boat tried to cross the schooner's bow. In my opinion the boat was without fault when run down by the schooner. The burden is, therefore, on the schooner to show that she was without fault, or that the collision was the result of inevitable accident. This burden the schooner has not met. On the contrary, the evidence shows conclusively that she was sailing a course where it was usual for fishing boats to be at anchor or fishing at the proper tide, and that she did not keep an efficient lookout as required by the rules. *The City of Augusta*, 80 Fed. 297, 25 C. C. A. 430; *The Pilot Boy*, 115 Fed. 873, 53 C. C. A. 329.

The witness Lindsay testified that, when it became apparent that the schooner was heading for the boat and was going to cross the reef, the deceased took and blew a horn to attract the attention of those on the schooner. Taxter said that he did not hear a horn, but that he did see a man at the stern standing up waiving his hand, and heard him hallooing, and that this was continued for several minutes before the collision, during which time the schooner was coming head-on. Lindsay did not say that any one was hallooing, but it may very well be that both the blowing of the horn and the hallooing took place;

the former not having been noticed by Taxter, and the latter done by Lindsay in the excitement induced by the extremity of that time. Neither Capt. Spice nor the witness O'Conner, the only two persons from the schooner that were produced as witnesses, saw the boat or knew of the collision until after it took place. They both say that there was a lookout on duty. His name is said to be Tompkins. Lindsay says there was no lookout when he climbed over the bow of the schooner immediately after the collision, that the captain alone was on the deck, and that he was at the wheel. According to the testimony of Spice and O'Conner, this man Tompkins left the schooner at 12 o'clock the same day, and never returned to it, and was never seen by either of them thereafter. The testimony fails to disclose any proper effort to locate this man Tompkins and produce him as a witness in this case, a circumstance that should not be overlooked. Assuming that Tompkins was a member of the schooner's crew, it does not follow that he was stationed as a lookout that morning, nor that, if he was so stationed, he was attentive to his duties. If he was attentive to such an important duty, how could he have missed seeing the boat, or hearing the hallooing of Lindsay, or the blowing of the horn by Elzer in time to give notice to the helmsman to deviate his course to avoid the collision. If a proper lookout had been maintained on the schooner, the boat on Robins Reef would have been seen by him as the schooner passed out of the Kills into the bay. Taxter testified that he had the schooner and the boat in view for about five minutes before the collision. What he saw and heard would have been seen and heard by an efficient lookout on board the schooner in time to avert the collision. This failure of duty on the part of the schooner was the sole cause of the disaster that overtook the fishing boat, and the libellant is legally responsible for the collision, and in damages for the death of said Rudolph Elzer.

This respondent is entitled to a decree for \$1,500 damages, the full value of said schooner.

COLUMBIA RIVER PACKERS' ASS'N v. McGOWAN et al.

(Circuit Court, W. D. Washington, W. D. September 10, 1909.)

No. 1,385.

1. STATES (§ 12*)—BOUNDARY BETWEEN WASHINGTON AND OREGON—COLUMBIA RIVER.

The boundary between the states of Washington and Oregon, as fixed by the Supreme Court in the case of *Washington v. Oregon*, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969, at the mouth of the Columbia river follows the channel on the north side of Sand Island as it exists at the present time.

[Ed. Note.—For other cases, see States, Cent. Dig. § 8; Dec. Dig. § 12.*]

2. COURTS (§ 266*)—FEDERAL COURTS—TERRITORIAL LIMITATIONS—BOUNDARY BETWEEN WASHINGTON AND OREGON—CONCURRENT JURISDICTION OVER COLUMBIA RIVER.

Act Feb. 14, 1859, c. 33, §§ 1, 2, 11 Stat. 383, admitting the state of Oregon into the Union, which provides that said state shall have jurisdic-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion in civil and criminal cases on the Columbia and Snake rivers concurrently with states and territories of which those rivers shall form a boundary in common with such state, vests the courts of Washington with jurisdiction of cases arising on the Columbia river where it forms the boundary between the states, and by the act creating the Western district of Washington the federal courts therein are given jurisdiction over the same territory concurrently with the courts in Oregon, and it is immaterial that the Constitution of Washington makes no mention of such jurisdiction beyond its boundaries.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807; Dec. Dig. § 266.*]

3. COURTS (§ 266*)—FEDERAL COURTS—TERRITORIAL LIMITATIONS—BOUNDARIES—JURISDICTION OVER COLUMBIA RIVER—"ON."

While such jurisdiction extends only to things "on" the river, and not to permanent structures attached to the riverbed within the other state, it includes a suit relating to floating structures used in connection with fish nets in the river, although anchored by means of weights.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807; Dec. Dig. § 266.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4960-4966; vol. 8, p. 7737.]

4. INJUNCTION (§ 129*)—VOLUNTARY DISMISSAL—RIGHT OF DEFENDANT TO REMEDY ON INJUNCTION BOND.

Where a federal court in Washington granted a restraining order enjoining a defendant from using floating structures in the Columbia river on the Oregon side, which it had power to do under the statutes giving concurrent jurisdiction to the courts of both states, although the structures were then erroneously supposed to be within the boundary of Washington, it will not dismiss the suit at the instance of complainant, and thus deprive defendant of any remedy it may have on the injunction bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279-281; Dec. Dig. § 129.*]

In Equity. On motion by complainant to dismiss.

C. W. & G. C. Fulton, for complainant.

Welsh, Welsh & O'Phelan, for defendants.

W. P. Bell, Atty. Gen., State of Washington, amicus curiæ.

DONWORTH, District Judge. This is a suit in equity begun originally in this court in July, 1908. The complainant is a corporation organized under the laws of the state of Oregon, and the defendants are citizens and residents of the state of Washington. The object of the suit is to obtain an injunction restraining the defendants from placing in any of the waters of the Columbia river in front of or adjacent to certain premises described as sites Nos. 2 and 3 on Sand Island, and from maintaining in front of said premises in said waters any obstruction whatever, particularly certain obstructions alleged in the bill to be there maintained by the defendants, and from interfering with the free and uninterrupted ingress to and egress from said premises. There is also a prayer that all obstructions placed in said waters in front of said premises be abated, and that the defendants be required to remove the same and for general relief. The amended bill filed August 11, 1908, alleges that the United States is the owner of "that certain tract of land situated and located within the county of Pacific in the state of Washington, the same being an island in the Columbia

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

river near the mouth of said river, which was and is generally known and named upon all official records, maps, and plats as Sand Island," and that, pursuant to an act of Congress granting authority to the Secretary of War for that purpose, the complainant holds a valid lease for those certain portions of Sand Island designated on the maps and plats of the government survey as sites Nos. 2 and 3 for the term of three years from May 1, 1908, "together with the tide lands, water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia river." It is further alleged that:

"Said sites 2 and 3 aforesaid are on the south side of said Sand Island, and are on the north shore of the main ship channel of the Columbia river, and within the jurisdiction of this court, and within the Western district and Western division thereof."

It is also averred that:

"Under the laws of the United States the said waters are required to be kept free from obstructions, and that, by virtue of said laws and said lease aforesaid, plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed, and is entitled of right to the free, unobstructed ingress to and egress from said premises, and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores."

The acts of the defendants constituting the alleged interference with complainant's rights are set forth in the amended bill as follows:

"That, in order to operate seines in front of said sites 2 and 3, it is necessary that the waters and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of 200 or 300 fathoms; each seine being about that long, and to permit the same to drift with the tide and current, and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and under the same lease aforesaid, when the defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in the channel of said navigable waters of said Columbia river directly in front of plaintiff's leased premises, and in front of said sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters, consisting of large stones to which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were 7 in number, and were placed in the waters of said river about 50 to 100 feet from the shore, and about 200 or 300 feet apart. That said stones and anchors, or weights, were large and of great weight, and were so placed that plaintiff could not operate its seines in the waters of said river, and could not land its seines or either thereof on the shores of said leased premises, and absolutely prevented plaintiff from operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river. That plaintiff thereafter, and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions, and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof, when the said defendants again on the 4th day of July, 1908, wrongfully and unlawfully, and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed; that is to say, that each of said obstructions consisted of a large stone or stones of great weight to which were attached wire cables and chains, and the same were placed on the bed of the river, and the float or buoy of large timbers were at-

tached at the end of said cables, and that said obstructions were placed from 50 to 100 feet from the shore of said sites 2 and 3, and from 200 to 300 feet apart, and in such a position as to absolutely prevent plaintiff from operating its said seines, and to prevent plaintiff from landing its seines or any seine on said shore. That said obstructions are in the navigable waters of said river, and are so placed as to prevent the free ingress to and egress from said premises, and interferes with and prevents free access to said premises. That the defendants threaten to, and will, unless restrained by this court, continue to place other of said obstructions in said waters in front of said premises, and threaten to continue to use and employ the same and will do so unless restrained by this court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any practical use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith, and each is an obstruction to the navigation of said river. * * * That the said trespass herein complained of is continuous, and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises, and will continue to harass and annoy plaintiff and prevent plaintiff from ingress to and egress from said premises."

On the filing of the bill the court fixed a time for hearing the application for an injunction pending the suit, and at the same time issued a restraining order restraining the defendants "from in any manner interfering with the free ingress to and egress from, and from placing or maintaining any obstruction or anchor or killock, or any timber, log, or appliance whatever that will interfere with the use of a seine floating upon and navigating the waters of the Columbia river in front of or adjacent to sites Nos. 2 and 3 on Sand Island." This order has not been dissolved. At the time of its issuance complainant was required to file an injunction bond in the penal sum of \$2,000.

Thereafter the defendants appeared and filed separate answers, wherein, after denying and admitting certain of the allegations of the amended bill, extensive affirmative matter is set forth. Briefly stated, the allegations of the defendants are to the effect that their acts in the premises were and are bona fide operations for the purpose of catching salmon fish by means of set nets under licenses issued by the fish commissioner of the state of Washington; that the objects maintained by them in the river in front of Sand Island were below the line of extreme low tide, and were put and kept there for the purpose of operating said set nets and marking and holding the location thereof; that each set net was located by a stone anchor weighing about 300 pounds, to which was attached a piece of chain about five feet long clamped to a wire rope about 25 feet long; and that to this was attached a cedar buoy about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location. The affirmative portions of the answers set forth with a good deal of detail the facts upon which the defendants base their claim of the right to maintain and operate nets, and to prosecute the business of salmon fishing in this location. They further allege wrongful acts in the premises on the part of complainant, and pray affirmatively for relief by way of injunction for the purpose of preventing any interference by complainant with their set nets and necessary appliances.

There are allegations of diverse citizenship and other allegations showing the purpose of the defendants to set forth a complete cause of action on their part against the complainant.

At the time of the commencement of the suit and the issuance of the restraining order and also at the time of the filing of the amended bill and of the answers, both parties assumed and believed that the boundary between the states of Oregon and Washington was in the middle of the main ship channel of the Columbia river south of Sand Island, thus placing the island and its shores and the waters involved in this controversy wholly within the state of Washington. The location of the interstate boundary was at that time in litigation in a suit begun in the Supreme Court on February 26, 1906, by the state of Washington against the state of Oregon. That suit was decided by an opinion delivered November 16, 1908, and by a supplemental opinion delivered May 24, 1909. *Washington v. Oregon*, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969. Since the final decision of the Supreme Court, complainant has moved this court to dismiss the pending suit for want of jurisdiction on the ground that the suit is a local one and concerns real estate and property situated in the state of Oregon, and therefore not within the Western district of Washington. The motion is resisted by the defendants. The question of jurisdiction has been fully argued, and is now to be decided.

In view of the decision of the Supreme Court in the boundary suit between the two states, I must hold that Sand Island and the shores and waters constituting the place involved in this controversy are south of the boundary line and lie within the state of Oregon. Counsel for defendants have urged with much vigor that the present Sand Island is not the same island as the one described by that name in the opinion of the Supreme Court. They assert that the old Sand Island entirely disappeared several years ago, and that the present island, bearing the same name, formed later by the action of the tides and currents, is north of the line which the Supreme Court has fixed as the boundary. They ask a reference to a master for the purpose of ascertaining the facts in this regard. The answer to this contention is that the Supreme Court has clearly decided that the boundary is the channel north of the present Sand Island. In the opinion on petition for rehearing it is said:

"There are practically two matters presented—one whether the boundary near the mouth of the Columbia river was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons therefor." *Washington v. Oregon*, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969.

There is no doubt whatever that this decision fixes the boundary north of the Sand Island that now exists, and I so hold.

This brings us to the further inquiry whether this court has jurisdiction to hear and determine this cause and to enforce its decree therein by virtue of the legislation of Congress relating to concurrent jurisdiction on the Columbia river. In *Nielsen v. Oregon*, 212 U. S. 315, 316, 29 Sup. Ct. 383, 53 L. Ed. 528, that legislation is briefly summarized as follows:

"By paragraph 1 of the act of Congress of March 2, 1853 (chapter 90, 10 Stat. 172), all that part of the territory of Oregon lying north of the 'main channel of the Columbia river' was organized into the territory of Washington, and by paragraph 21 of the same act it is provided 'that the territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia river, where said river forms the common boundary between said territories.' Section 1 of the act of Congress admitting Oregon into the Union (Act of February 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the state, provides: 'Including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with states and territories of which those rivers form a boundary in common with this state.' And in paragraph 2 it is said 'the state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same.'"

The Constitution of the state of Washington defines the state boundaries and makes no mention of concurrent jurisdiction on the Columbia river, but, as will be shown later, the state has not lost such jurisdiction by reason of its failure to assert it by positive enactment. The territorial jurisdiction of this court is defined in the act dividing Washington into two judicial districts. That act provides that certain counties lying east of the Cascade Mountains with the waters thereof shall be detached from the judicial district of Washington, and "that the residue of said state of Washington with the waters thereof shall hereafter be the Western district of Washington." Act March 2, 1905, c. 1305, 33 Stat. pt. 1, 824 (U. S. Comp. St. Supp. 1907, p. 175). This language is ample to vest in this court as broad a jurisdiction over that part of the Columbia river involved in this controversy as any state court might exercise, and is to be read in connection with the former legislation of Congress above mentioned.

In *Nielsen v. Oregon*, supra, it is said:

"By the legislation of Congress the Columbia river is made the common boundary between Oregon and Washington, and to each of those states is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either state, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to 'civil and criminal cases,' but in the second section of that act there was given in general terms 'concurrent jurisdiction.' In *Wedding v. Meyler*, 192 U. S. 573, 584, 24 Sup. Ct. 322, 48 L. Ed. 570, construing the term 'concurrent jurisdiction,' as given to Kentucky and Indiana over the Ohio river, this court, reversing the Court of Appeals of Kentucky, said: 'Concurrent jurisdiction, properly so called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders v. St. Louis & New Orleans Anchor Line*, 97 Mo. 26, 30, 10 S. W. 595, 3 L. R. A. 390; *Opsahl v. Judd*, 30 Minn. 126, 129, 130, 14 N. W. 575; *J. S. Keator Lumber Company v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837, and the cases last cited. The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words 'meant only that the states should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. *Vicat Vocab. sub. v.* See *Rhode Island v. Massachusetts*, 12 Pet. 657, 718, 9 L. Ed. 1233. What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State v. Mullen*, 35 Iowa, 199, 205, 206."

Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel; that boundary sometimes changing by reason of the shifting of the channel. * * * But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the states."

In *State v. Mullen*, 35 Iowa, 199, the court sustained the conviction in Iowa of a person charged with maintaining a nuisance on a boat in the Mississippi river, although the boat was for a portion of the time resting on the soil of an island near to the Illinois shore, and within the territorial limits of Illinois. The rights of concurrent jurisdiction on the Mississippi river were substantially the same as on the Columbia. The court said:

"If this boat is so upon the river that the person maintaining it there is amenable to the laws of this state, and our courts have jurisdiction to try and punish him for keeping a nuisance, it is a logical sequence that this jurisdiction must draw after it everything necessary to make it effective and complete. We must either concede the right to abate the nuisance, or deny the right to try and punish the defendant for maintaining it. A denial of the 'drop of blood' is equally a denial of the 'pound of flesh.' It is claimed that to allow the officers of this state to seize this boat would work an invasion of the sovereignty of the state of Illinois. If the defendant may be tried by the courts of this state for an act done upon the boat, it must follow that the officers of this state may arrest him upon the boat for the purpose of bringing him before the court for trial. It would be inconsistent to say that the locus of a crime is within the jurisdiction of a court for the trial of an offense, and yet beyond it for the arrest of the offender. If the officers of this state may lawfully go upon the boat for the arrest of the defendant, why may they not lawfully do so for the seizure of the boat itself? If one is not an invasion of the sovereignty of the state of Illinois, why is the other?"

As above shown, this case is cited with approval in *Wedding v. Meyler*, 192 U. S. 573, 585, 24 Sup. Ct. 322, 48 L. Ed. 570. In the *Annie M. Smull*, 2 Sawyer, 226, Fed. Cas. No. 423, which is perhaps an extreme case, District Judge Deady sustained the jurisdiction in admiralty of the district court of Oregon over a vessel moored at a wharf at Kalama on the Washington shore. See, also, in addition to cases cited above, *Memphis Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527, and *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927. Nor was it necessary that the state of Washington should by its Constitution or otherwise assert its concurrent jurisdiction by expressly accepting the congressional enactments. "It must be remembered that this was legislation, and when it is enacted by the sovereign power that new states, when formed by that power, shall have a certain jurisdiction, those states as they come into existence fall within the range of the enactment and have the jurisdiction." *Wedding v. Meyler*, 192 U. S. 573, 583, 24 Sup. Ct. 322, 48 L. Ed. 570. It is, of course, clear, as held in the case last cited, that the concurrent jurisdiction given is jurisdiction "on" the river, and does not extend to permanent structures attached to the riverbed and within the boundary of the other state. Complainant's counsel urge that the present case does not involve things "on" the river, and contend that the cases of *Gilbert v. Moline Water Power Co.*, 19 Iowa, 319, and *M. & M. Railroad Co. v. Ward*, 67 U. S. 485, 17 L. Ed. 311,

are controlling. To me, however, it seems clear that the parties in this case are here contending about things "on" the river. I have set forth with some fullness their respective allegations and claims, and do not consider any extended reasoning necessary to demonstrate that the subject-matter of the litigation is within both the letter and the spirit of the congressional enactments. The only objects involved which by any possible theory could be considered permanent structures are the stone anchors, and I cannot assume that the stones at the bottom of the river are the only or even the principal things concerned in the controversy. If it should be held that the mere fact of anchoring a floating object takes it out of the grant of concurrent jurisdiction, there would be little left of that jurisdiction. It is not necessary, in order to uphold the jurisdiction, that the court have power to administer all of the relief asked. It is sufficient if the facts alleged show a substantial controversy between the parties within the jurisdiction of the court. It is also urged that the case of *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953, is in point, and is opposed to the views above stated. The question there involved, however, was chiefly legislative rather than judicial jurisdiction, and, were it not so, I should in any event feel bound by the decisions of the Supreme Court to sustain the jurisdiction of this court in the present case. Many nice questions must arise from conflicting state legislation in these cases, and I express no opinion at this time as to what law defines the rights of the parties at the place in controversy. But, as between courts of concurrent jurisdiction, the court that first acquires jurisdiction holds it to the exclusion of all others. The question as to what law will be the rule of decision between the parties relates to the merits, and not to the jurisdiction.

If at the time of the commencement of this action the court possessed the definite knowledge of the actual location of the state boundary which it now has, it is perhaps probable that in the exercise of judicial discretion, and with due regard for the comity of courts, the restraining order and injunction applied for would have been refused, leaving complainant to seek a remedy in the courts sitting in the state of Oregon. But a different situation is now to be met. By reason of the action of complainant in beginning suit in this court and obtaining the restraining order, the defendants have been prevented for an entire year from making any use of such nets and appliances as they may have had or may have purposed to have on the premises. If it should develop that they are in the right of the controversy (which is obviously a thing that cannot be known at this time), they should not be deprived of such remedy as they may have under the injunction bond or otherwise for yielding obedience to the orders of a court which, under the legislation of Congress, was a court of competent jurisdiction.

Numerous reasons may be assigned for the action of Congress in granting concurrent jurisdiction to new states bounded by the great rivers; and, though there are obvious difficulties, the conveniences far outweigh the disadvantages. The circumstances of the present case vindicate the wisdom of the enactment. Valuable rights being

in controversy in a situation near to the boundary line between the two states, and there being no process other than the writ of injunction that would prevent the use of force in the assertion of the diverse claims, this suit was brought in this court on the assumption that the location was within its jurisdictional limits. In my opinion the grant of concurrent jurisdiction sustains the right of this court to hear and determine the controversy and to enforce its decree, regardless of the fact that by judicial determination the actual boundary is now found to be so situated as to place the location of the controversy in the other state. To decline to retain jurisdiction of this suit would be to refuse to apply the congressional enactment to a case peculiarly within the reason for its existence.

The motion to dismiss is denied.

FIRST STATE BANK OF HOLSTEIN, NEB., et al. v. SHALLENBERGER,
Governor, et al.

(Circuit Court, D. Nebraska, Lincoln Division. October 16, 1909.)

1. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—BANKING—RESTRICTING BUSINESS TO CORPORATIONS—GUARANTY FUND.

The Nebraska act of March 25, 1909 (Laws Neb. 1909, p. 66, c. 10), which prohibits individuals from engaging in the banking business unless they do so through the agency of a corporation, and which also conditions the right to engage in that business in that form upon the making of enforced contributions from time to time to a depositors' guaranty fund to be employed in the payment of the claims of depositors of any bank which shall become insolvent, is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law"—and is in conflict with section 3 of article 1 of the Constitution of Nebraska, which declares: "No person shall be deprived of life, liberty or property without due process of law," and therefore is void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-830, 834-846; Dec. Dig. § 296.*]

2. STATUTES (§ 64*)—VOID PROVISION, WHEN INDUCEMENT TO PASSAGE OF ACT, RENDERS ENTIRE ACT INVALID.

The provisions of the Nebraska act of March 25, 1909 (Laws 1909, p. 66, c. 10), which prohibit individuals from engaging in the banking business unless they do so through the agency of a corporation, and also condition the right to engage in that business in that form upon the making of enforced contributions from time to time to a depositors' guaranty fund to be employed in the payment of the claims of depositors of any bank which shall become insolvent, were the inducement to the passage of that act; and as those provisions, so coupled together, are void, the entire act is thereby rendered invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

(Syllabus by the Court.)

Bill by the First State Bank of Holstein, Neb., and others against Ashton C. Shallenberger, Governor, and others, for an injunction. Decree for complainants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John L. Webster and William V. Allen, for complainants.
W. T. Thompson, Atty. Gen., Charles O. Whedon, and I. L. Albert,
for defendants.

Before VAN DEVANTER, Circuit Judge, and T. C. MUNGER,
District Judge.

T. C. MUNGER, District Judge. The Legislature of Nebraska passed an act relating to the conduct of the banking business within the state, by others than national banks, which was approved March 25, 1909 (chapter 10, p. 66, Laws Neb. 1909). This act purports to be a comprehensive regulation of the business named and to repeal existing laws upon that subject. It prohibits individuals from engaging in the banking business, unless they do so through the agency of a corporation, and also conditions the right to engage in that business upon the making of enforced contributions to a separate fund, called a "depositors' guaranty fund," to be used for the payment of the claims of depositors of any bank organized under the state law, which shall become insolvent. The state banking board is given authority to draw the money out of this fund to discharge the obligations of the insolvent bank to its depositors.

The complainants are certain incorporations and private individuals who were engaged in the banking business in this state under the laws in force prior to the passage of the act in question, and the object of the bill is an injunction against the enforcement of the act. The case is submitted for final decree upon a demurrer to complainants' bill. The questions involved are whether the act violates the provisions of the Constitution of the United States and of the Constitution of the state of Nebraska. May the Legislature of Nebraska restrict to corporations formed under the laws of the state the right to engage in the banking business, and at the same time require them, as a condition of engaging or continuing in such business, to make these periodic contributions to what is called the "depositors' guaranty fund"?

The banking business is one of the ancient and ordinary occupations, and has been and is recognized as a lawful business, not only in the state of Nebraska, but in all states of the Union, and in general in all countries that have developed civilization and commerce. It has not been regarded as a business of such harmful tendencies that society might entirely forbid its exercise.

Section 1 of the fourteenth amendment to the Constitution of the United States provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

And section 1 of article 1 of the Constitution of Nebraska declares that all persons have certain inalienable rights, and "among these are life, liberty and the pursuit of happiness"; and section 3 of the same article provides that:

"No person shall be deprived of life, liberty or property without due process of law."

In the Slaughter-House Cases, 16 Wall. 36, 116, 122, 21 L. Ed. 394, speaking of that portion of the fourteenth amendment to the national Constitution, Mr. Justice Bradley said:

"This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed. * * * In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property."

In the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. Ed. 832, the court quoted with approval from these remarks of Justice Bradley, and said:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

To the same effect are *Butchers' Union Co. v. Crescent Co.*, 111 U. S. 746, 764, 4 Sup. Ct. 652, 28 L. Ed. 585; In the Matter of the Application of Peter Jacobs, 98 N. Y. 98, 105; *People v. Marx*, 99 N. Y. 377, 386, 2 N. E. 29, 52 Am. Rep. 34; *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93; *People v. Steele*, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321; *Cooley on Torts*, p. 277.

At common law the business of banking was regarded as one of the lawful occupations, in which citizens might engage. In the case of *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130, the court says:

"Admittedly, the mere right to do a banking business is not a franchise in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual, or any number of individuals, may, under such regulations as the state, in the exercise of its police powers, may legally make, engage therein, without any grant from the state."

And in *Bank of Augusta v. Earle*, 13 Pet. 519, 596, 10 L. Ed. 274, it is said:

"At common law the right of banking in all its ramifications belonged to individual citizens and might be exercised by them at pleasure. * * * Undoubtedly the sovereign authority may regulate and restrain this right."

Of like import are *State v. Scougal*, 51 N. W. 858, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Ex parte Pittman* (Nev.) 99 Pac. 700; 5 Cyc. 433.

By the express terms of the act in question individuals may transact the banking business only under corporate form and management, and such corporations must also submit to the payment out of their funds of the claims of the private creditors of other banks when such

banks become insolvent, although the banks required to make such payment have had no supervision or control of the acts of such insolvent bank. It is said that this requirement is not a deprivation of the property of the citizen engaged in the banking business, but is merely a reasonable regulation of the business under the police power of the state; that banks are subject to regulation by the state; and that the failure of banks to pay their depositors causes such widespread financial loss and attendant suffering, and so impairs business confidence, that the state has an especial interest in the prevention of such disasters. It is apparent that the effect upon the community of the insolvency of banks can differ only in degree, and not in kind, from the effect of the insolvency of any other debtor. In fact, the failure of large railway, insurance, mercantile, or manufacturing companies may, and often does, more profoundly affect the business community than the failure of a small bank.

If the state possesses the power to single out a certain form of business activity and to compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate as often as inequality of fortune may arise. The provisions relating to the depositors' guaranty fund cannot be sustained on the theory that society is discharging an obligation it owes to those pauper and dependent classes who have always been regarded as proper subjects of its bounty and care. The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers; but payment is required to all depositors, whatever their financial condition may be.

It is insisted that the provision in question is similar to those regulatory measures often imposed upon banking and other business interests, whereby the state lawfully imposes license fees, requires frequent examinations or inspections, designates the character of investments that may be held, prescribes the amount of capital necessary to engage in a designated business, and the like. It is sufficient to say that these and similar measures are founded on the theory that they merely require the one upon whom they are imposed to pay the expense of inspection of his own business and to safeguard those who deal with him. It is entirely clear that this act of the Legislature does deprive the citizen of his right to engage in a lawful business, except upon the terms that the state will take of his property, without his consent, for the private use of others, and without due process of law. This is not accomplished by requiring that A. shall pay directly to B., or to B.'s creditors, a certain sum of money for the financial relief of B., or of his creditors; but the same result is effected through a process akin to taxation. It is well settled that the state cannot, under the form of taxation, take the property of its citizens and give it to build up the private fortunes of others.

In *Loan Association v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455,

bonds of the city of Topeka were in question, which had been voted, pursuant to an act of the Legislature, to aid a manufacturing company in establishing its shops at that city. In declaring them void the court said:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. * * * No court, for instance, would hesitate to declare void a statute which * * * should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. * * * To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. * * * If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

It is needless to review at length the many cases which hold to the same effect. See *Parkersburg v. Brown*, 106 U. S. 487, 491, 1 Sup. Ct. 442, 27 L. Ed. 238 (bonds to aid manufacturers); *Cole v. La Grange*, 113 U. S. 1, 9, 5 Sup. Ct. 416, 28 L. Ed. 896 (bonds to aid manufacturers); *Dodge v. Mission Tp.*, 107 Fed. 827, 832, 46 C. C. A. 661, 54 L. R. A. 242 (bonds to aid manufacturers); *Allen v. Inhabitants*, 60 Me. 124, 11 Am. Rep. 185 (bonds to aid manufacturers); *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366 (bonds to aid manufacturers); *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39 (bonds to aid sufferers from Boston fire); *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744 (aid to flood sufferers); *Lucas County v. State*, 75 Ohio St. 114, 135, 78 N. E. 955 (annuities for the blind); *Wisconsin Keeley Institute Co. v. Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105 (bounty to private inebriate hospital); *State v. Froehlich*, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985 (bounty to private inebriate hospital); *State v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (bounty to students attending state university); *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123 (aid in erection of building for Grand Army post); *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99 (furnishing seed grain to farmers); *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568 (appropriation to purchase seed grain for those without crops); *Deal v. Mississippi County*, 18 S. W. 24, 107 Mo. 464, 14 L. R. A. 622 (bounties to growers of trees); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489 (taking of railway right of way for private elevator); *Atchison, T. & S. F. Ry. Co. v. Campbell*, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 323 (free tickets to stock shippers); *Harp v. Choctaw, O. & G. Ry. Co.* (C. C.) 118 Fed. 169 (compelling building of spur track to coal

mine); *Oxnard Beet Sugar Co. v. State of Nebraska*, 73 Neb. 57, 66, 68, 102 N. W. 80, 105 N. W. 716 (bounty for growers of sugar beets); *Michigan Sugar Co. v. Dix*, 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354 (bounty for growers of sugar beets); *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 455 (bounty for growers of sugar beets).

It is also apparent that the prohibition of the right to engage in the banking business by individuals, except upon the terms stated, was the inducement to the passage of this act of the Legislature. Unless it be wholly void, there is no other state statute regulating the conduct of the banking business, and to assume that the Legislature would have passed this act, even although not applying to individuals, implies that it would have left individual bankers free from any restraint, with liberty to operate as many banks as they chose, to receive deposits, including the public money, to operate with little or no capital, to make no reports, be subject to no examination, and pay no license fees while subjecting corporate banks to the strictest regulation, and only allowing them to do business when possessed of fixed and large amounts of capital.

Counsel at the argument conceded, and rightly so, as we think, that if the act could not lawfully prohibit individuals from engaging in the banking business, except upon the terms stated, the whole act must fail. In this view of the case, it has not been necessary to decide whether or not the act could be sustained as to existing banking corporations, if it were valid in other respects. See section 1, art. 11b, Const. Neb.; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 4 Sup. Ct. 48, 28 L. Ed. 173; *New York, etc., Co. v. Bristol*, 151 U. S. 556, 567, 14 Sup. Ct. 437, 38 L. Ed. 269; *Lake Shore, etc., Co. v. Smith*, 173 U. S. 684, 698, 19 Sup. Ct. 565, 43 L. Ed. 858. Neither has it been necessary to decide whether the state, as a matter of regulation only, could restrict the business of banking to corporations, if the other restrictions, unlike the present guaranty fund provision, were all such as lawfully could be imposed upon individuals engaged in that business. See *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; *State ex rel. v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756.

The act not only attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation, but also attempts to impose upon them, as a condition to their engaging in that business even in that form, a duty to make good the obligations of all other bankers in the state to their depositors. For the reasons before stated, we are of opinion that this cannot be done consistently with the fourteenth amendment to the national Constitution, or with section 3 of article 1 of the state Constitution, and that the act is therefore void.

It follows that the demurrer must be overruled, and a decree must be entered enjoining the enforcement of the act.

THE HUDSON.

(District Court, S. D. New York. October 4, 1909.)

SHIPPING (§ 141*)—CARRIAGE OF GOODS—INJURY TO CARGO.

Damage to goat skins, a part of cargo on voyage from Shanghai to New York. *Held* that the ship was not liable, as the evidence showed that the damage was due to sweat and spray.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southern-Innes Co., Ltd., v. Thynas*, 64 C. C. A. 118.]

(Syllabus by the Judge.)

In Admiralty. Action by the Surpass Leather Company against the steamship Hudson. Libel dismissed.

Kneeland & Harison, for libellant.

Convers & Kirlin, for the Hudson.

ADAMS, District Judge. The Surpass Leather Company shipped at Shanghai in February, 1907, on the steamer Hudson, in good order, some 316 bales of untanned goat skins for delivery in New York. Bills of lading were duly issued, acknowledging the receipt of the skins in good order. When the steamer reached her destination in May, 1907, it was found that some 63 of the bales containing the skins were in a wet and damaged condition, whereby the libellant has suffered damages to the extent of \$10,000. The libel alleged that the damage was not caused by sea peril, or any peril excepted to in the bills of lading, but was due to the unfit and defective condition of the steamer or to fault in the loading, stowage, custody or care of said cargo.

The claimant of the steamer, after some admissions and denials, alleged:

"Seventh: Further answering and as a separate defence herein, the claimant alleges that the bills of lading under which the skins referred to were carried, stated that they were shipped in apparent good order and condition, and that the weights, quality and contents were unknown. They provided that the Steamship should be exempted from liability for loss or damage arising from heat, insufficient packing or reasonable wear and tear of packages, sweat, decay, vermin, rain, spray, effects of climate, putrefaction, evaporation, heat of the holds, change of character, inherent quality or vice of the goods shipped, and land damage.

The claimant avers that the Steamship Hudson, her owners, master and officers, duly performed all the duties and obligations imposed on her by the bills of lading which constitute the contract of carriage in this case and that if there was any damage, as is alleged in the libel, which is not conceded it was within the exemptions of the contract and was due to sweat and to heat of holds and to other causes within the exemptions, and was not caused by or contributed to in any manner by any fault or neglect on the part of the Steamship Hudson, her owners, master, officers or crew, or any one for whom the Steamship Hudson or her owners, may have been responsible.

Eighth: Further answering, the claimant alleges that at all the times hereinbefore recited, the Steamship Hudson was engaged in transporting merchandise to a port in the United States of America and that her owners exercised due diligence to make her in all respects properly manned, equipped and supplied and that, accordingly, under the terms and provisions of the Act of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Congress, approved February 13th, 1893, entitled 'An Act relating to the Navigation of vessels,' etc., the said vessel and her owners are not to be held responsible for any damage which may have occurred in the manner alleged in the libel."

The libellant claims that this wetness was due to salt water, while the claimant contends that it was caused by sweat or spray, which were causes of damage covered by the bill of lading exceptions.

It appears that the skins were stowed in the No. 2 between decks of the steamer, which was a compartment about 100 feet long from the forward iron bulkhead. At a point about 38 feet forward of the engine room bulkhead, a wooden bulkhead had been erected, about 4 years previously, for the purpose of forming a reserved coal bunker, which had been used at times for coal and at other times for general cargo. There were doors in this bulkhead about 7 feet high by 6 feet wide, one on each side, which when cargo was carried in the place were taken down and laid on the deck. In the after part of this reserved space at the outer sides of the deck and about 2 feet forward of the engine room bulkhead was a 1½ inch scupper on each side, with a grating on top, leading to the bilges. There were openings in the wooden bulkhead at the deck on each side to permit the flow of water to the scuppers. These scuppers were the only means provided for draining the entire No. 2 between decks. The wooden bulkhead which formed the reserve bunker was almost directly under the bridge bulkhead and about 2 feet aft of the after coaming of No. 2 hold. It was on the floor of this reserve bunker space that the skins in question were stowed.

Between the after coaming of the No. 2 hatch and the bridge bulkhead a ventilator was situated, a little on the starboard side of the center of the vessel. The tube of this ventilator extended from 18 inches to 2 feet above the deck, the hatch coaming being of the same height and the bridge bulkhead much higher. This ventilator, therefore, stood in a narrow channel between the hatch coaming and the bridge bulkhead and the officers of the vessel testified that any water coming on board would necessarily rush back and forth through this narrow space.

The bales of skins were stowed on dunnage consisting of sticks of bamboo laid fore and aft and athwartship and of double matting laid over the bamboo. The damage found at New York was particularly noticeable on the sides and bottoms of the bales. It was described by one of the libellant's witnesses as "positively rotten" and by another as "decomposed, rotten."

The question to be determined is whether the damage was due to some fault on the part of the ship or was within the duly excepted clauses of the bill of lading, which included sweat and spray.

The passage was a stormy one, especially in the Mediterranean and Atlantic Ocean. The ventilators were kept open whenever practicable but the weather necessitated keeping them hooded for about half the time.

The preponderance of the testimony shows that the damage was due to fresh not salt water. The libellant's witnesses seemed to think otherwise but were not positive and admitted that the damage might

have been done by sweat. These witnesses did not test the water and the claimant's witness Meikle placed the burlap surrounding the damaged bales in his mouth and tasted it and found that the taste was fresh. This was also found to be the case by other persons who tasted it. The claim therefore that the damage was due to sea water must fail. Possibly there was some slight damage from spray during the voyage but that was covered by an exception.

The skins were stowed in a proper place and were duly ventilated. No fault can be found with the vessel in these respects.

It is alleged that the scuppers of the between decks were insufficient and that the damage was attributable to such cause or to some stoppage of the scuppers prior to her sailing from the East.

The vessel was built under a special survey of Lloyds and was under the supervision of a Lloyds representative during the period of construction. She was rated in the highest class and the testimony shows that the number of scuppers had never been found insufficient on previous voyages. The libellant's witness, Wilkinson, testified that the scuppers were sufficient to deal with any water in the space affected. There can be no doubt that at the beginning of the voyage the scuppers were open and in good condition. The libellant's witnesses said that they found them closed a short time subsequent to the ship's arrival here but this should doubtless be attributed to exposure to the dust and cinders incident to rebunkering in New York. There is no satisfactory evidence to show that the scuppers were clogged when the ship first came into port. She arrived April 23rd and was at her berth April 25th. The libellant's witnesses did not examine the compartment until May 1st or subsequent thereto. The ship's officers examined it but found no water standing over the scuppers but on the contrary found them clear except for a few pieces of matting and some "washing stuff" on top, which one of them scraped off with his knife. This officer found the scuppers clear and upon opening up of the limbers, saw the water come down. This rubbish was probably washed from the deck through a ventilator hole opened up after the cargo was taken out. If, however, the scuppers were clogged during the voyage, there is nothing to show that the master and crew were negligent in allowing them to become so. They would not have access to them during the voyage and the dunnage and materials used were of the usual kind, such as would not be expected to clog scuppers.

The damage to the skins, which was due to sweat and spray, as above indicated, is explainable by the climatic conditions encountered during the voyage, which began in February at Shanghai, where the weather was very cold. Thence the vessel proceeded to Singapore in a tropical latitude. From there, she again came into cold weather, striking the North Atlantic in the early part of April. In coming from the Indian Ocean, she met with sudden and great changes of temperature, conducive to the sweating of hold and cargo. The testimony shows that under the conditions prevailing, sweat is often produced in sufficient quantities to run along the deck and to accumulate to the extent of 2 or 3 inches in a single night. It should be remembered that it frequently became necessary to keep the ventilators closed.

If there was any negligence in the management of the ship on the

voyage in failing to cover the ventilators, or remove them and stop the tubes in rough weather, or in failing to keep the scuppers clear, the owner is exempted from liability by the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), having used due diligence to make the ship seaworthy at the outset of the voyage.

The libel is dismissed.

THE FORT GEORGE.

(District Court, S. D. New York. October 6, 1909.)

COLLISION (§ 62*)—TUGS AND TOWS—NEGLIGENCE.

Towing on a hawser in the Delaware River. The tow collided with and damaged an anchored dredge. There were only six inches of water between the bottom of the barque and the bottom of the river. *Held* that the tug was in fault for proceeding with an insufficient draft for the tow, and for casting off the hawser when in the proximity of the dredge, and the barque, knowing the facts, was also in fault for allowing the tug to proceed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 80; Dec. Dig. § 62.*]

(Syllabus by the Judge.)

In Admiralty. Action by the Maryland Dredging & Contracting Company against Frank L. Neall and the barque Fort George. Decree for libellant.

Robert H. Smith and Wing, Putnam & Burlingham, for libellant.

Robinson, Biddle & Benedict, for Neall.

Wallace, Butler & Brown, for the Fort George.

ADAMS, District Judge. This action was brought by the Maryland Dredging and Contracting Company, the owner of the dredge Vim, against Frank L. Neall, Trustee, owner of the tug Sommers N. Smith, to recover the damages, said to amount to \$9,000, resulting from a collision between the Vim and a barque in tow of the Smith in the Delaware River, about 10:30 a. m. of the 8th of December, 1906. Neall brought the barque Fort George into the action by petition. The allegations against the Smith are that the Vim was at work deepening the river in the Deep Water Point Range Channel in the vicinity of Pennsville, New Jersey, and New Castle, Delaware, under a contract with the Government of the United States. The dredge was lying with her head to the northward, being held in position by lines running from either side to anchors. The Smith had the Fort George in tow on a hawser of about 70 fathoms and was bound to sea from Philadelphia. The weather was clear, the wind light from the north and the tide the last of the ebb. As the tug and tow approached, all the lines on the eastward or starboard side of the dredge were slackened and sufficient room left for the tug and tow to pass safely on that side. Other dredges were working in the vicinity, the Chesapeake being about a quarter of a mile above the Vim and the Patapsco somewhat

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

less below. The Vim was slightly to the eastward of a line drawn between the other dredges. As the tug and tow approached the Vim, after they had passed the Chesapeake, those on the Vim noticed that the Fort George was not steering after the Smith but was heading on a course to the eastward of the course of the tug, and, it is alleged, that while they were in this position, the tug by an extraordinary effort changed the course of the tow rapidly to the westward, so that the barque was headed directly for the northerly end of the Vim and the tug cast off the hawser between the tug and the tow so that all control by the tug was lost. While the tug passed the Vim in safety on the eastward side, the barque continued on her course and collided with the northerly end of the Vim about the center, doing the damage complained of. The libellant charges the tug with fault: (a) in failing to direct the course of the barque so as to avoid the Vim, (b) in failing to keep the barque a safe distance from the Vim, (c) in casting off the hawser, (d) in failing to avoid a collision with the Vim while lying in the channel engaged in her lawful occupation.

Neall, in his answer, after various denials and admissions, alleged as follows:

"Tenth: Further answering, the respondent alleges as follows:

On December 8th, 1906, at about 7 A. M., the tug 'Sommers N. Smith,' being well and sufficiently manned and equipped, left the port of Philadelphia for the Delaware Breakwater, with the Bark 'Fort George' in tow, astern upon a hawser of the usual and proper length. The bark 'Fort George' was in charge of a licensed pilot, who, with the captain of the bark, during all of the times hereinafter referred to, was at the stern of said bark, and who was in command and in control of her navigation.

The weather was clear, the wind light, northwest, and the tide about low water.

In the neighborhood of Newcastle, Delaware, on the voyage down the river, the tug 'Sommers N. Smith' approached the dredges 'Chesapeake' and 'Vim,' both of which were engaged in deepening the channel along the Deep Water Point Range. The upper of the dredges, the 'Chesapeake,' was three-quarters of a mile, or thereabouts, above the 'Vim,' and the signals on each dredge indicated that the 'Sommers N. Smith,' with the 'Fort George' in tow, should pass on the starboard, or eastward, side of the dredges.

The tug and tow passed the dredge 'Chesapeake' safely to the eastward. Both vessels, the 'Sommers N. Smith' and the 'Fort George,' then and subsequently, and until the happening of the collision hereinafter mentioned, were in the channel, in water of sufficient depth for their proper navigation, and the course pursued by the tug 'Sommers N. Smith' was the course usual and proper under the circumstances.

After passing the dredge 'Chesapeake,' the 'Sommers N. Smith' observed that the 'Fort George,' either through inattention on the part of those in charge of her navigation, or in consequence of defect in her equipment for steering, or for some other cause occurring without any negligence or want of proper care or proper navigation on the part of the 'Sommers N. Smith,' failed to follow the 'Sommers N. Smith,' but held a course a point and upwards to the westward of that held by the tug, and such as involved risk of collision with the dredges. The tug thereupon blew two blasts of her whistle as a signal to the 'Fort George' to hard-a-starboard her wheel, but the 'Fort George' failed to change her course. The 'Sommers N. Smith,' at the same time these signals were blown to the 'Fort George,' hard-a-starboarded her own wheel and pulled well off to the eastward in an attempt to haul the 'Fort George' to the eastward and clear of the dredge. It became apparent to the navigating officers of the tug that it was impossible to pull the 'Fort George' against her helm, and the master of the 'Sommers N. Smith' called to the pilot on the 'Fort George' to inquire if the 'Fort George' could pass to the westward of the

dredge. The master of the tug was answered in the affirmative, and there-upon immediately stopped the tug in order to slack the hawser, and caused it to be cut, so as to enable the 'Fort George' to port her helm and pass to the westward of the dredge as the pilot had indicated the 'Fort George' was able to do.

The 'Fort George,' however, still continued upon the same course, and notwithstanding there was sufficient time and space if the 'Fort George' had been properly equipped and properly navigated, by porting her helm, for the bark to have passed the dredge to the westward, or, by dropping her anchor, to have avoided any collision, the 'Fort George' was permitted, in consequence of the inattention and negligence of those in charge of her navigation or by reason of defective equipment, or for some other cause, without any negligence or improper navigation on the part of the 'Sommers N. Smith' to come into collision with the dredge 'Vim,' thereby inflicting certain damage, which was greatly exaggerated in said libel. And respondent alleges that the said 'Sommers N. Smith' was at the time of the said collision well and sufficiently manned and equipped and preserving the proper lookout; and that the said collision and the damages alleged to have been sustained by the dredge 'Vim' in consequence thereof were not due in any respect to the negligence or carelessness of the master of the tug 'Sommers N. Smith' or any of her crew."

Prior to filing the above answer, Neall filed a petition, alleging practically the same facts and that the faults of the collision were with the Fort George, and caused her to be brought into the action. The charges of fault against the barque were as follows:

- "(a) In failing to keep a proper lookout.
- (b) In failing to observe the position of the dredge 'Vim.'
- (c) In failing to observe the course of the tug.
- (d) In failing to steer after the tug 'Sommers N. Smith.'
- (e) In failing to direct the course of the 'Fort George' so as to avoid the dredge 'Vim.'
- (f) In failing to keep the 'Fort George' at a safe distance from the dredge 'Vim.'
- (g) In failing to drop an anchor to avoid coming into collision with the dredge 'Vim.'
- (h) In failing to do anything to avoid a collision with the dredge 'Vim' and in other respects to be made known at the trial."

The claimant of the barque, in connection with some admissions and denials, alleged as follows:

"On December 8, 1906, at about 7 A. M. the tug Sommers N. Smith left the Port of Philadelphia for the Delaware Breakwater with the Barque Fort George in tow astern upon a hawser. The Barque Fort George was in charge of a licensed pilot who, with the captain of the Barque, was during all of the times hereinafter referred to, on the poop deck at the stern of said Barque near her wheel, and who was directing her steering. Aside from the mere duty of steering after the tug, which rested upon and was performed by those in charge of the Fort George, the navigation of the Fort George was entirely under the direction and control of the tug Sommers N. Smith. The weather was clear and the wind light. In the neighborhood of New Castle, Delaware, the tug Sommers N. Smith approached the dredges Chesapeake and Vim, both of which were anchored in the channel with signals set indicating that vessels passing down the river should pass to the eastward of the said dredges. Throughout the voyage those in charge of the Fort George had steered directly after the tug, as was their duty, and prior to passing the dredge Chesapeake the Fort George had answered her helm readily and had followed exactly in the course of the tug. Both tug and Barque passed safely on the eastward side of the dredge Chesapeake. Shortly after passing that dredge, however, the channel was found to be extremely shallow, so that the barque was barely clearing the bottom, if she was not slightly in the mud. On account of the insufficient depth of water the Fort George began to 'suck the bottom' and failed to answer her helm. At this time she was heading almost directly for the

dredge Vim which was between a quarter and a half a mile away, and was proceeding under a starboard wheel.

Upon observing that the ship did not answer her helm readily the pilot of the Fort George ordered the wheel put hard-a-starboard, which was done, but without effect. Shortly afterward the tug blew two whistles, whereupon the pilot of the Fort George shouted to the captain of the tug that the Barque would not steer. The tug had meanwhile been sheering off to the eastward. Instead of continuing to tow on the Barque, however, the tug, immediately upon reaching a position well off to the eastward of the Barque, slowed down and the captain of the tug called to those on the Fort George to cast off the hawser and port her helm. This order the pilot of the Fort George countermanded and refused to obey, as the Fort George was then only about one of her lengths from the dredge, and it was impossible by the operation of her helm alone for her to go clear on either side of the dredge. The captain of the tug, however, immediately after giving the order to cast off the hawser, ordered it cut and it was immediately cut by one of the crew of the tug. The Fort George was thus left helpless, except for the action of her helm, which, as above stated, was extremely slight. Upon seeing that the hawser had been cut the pilot ordered that the anchor be let go, but upon seeing that it was too late to prevent a collision by this means and fearing also that an anchor dropped in such shallow water might punch a hole in the bottom of the ship, he immediately countermanded this order. The Fort George, with her helm still hard-a-starboard was carried on by her own momentum past the dredge Vim, passing on the eastward side of said dredge, which she barely touched in passing. So far as those aboard the Fort George could observe, that vessel did not touch the body of the said dredge, but merely the chains by which the buckets were suspended from the A frame of the said dredge. These chains were brushed by the jib-boom guys on the starboard side of the Fort George. The Fort George then drifted on for about three ship's lengths and went firmly aground at a point somewhat nearer the Delaware shore than the position of the Vim. The helm of the Fort George remained hard-a-starboard until after the collision. Had the tug Sommers N. Smith continued to tow on the Fort George instead of slacking and cutting her hawser, the Fort George would undoubtedly have been drawn clear of the dredge. There was not sufficient depth of water to westward of the dredge Vim for the Fort George to have passed on that side, even if she could have directed her course sufficiently to westward, which she could not have done by the action of her helm alone."

During the trial, faults were alleged by the Fort George against the Smith as follows:

"(1) In that, if the power of the Sommers N. Smith was insufficient to control the movements of the Fort George in the shallowest water to be met with, the tug should have anchored during the lowest water.

(2) In that no sufficient lookout was maintained on the tug and in that the tug did not seasonably discover that the Fort George was not following directly in the course of the tug.

(3) In that the tug did not seasonably turn to the eastward and did not seasonably use her utmost power to control the heading of the Fort George which was not under the control of her own helm as the tug with due diligence would have discovered earlier than she did.

(4) In that the tug when she turned under a starboard helm did not use a hard-a-starboard helm and did not turn as rapidly and as far to eastward as possible.

(5) In that the tug slacked and cut the towing hawser and in that the tug did not continue towing with her utmost power on the Fort George."

The testimony shows that at the time of the collision the tide was nearly ebb. The water in the channel was only 22½ feet deep, while the barque was drawing 22 feet. There was therefore not more than 6 inches between the vessel and the bottom of the river. It is well known that vessels will not steer well under such circumstances and on this occasion she refused to yield to her helm but having been point-

ed at the dredge, kept on and struck her, notwithstanding a change of the helm to endeavor to carry her to the eastward. It was the duty of the master of the tug to know the danger of attempting to tow the barque when the water was so low. The position of the Vim was well known and when the Smith undertook to tow the barque in her vicinity, she took the risk of what would probably ensue. The danger was recognized too late for effective preventive measures. The cutting of the hawser, as ordered by the master of the Smith, was not in time to prove of any effect even if it was not a fault on the part of the Smith to thus give up control of her tow, leaving it helpless. It is not established that the Fort George agreed with the tug to pass to the westward of the dredge. It was too late to drop her anchor and it was a dangerous thing to do in any event. The Smith should be condemned for these reasons.

The situation was also known to the barque. Her pilot was aware that the dredges were lying in the channel, of the state of the tide and the draft of the barque. It was evidently the duty of the pilot on board of the barque, or of her master, to warn the tug of the facts and that it was not safe to proceed. In allowing the tug to go on, the barque participated in the risk and must bear a part of the consequences.

There will be a decree against the respondent Neall and the barque, with an order of reference.

ENCYCLOPÆDIA BRITANNICA CO. v. WERNER CO. et al.

(Circuit Court, D. New Jersey. September 9, 1909.)

INJUNCTION (§ 226*)—VIOLATION—EXCUSE—AGREEMENT OF PARTIES.

Where an agreement between the parties to a suit in a federal court for the entry of a consent decree for an injunction also contained provisions intended to modify the operation of the decree, and inconsistent with its terms, the court will not impose a fine for violation of the decree as for a civil contempt for the benefit of the other party, when such violation arose from a difference of opinion as to the construction of the agreement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 478; Dec. Dig. § 226.*]

In Equity. On petition to punish for contempt.

See, also, 138 Fed. 461.

Frederic R. Kellogg and Vroom, Dickinson & Scammell, for petitioner.

George W. Seiber and James & Malcolm G. Buchanan, for respondents.

LANNING, Circuit Judge. This is an unfair trade case. The bill of complaint was filed in 1903 by the Encyclopædia Britannica Company, hereinafter called the Britannica Company, for an injunction to restrain the defendants the Werner Company and the American Newspaper Association from using in their business, or in connection with encyclopædias and books published and sold by them, the words "En-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cyclopædia Britannica" or "Britannica." After answers had been filed by the defendants and the complainant had taken proofs in this country and in Great Britain, the parties consented to the entry of a final decree enjoining the defendants, and their officers and agents, from using the above mentioned words in their business. The Britannica Company now charges by its petition that the Werner Company, Paul E. Werner, its president, Richard M. Werner, its vice president, C. I. Bruner, its treasurer, and H. Kendig, its secretary, have violated the decree. Upon that petition a rule has been allowed requiring the Werner Company and its said officers to show cause why they should not be punished for contempt. The present hearing is on that rule.

The entry of the final decree was preceded by the execution of two agreements. The first of these agreements was dated February 23, 1906, and was executed by the Britannica Company, as party of the first part, the Werner Company, the principal of the two defendants in the suit, as party of the second part, Paul E. Werner, president of the Werner Company, as party of the third part, and Horace E. Hooper and Walter M. Jackson, the principal stockholders of the Britannica Company, as parties of the fourth part. This agreement contained amongst other things the following provisions:

Clause 1: That the Britannica Company would at once dismiss all suits then pending between it, as complainant, and the Werner Company and the American Newspaper Association, defendants, excepting the suit in which this proceeding is now had.

Clause 3: That until March 1, 1908, the Britannica Company would bring no suits or actions at law against the Werner Company on account of the latter company's publication and sale of the new Werner edition of the Encyclopædia Britannica in the United States, as that work was then printed and published by the Werner Company, or interfere with the sale of such work, provided the Werner Company should comply with the conditions of the agreement.

Clause 4, subd. "c": That the Werner Company would at no time prior to March 1, 1908, sell or dispose of any copies or sets of the work then known as the new Werner edition of the Encyclopædia Britannica except by direct contracts with individual subscribers and consumers of the work to be supplied by the Werner Company direct, or by J. A. Hill, the Globe Publishing Company, or the American Newspaper Association; that is to say, that it would not sell any sets of the said work in bulk, either to the trade or agents, or to any other concern whatsoever. In a subsequent part of clause 4 it is also provided that the Werner Company should pay to the Britannica Company as liquidated damages \$10 for each set of said work sold in violation of subdivision "c" of clause 4.

Clause 5: That on March 1, 1908, or within a reasonable time thereafter, a final decree and injunction should be entered in this suit.

Clause 7: That upon the entry of the decree and compliance by the Werner Company and Paul E. Werner with their covenants and obligations mentioned in the agreement the Britannica Company would pay to the Werner Company \$60,000, and that, after the entry of the decree, the Werner Company should be allowed to sell books, except the prefaces and title pages thereof, printed from any of the sets of plates

then in existence called the "Werner plates," the "Allen plates," and the "Stoddart plates," and to use all the literary matter in the said new Werner edition of the *Encyclopædia Britannica* as the same was then being printed from said plates, and that the books thus printed should be sold under some name to be mutually agreed upon by the parties to the agreement; and also that, after the entry of the decree, the Werner Company would continue to comply with the obligations of subdivision "c" of clause 4, and with the provisions of clause 4 regarding liquidated damages payable in cases of sales in bulk, except that the restriction as to sales in bulk should apply only to unbound sets, and not to books bound in cloth or leather, and also that any sets or portions of sets of the new Werner edition of the *Encyclopædia Britannica* which should be returned to the Werner Company by the purchasers after March 1, 1908, might be resold by the Werner Company within six months after March 1, 1908, under the name of "The Werner Edition of the *Encyclopædia Britannica*," provided that before any such resale notice should be first given to the Britannica Company of the number of sets thus returned, whereupon it should have the first and exclusive right, within 10 days thereafter, to purchase the same from the Werner Company at the manufacturing price thereof.

On December 19, 1907, 2½ months previous to March 1, 1908, it will be observed, the Britannica Company, the Werner Company, and Paul E. Werner executed a second agreement, by which the Werner Company and Paul E. Werner consented to the immediate entry of the decree for injunction. The Britannica Company thereby agreed that it would take no steps to compel the Werner Company to obey the decree before May 1, 1908, nor any steps to punish any violation of the decree committed before May 1, 1908, provided the terms and conditions of the agreement of February 23, 1906, should be in all respects kept and performed by the Werner Company, and provided, also, that the terms of the decree and each of them should be strictly complied with by the Werner Company on and after May 1, 1908.

The decree for injunction was entered on December 20, 1907, with a stipulation of the solicitors of the parties annexed thereto, stating that the facts recited in the decree were in all respects correct, and that the parties each assented to its entry. The decree adjudged that the Britannica Company had established its exclusive right to the use in the United States of the words "*Encyclopædia Britannica*" and "Britannica" as trade-names designating the origin and ownership of their work known as the *Encyclopædia Britannica*, and enjoined the Werner Company, its officers, agents, servants, employes, associates, successors, and assigns from using or employing the words "*Encyclopædia Britannica*" or "Britannica" as the name or style of, or in connection with, any encyclopædias or publications of an encyclopædic nature, or in any circulars or other literature relating thereto, and from publishing or selling, through agents or otherwise, any encyclopædia, books, or publications, bearing thereon the name "*Encyclopædia Britannica*" or "Britannica," or any colorable alteration or simulation thereof, etc.

It thus appears that the operative effect of the decree of the court was suspended and materially modified by the parties by private agreements between them. The record of this proceeding shows that there

were differences of opinion between the parties as to the meaning and effect of several of the provisions of the agreements. The language of the decree is clear. The fact that it was entered by consent did not in any wise impair its authority. If the court had its decree and the acts of the defendants only to consider, its duty would be simple. But the Britannica Company now asks the court to punish the Werner Company and its officers, not for their disobedience of the decree as it was pronounced by the court, but for their failure to observe the decree in the manner privately agreed on by the parties to the suit. In other words, the court is asked to punish by fine or imprisonment certain parties who, the Britannica Company says, have not kept their agreements with it. Instead of asking for a decree embodying the provisions of the agreements, the Britannica Company obtained from the court a consent decree which by its terms was immediately operative, but which by a private understanding between the parties was not to become operative until some future time. The decrees of courts cannot be modified by agreements between suitors. The proofs before me show that the acts of the Werner Company and its officers were plainly violative of the terms of the decree. But, while the decrees of courts cannot ordinarily be violated with impunity, the same proofs also show that the violation in this case was the result, not of a spirit of disregard for the authority of this court, but of differences of opinion between the parties as to the proper construction of their agreements. For example, there are disputes as to whether the agreement of December 19, 1907, extended the period within which the Werner Company might sell certain of its encyclopædias from six months after March 1, 1908, to six months after May 1, 1908, and also as to what were the rights of the Werner Company under the agreements to make sales in bulk and sales of books returned by purchasers. There is not a disputed question in this proceeding that calls for a construction of the language used in the decree. The disputes relate wholly to the meaning of the agreements. The construction of the agreements now contended for by the counsel for the Werner Company may not in all respects be sound, but, even if unsound, I do not find that the Werner Company's officers in the acts complained of intended to contemn the authority of this court, and therefore I do not find in the case any proper basis for treating those acts as a criminal contempt.

The Britannica Company, however, does not ask that the Werner Company or its officers should be held guilty of a criminal contempt. If so adjudged, any fine imposed would go to the United States. Its counsel urge, with much zeal, that, while this is a contempt proceeding, it is not to vindicate a public right or the authority of this court, but that it is in its nature a civil proceeding designed to give satisfaction to an injured party, and that whatever fine may be imposed should be paid to the Britannica Company by way of satisfaction for the damages which it claims it has sustained. Assuming for present purposes that a federal court has jurisdiction of so-called civil contempt proceedings, and that it may impose upon a violator of its decree or its injunction a fine the amount of which shall be equal to the damages sustained from the violation by the party in whose favor a decree or injunction was granted, and that it may also direct that fine to be paid to such party,

the jurisdiction should not be exercised in such a case as this. The very fact that the disputes in this case are based wholly on two private agreements which antedate the decree, and that those agreements are inconsistent with the decree and were intended by the parties to control its operative effect, is sufficient reason for holding that whatever damages the Britannica Company may have sustained by the Werner Company's breach of the agreements should be recovered in an action at law and not in a contempt proceeding.

I conclude, therefore, that the rule to show cause should be discharged and the petition dismissed, with costs. An order to that effect may be prepared by counsel.

JOHNSTONE v. FURNESS, WITHEY & CO., Limited, et al.

(District Court, S. D. New York. October 11, 1909.)

SHIPPING (§ 132*)—INJURY TO CARGO—NEGLIGENCE IN LOADING.

Damage to cotton on a lighter in the harbor of Savannah, Georgia. *Held*, that the damage was due to water being pumped on the lighter by the steamer Dalton Hall, belonging to Furness, Withy & Co., and that there was no fault on the part of the Atlantic Coast Line Railroad Company.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

(Syllabus by the Judge.)

Action by Frederick F. Johnstone against Furness, Withy & Co., Limited, and the Atlantic Coast Line Railroad Company. Decree against Furness, Withy & Co., Limited. Petition against railroad company dismissed.

Kneeland & Harison, for libellant.

Convers & Kirlin, for Furness, Withy & Co.

Stewart & Shearer, for Atlantic Coast Line R. Co.

ADAMS, District Judge. This action was brought by Frederick F. Johnstone against Furness, Withy & Co., Limited, to recover the damage, said to amount to \$2,069.93, caused by the wetting of 155 bales of a shipment of 200 bales of cotton, while on the lighter No. 23 in the harbor of Savannah, Georgia, on the 17th of October, 1904. The allegations are that Johnstone shipped the cotton on a through bill of lading to Genoa, Italy, from Montgomery, Alabama, and while on the said lighter in the harbor of Savannah on the said day, in readiness for shipment on the respondent's steamer Dalton Hall, the lighter sank through unseaworthiness, causing the damage.

Furness, Withy & Company brought into the action the Atlantic Coast Line Railroad Company, alleging that the lighter was taken alongside of the Dalton Hall on October 15th by a tug employed by the Railroad Company and remained moored as she was left by such tug, no cargo having been removed and that no work was done in loading the steamer on the night of October 15th or on Sunday, October 16th. It was further alleged that during the nights of those days, pursuant to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the laws and regulations of the port, the crew of the steamship were compelled to go ashore at 6 p. m. and remain during the night; that on Monday, the 17th, when the officers of the steamer arrived on board to proceed with her loading, it was found that the lighter had sunk alongside the steamer and the cotton in question was floating in the water or had drifted ashore; that the damage was not due to any fault of the steamer but was owing to the unfit and unseaworthy condition of the lighter, or to the improper loading or overloading of the lighter by the agents of the Railroad Company or to some neglect or default of the same; that the cotton at the time of the damage was in the custody of the Atlantic Company and not in the custody of the Dalton Hall; that the negligence to which the damage was due was the act of that company, and it would be in the furtherance of justice to bring it into the action.

The Atlantic Company filed its answer to the petition, in which it was alleged, after some denials and admissions:

"On September 26th, 1904, the respondent received from F. F. Johnstone & Company at Montgomery, Alabama, 200 bales round lap cotton, for which it issued and delivered to said Johnstone & Company the through bill of lading hereinbefore mentioned, whereby, among other things, it was agreed that said cotton should be 'carried to the port of Savannah, Georgia, and thence by S. S. Glenwood to the port (B) of (Genoa, Italy) * * * and to be there delivered in like good order and condition on * * * (to the order of F. F. Johnstone & Company), or to consignee's assigns, or to another carrier on the route to destination, if consigned beyond said port (B), upon payment, immediately on discharge of the property, of the freight from Montgomery to Genoa, Italy, of 63 cents, United States gold currency, per 100 pounds gross weight * * * Inland.....38
Ocean25

63

Said bill of lading contained the following provisions, among others:

"The carrier shall have the liberty to * * * lighter * * * and to load and discharge goods at any time."

Further

"3. No carrier shall be liable for any loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the next carrier."

"13. This contract is executed and accomplished, and all liability hereunder terminates, upon delivery of said property to the exporting steamer, her master, agent or servants, or to the exporting steamship company, or on the pier usually used by the exporting steamer at the said port (Savannah), whether or not the same may be the property of or used as a warehouse by the inland carrier also. * * *

When said cotton reached Savannah in the regular course of transportation the respondent received instructions from Strachan & Company, agents of Furness, Withy & Company, Limited, to have the libellant's shipment of 200 bales delivered to the steamship Dalton Hall. Pursuant to such instructions, the respondent, which had no lighters of its own at this port for carrying cotton, unloaded the said 200 bales on the end of its wharf and delivered the same into the hands of Savannah Lighterage & Transfer Company to be conveyed as it saw fit to said Steamship Dalton Hall pursuant to the contract between the said Savannah Lighterage & Transfer Company and the respondent as aforesaid.

The agents and servants of said Savannah Lighterage and Transfer Company loaded the said 200 bales of cotton together with 102 other bales on board lighter No. 23 which was either owned or rented by them and said lighter was then towed alongside the steamship Dalton Hall on the afternoon of Friday, October 14th, 1904, on which date the mate of said steamship duly

receipted for said cotton. The next morning the discharge of said lighter into said steamship was begun. During the day 102 square bales of cotton were discharged from the lighter and taken on board the steamship, together with 45 bales of the Johnstone shipment, leaving 155 bales still on board the lighter.

On October 15th, 1904, the master of said steamship executed and delivered to the respondent a receipt for said 200 bales as set forth in the sixth article of the libel.

The discharge of said lighter was exclusively under the control and management of the steamship Dalton Hall and the agents of Furness, Withy & Company, Limited, who as the respondent is informed, so negligently and improperly discharged the cargo of said lighter that during the night of October 16th-17th, 1904, she sank.

Said lighter was tight, staunch, and strong, and in all respects seaworthy. She did not spring a leak and her sinking was due solely to the negligence of those in charge of the steamship Dalton Hall, in that they did not unload her with care and skill, but instead allowed a portion of her cargo to remain at one end of the lighter, which put her by the head or by the stern, so that she took in water over her decks and thus filled and sank. Said lighter was afterwards raised and put into service and continued in service for many months without repairs of any kind.

Whatever loss or damage was sustained by the libellant was due solely to the negligence of the respondent Furness, Withy & Company, Limited, and those in charge of the steamship Dalton Hall."

On the trial an amendment was asked for, as follows:

"And further, in that they negligently allowed a stream of water from the steamship's pumps to flow on to the lighter on the morning of October 17 thus causing the lighter to sink."

The proposed amendment was strenuously objected to by Furness, Withy & Co., but after consideration, I have concluded to permit it. The only substantial effect is to make the pleadings conform to the proof, which was properly received in replying to a general allegation of negligence and simply gave particulars. I have also allowed a proposed amendment of the libellant not hereinbefore alluded to. It only serves the same purpose.

The testimony shows that the lighter arrived alongside of the steamer on the 14th of October, about 7 or 7:30 P. M. Upon arrival, or shortly thereafter, the 200 bales were receipted for by the mate of the steamer. On the next day, the 15th, the master signed a receipt for 200 bales. These were round bales. There were also 102 square bales loaded on the lighter. At the time of delivery all of the crew were on shore and the ship in charge of a watchman. On the 14th, 45 bales of the 200 were removed from the lighter to the steamer. The cotton was loaded on the lighter in the usual and customary manner. The quantity was not in excess of her safe capacity. She was all right up to 5 o'clock Monday morning as seen by the watchman who had examined her three times during the night. She was found to be sinking at $\frac{1}{4}$ before 6 o'clock.

There can be little doubt of the lighter's seaworthiness. After this occurrence, she was pumped out, repaired at an expense of \$28 and put to work again and continued working, carrying full loads. Some other reason than unseaworthiness must be found for the sinking.

It appears that water was pumped into her by the steamship between 5 and 7 o'clock Monday morning. Several credible witnesses said the flow was from the ship's discharge pipe. She was moored on

the port side, opposite some discharge pipes of the steamer. These pipes were situated about amidships of the engine a little abaft the middle of the ship. The lighter was 65 feet long. The steamer was 337 feet long on the water's line, her water ballast tanks occupying the first 21 feet; hold No. 1, 60 feet; hold No. 2, 72 feet; the engine and boiler room, 56 feet; hold No. 3, 58 feet; hold No. 4, 54 feet, and the water ballast tank the remaining 16 feet. This would bring the lighter under the discharge pipes. Several witnesses saw a 5 inch stream of water coming out of the pipe, early Monday morning, which struck the deck of the lighter a little forward of a hatch. It was testified that a stream of this size would fill the lighter in from 15 to 20 minutes.

The steamer's crew had taken possession of the lighter, moved her at their pleasure, put tarpaulins over the cotton, and some time Saturday, the 15th, removed from her 45 bales. In connection with the receipt given, there can be no doubt that the steamer was in full charge. In view of these facts, the burden was upon her to show that the sinking and the damage to the cotton was due to some act not under its control. The owner has accepted this burden but has failed to show that the cause of the sinking was due to any act for which it is not itself responsible.

There will be a decree for the libellant against Furness, Withy & Company, with an order of reference. The petition against the Railroad Company is dismissed.

THE CHARLES H. KLINCK.

(District Court, S. D. New York. October 12, 1909.)

SEAMEN (§§ 11, 29*)—NEGLIGENCE OF FELLOW SERVANT—INJURY TO SEAMAN—DAMAGES.

Injury to seaman from becoming entangled in a winch when engaged in hoisting the spanker. *Held* that the vessel was not liable for the injuries as they happened through the negligence of the mate, but that the seaman was entitled to care and maintenance under the doctrine of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 39, 40; Dec. Dig. §§ 11, 29; * *Master and Servant*, Cent. Dig. §§ 211, 492, 592, 734.]

(Syllabus by the Judge.)

Libel by John Kersh against the schooner *Charles H. Klinck*. Case referred to commissioner.

Simon O. Pollock, John F. McIntyre, and David C. Hersh, for libellant.

Bertrand L. Pettigrew, Frederick B. Campbell, and Henry S. Curtis, for the schooner.

ADAMS, District Judge. This action was brought by John Kersh to recover his damages, said to be \$10,000, sustained through the loss of his right arm, a little below the elbow, while engaged in performing his duties as seaman on the schooner *Charles H. Klinck*, on the 23d

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

day of February, 1907. She was then lying off the Chatham Lightship, Long Island Sound. The libellant was operating the winch, which received its power from a gasoline engine located in the fore-castle cabin, through which the winch ran, one drum head coming out on the port side and one on the starboard side. Some little distance above the winch-head was a rod which ran through the cabin, and started or stopped the winch as was desired. The engine had previously been started and was going at the time regardless of the use of the winch. In order to start the winch from the port side, it was necessary to pull out the connecting rod, and to push it in to stop it.

They were raising the spanker on the vessel, and the libellant, acting under the directions of the mate, took some turns with the halyards around the drum on the port side. The libellant in his libel describes the accident as follows, viz.:

"That on or about the 23d day of February, 1907, the schooner had been at anchor in the eastern end of the sound and was about to get up her anchor and hoist her sails for the purpose of proceeding on her voyage; that the libellant was ordered by the mate of the vessel to stand at the winch of the vessel for the purpose of hoisting the sails; that while standing there his hand became entangled in the rope of the fall which led around the winch, and he was for the moment unable to extricate himself. The winch at the time was stopped. The mate of the vessel, who was aft on the vessel, shouted to the men at the winch to hoist away the spanker, and thereupon the sailor who was on the other side of the winch and who could not see this libellant from where he stood, started the winch, although the libellant had shouted to the mate that his hand was entangled and not to allow the winch to be started. The result of the starting up of the winch in this manner was such that the libellant's right arm was so crushed by the fall and the winch that it became necessary to amputate it, and the libellant has thereby lost his right arm."

This seems to be a correct account of the occurrence. The mate, who was called by the claimant, gave a somewhat different version of the matter, but I think the foregoing should be regarded as accurate.

It appears that the mate was standing somewhat aft of the place of the accident but in full view of the winch and what was taking place. He should have seen what was being done and the accident is no doubt attributable to his carelessness in giving directions to go ahead with the engine, while the libellant was so situated as to be liable to injury from its movement.

It is claimed by the libellant that in consequence of the dangerous method of operating the winch, the vessel was rendered unseaworthy, but it does not appear that the accident happened through such cause, but, as stated above, from the action of the mate.

This conclusion precludes a recovery for personal injuries but the libellant is entitled to the sum that will be necessary for his maintenance and care, under the doctrine of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760. The case is therefore referred to a commissioner for further proceedings in such respect.

MEMORANDUM DECISIONS.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES (two cases). (Circuit Court of Appeals, Eighth Circuit. October 5, 1909.) Nos. 3,027, 3,028. In Error to the District Court of the United States for the District of Colorado. George A. H. Fraser (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and Pierpont Fuller, on the brief), for plaintiff in error. Ralph Hartzell and Philip J. Doherty, for the United States. Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

PER CURIAM. These were actions for penalties for the violation of the safety appliance law embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), and the principal question in the cases was whether the duty of the railway company, where this law was applicable, was that of exercising reasonable care to maintain the prescribed safety appliances in operative condition, or was absolute. This question, and all the other questions in these cases, have been repeatedly considered and decided, and upon the authority of *St. Louis, Iron Mountain & Southern Railway Company v. Taylor*, 210 U. S. 281, 294, 28 Sup. Ct. 616, 52 L. Ed. 1061, *United States v. Denver & Rio Grande R. Co.*, 163 Fed. 519, 90 C. C. A. 329, *Chicago, Milwaukee & St. Paul Ry. Co. v. United States*, 165 Fed. 423, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473, *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, and *Chicago, Burlington & Quincy R. Co. v. United States* (C. C. A.) 170 Fed. 556, the judgments below must be affirmed. It is so ordered.

BARBER ASPHALT PAVING CO. v. FORTY-SECOND ST., M. & ST. N. AVE. RY. CO. et al. (Circuit Court of Appeals, Second Circuit. August 2, 1909.) No. 297. Appeal from the Circuit Court of the United States for the Southern District of New York. Dexter, Osborn & Fleming (George N. Whittlesey, of counsel), for appellant. Kellogg & Rose, for complainant. Evarts, Choate & Sherman (Herbert J. Bickford, of counsel), for respondent Whitridge. Henry M. Ward and Nathan Ottinger, amici curiæ. Selden Bacon, for Haley, Adm'r. Merrill & Rogers (Alfred H. Holbrook, of counsel), for receiver of Forty-Second St., M. & St. N. Ave. Ry. Co. Hamilton v. Wood, for creditors' committee of the New York City Ry. Co. Bowers & Sands, for Central Trust Co. Before ADAMS, HOLT, and HAND, District Judges.

PER CURIAM. Judge Lacombe's order (170 Fed. 1022) is in no sense final, even assuming that a decree finally determining this proceeding is itself a final decree in the suit from which an appeal can be taken. The reference which he has directed to the master is not a mere ministerial act in execution of a final order. It is a substantial part of the litigation, upon the determination of which the rights of the parties wholly depend. Although no parties to the record have raised this point, the brief of others interested does raise it, and in any case no jurisdiction can be conferred by consent, for the proceedings are non coram judice. We must therefore dismiss the appeal, and the parties must prosecute the reference before the special master.

In re BLANCHITE CO., Limited. (Circuit Court of Appeals, Second Circuit. November 16, 1908.) No. 64. Petition to Review Order of the District Court of the United States for the Southern District of New York. P. O. W. Smith and Kendall & Herzog, for petitioner. McLaughlin, Russell, Coe & Sprague

(Charles Levy, of counsel), for respondent. E. W. Tyler and Henry B. Singer, for purchaser. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Order of the District Court affirmed, with costs; time to comply with its terms to run from date of entry of order on remittitur.

C. CRANE & CO. v. SESHER. (Circuit Court of Appeals, Sixth Circuit. October 25, 1909.) No. 1,939. In Error to the Circuit Court of the United States for the Eastern District of Kentucky. W. H. Mackoy and Charles Stevens, for plaintiffs in error. S. C. Bailey and J. C. Wright, for defendant in error. Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

PER CURIAM. The facts in this case are identical with those in the case of Noble v. Crane & Co. (decided by this court at the June session) 169 Fed. 55, where we affirmed an instruction for the defendant company. It was error in the court below to deny the request by plaintiff in error for a similar instruction; Noble and Seshier having been hurt by the fall of the same scaffold at the same time. Reversed, and remanded for new trial.

EICHELBAUM v. SCOTT et al. (Circuit Court of Appeals, Fourth Circuit. March 9, 1909.) No. 876. Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg. J. E. Edmunds and G. E. Caskie, for appellant. F. W. Whitaker, for appellees. Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PER CURIAM. After due consideration of the questions involved in this controversy, we are of opinion that there is no error in the ruling of the court below. Affirmed.

THE GYPSUM KING. (Circuit Court of Appeals, Second Circuit. August 27, 1909.) Appeal from the District Court of the United States for the Southern District of New York. Motion to take new proofs on appeal. Before WARD, Circuit Judge (in vacation).

WARD, Circuit Judge. Under the former practice of this court the parties might take new proofs at will, though the depositions of witnesses who had deliberately not been examined, or who might have been called at the trial, might be suppressed on motion. Singlehurst v. La Compagnie Générale Transatlantique, 50 Fed. 104, 1 C. C. A. 487; The Venezuela, 52 Fed. 873, 3 C. C. A. 319. The present rules 1 and 7 of this court in admiralty changed the practice, permitting new proofs to be taken only by leave of the court. The appellant seeks to examine two sea-faring witnesses in this court. Its secretary swears "that at the time of the trial in the District Court I made strenuous efforts" to secure the presence of these witnesses, but they were then not in port and so could not be produced. That they were competent and material witnesses evidently was known, and also that their occupation put them in the class of going witnesses. What these efforts were is not stated. It is not shown that any reasonable steps were taken before the trial, by subpoena or otherwise. The motion is denied.

MAHLE v. SCHILPP. (Circuit Court of Appeals, Fourth Circuit. December 7, 1908.) No. 848. Appeal from the District Court of the United States for the District of Maryland. A. W. Patterson (Rignal W. Baldwin, on the brief), for appellant. William Reynolds, for appellee. Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. We fully concur with the conclusion reached by the court below. Affirmed.

MINER v. RICKEY et al. (Circuit Court of Appeals, Ninth Circuit. September 7, 1909.) No. 1,583. In Error to the Circuit Court of the United States for the Northern District of California. J. P. Langhorne and R. S. Miner, for plaintiff in error. James F. Peck and Charles C. Boynton, for defendants in error. Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

PER CURIAM. This action was brought by the plaintiff in error in the court below against the defendants in error to recover certain money claimed to be due by reason of his alleged employment by the defendants as their attorney in certain litigation. The case was tried before the court without a jury by agreement of the parties, and resulted in findings to the effect that the plaintiff was never employed by the defendants in the litigation referred to, and in findings against the plaintiff upon all the issues made in the cause. An examination of the record satisfies us that we would not be justified in interfering with the findings of the court below, nor do we find that there was any prejudicial error committed by the trial court in its rulings complained of respecting matters of evidence. The judgment is affirmed.

In re PLAUT. (Circuit Court of Appeals, Second Circuit. November 27, 1908.) See, also, 154 Fed. 194, 83 C. C. A. 288. S. S. Myers, for the motion. J. Moble Hayes, opposed. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. It is unnecessary to go into any of the points of law which have been raised on this motion. We are not prepared to hold that it was an improper exercise of the discretion of the District Judge to require the plaintiff to terminate his prior state court action, either by trial or discontinuance, before proceeding to the trial of the second and later one, which he has brought on precisely the same cause of action.